

Extraterritorial Jurisdiction: Lessons for the Business and Human Rights Sphere from Six Regulatory Areas



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A report for the Harvard Corporate Social Responsibility Initiative to help inform the mandate of the UNSG's Special Representative on Business and Human Rights

June 2010 | Working Paper No. 59

A Working Paper of the:
Corporate Social Responsibility Initiative

A Cooperative Project among:
The Mossavar-Rahmani Center for Business and Government
The Center for Public Leadership
The Hauser Center for Nonprofit Organizations
The Joan Shorenstein Center on the Press, Politics and Public Policy

Citation

This paper may be cited as: Zerk, Jennifer A. 2010. "Extraterritorial jurisdiction: lessons for the business and human rights sphere from six regulatory areas." Corporate Social Responsibility Initiative Working Paper No. 59. Cambridge, MA: John F. Kennedy School of Government, Harvard University. Comments may be directed to the author – jaz@jenniferzerkconsulting.com

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Acknowledgments

This report covers significant regulatory ground, and it would not have been possible without the help, advice and assistance of a good number of people. First of all, I would like to express my gratitude to the International Bar Association’s Task Force on Extraterritorial Jurisdiction for their very detailed and thoughtful research into the regulatory practices of states, and the practical problems that arise. The 2009 report of the IBA’s Task Force¹ contains a wealth of information about current and recent state practice in most of the areas covered in this report, which obviously provided an extremely valuable starting point for the purposes of this study. Secondly, I would like to thank Vanessa Zimmerman and Rachel Davis for their tireless help, guidance and practical support throughout this research project. Thirdly, I would like to thank the many experts who gave up their time to discuss different aspects of extraterritorial regulation with me, to review materials and to provide additional information; in particular, Julio Barnet, Chris Bates, Antonio Bavasso, Joseph Brehm, Alan Boyle, Sara Chidgey, Deba Das, Patrick Doris, Daniel Guzman, Richard Hermer, Stephen Humphreys, Jody Ketteringham, John Knox, Lucinda Low, Kate Orange, Marcos Orellana, Mark Pieth, Jasper Teulings, Louise Tolley, Anna Triponel, Christine Uriarte and Jonathan Winer. Finally, I would like to thank Jo En Low and Michelle Chan for their excellent research assistance throughout this project. Obviously, though, the views expressed in this report are the author’s own, and do not represent those of any of the experts or their institutions. Moreover, while this report was prepared for the Harvard Corporate Social Responsibility Initiative to inform the mandate of the Special Representative of UN Secretary-General (SRSG) on Business and Human Rights, Professor John Ruggie, its contents do not necessarily represent his views or those of the Harvard Corporate Social Responsibility Initiative.

This report is not intended to be, and should not be taken as, legal advice.

¹ International Bar Association, ‘Report of the IBA, ‘Report of the Task Force on Extraterritorial Jurisdiction’, February 6, 2009. A copy of the report can be downloaded from <http://www.ibanet.org/Article/Detail.aspx?ArticleUid=597D4FCC-2589-499F-9D9B-0E392D045CD1> (the “IBA Task Force Report”).

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Executive summary

This study is intended to assist the Special Representative of the UN Secretary-General on Business and Human Rights (“SRSG”) as he works to operationalize the UN “Protect, Respect and Remedy” Framework, and particularly as he develops guidance on the state duty to protect against corporate-related abuse. It does so by exploring extraterritoriality in six different regulatory areas: anti-corruption, securities, antitrust, criminal law, civil cases generally and the environment. The study examines the legal frameworks through which states attempt to influence private actors and conduct abroad, and associated legal and practical challenges, in order to draw some lessons for the business and human rights (B&HR) sphere. In doing so, it adopts the distinction made by the SRSG between the use of domestic measures with extraterritorial implications and the exercise of direct extraterritorial jurisdiction over private actors or activities abroad.

The SRSG has suggested that the different ways that states may seek to influence private foreign actors and conduct may be arranged in the form of a matrix. This matrix has two rows, based on the distinction noted above between domestic measures with extraterritorial implications and direct extraterritorial jurisdiction. And it has three columns – public policies, regulation, and enforcement actions. Their combination yields six cells, each offering a range of options. This matrix shows that extraterritoriality is not a binary matter. Instead, it encompasses a wide range of possible regulatory actions. And, as the SRSG has noted, not all of these are equally likely to trigger objections in all circumstances.

States’ use of direct extraterritorial jurisdiction is often controversial. This is because of the political and legal importance of territorial sovereignty: the idea that each state should be able to regulate activities within its own territory in accordance with its own policies and priorities. However, globalization has posed challenges to the effectiveness of this territorially-based system. Increasingly, governments recognise that, in some areas, effective regulation of activities within their territories demands some degree of control over private activities beyond their borders. Moreover, globalizing factors – such as international trade and travel, foreign investment, and modern communications technologies – have all greatly increased the potential for overlapping jurisdictional claims.

States have made use of domestic measures with extraterritorial implications to help influence the behavior of private actors abroad without the direct use of extraterritorial jurisdiction. Examples include asking locally incorporated parent companies to take certain steps in relation to the management of foreign subsidiaries. Other methods involve the use of reporting obligations, or import or export controls, and taking steps to monitor and reduce risks associated with projects requiring export assistance. These measures can be highly influential in relation to private foreign conduct. They also often seem to attract less controversy than assertions of direct extraterritorial jurisdiction, presumably because they focus on acts or persons at home.

States are increasingly prepared to use direct extraterritorial jurisdiction in relation to criminal activity such as terrorism, money laundering, corruption, grave human rights breaches and “sex tourism.” In competition law and securities law, too, states have

made more extensive jurisdictional claims over foreign companies and conduct based on previously contested legal theories.

This study shows that the reactions of states – both to domestic measures with extraterritorial implications and to direct extraterritorial jurisdiction over private actors or activities abroad – depend greatly on regulatory motives and modes, and on the potential for inter-state regulatory conflicts.

Other stakeholders, including businesses, may also raise additional issues and concerns, especially regarding regulatory techniques. Concerns about certainty, legitimacy, efficiency and competitiveness are sometimes expressed, though typically more in relation to unilateral than collective actions.

The following briefly highlights each substantive chapter's main points, including some of the general lessons identified for the B&HR sphere, indicated by italics.

Chapter 1: Anti-corruption

Here, there appears to be significant international consensus on the need for direct extraterritorial jurisdiction. Initially, extraterritorial regulation in this field was confined to the US's unilateral attempts starting in the late 1970s. Gradually, though, other states have since acknowledged the need for greater international cooperation to combat bribery in international business transactions, and several significant international and regional regimes have emerged, in some cases with business support.

As a result of these regimes, and the convergence of standards they facilitated, there now seems to be increasing bilateral, regional and international cooperation to investigate and prosecute foreign bribery offences. This has also led to some innovative solutions to conflicting jurisdictional claims.

Measures to prevent bribery of foreign officials by private actors also rely heavily on domestic measures with extraterritorial implications, such as group reporting obligations. Domestic actors may also be liable for foreign bribery under secondary liability theories (e.g. aiding and abetting a foreign bribe), or because they failed sufficiently to control the circumstances that led to the bribe.

State practice in the anti-corruption field highlights the importance and usefulness of domestic measures with extraterritorial implications for “outward-looking regimes” (i.e. regimes concerned primarily with problems occurring outside the regulating state’s territorial boundaries). It also illustrates how direct extraterritorial jurisdiction can help fill regulatory and accountability gaps, especially when used as part of an overarching international regime. In practice, though, the effectiveness of these regimes relies on close cooperation between states.

Chapter 2: Securities law

Securities regimes are largely “inward-looking.” Whereas extraterritorial anti-corruption regimes criminalize foreign bribery in its own right, securities regimes,

insofar as they apply extraterritorially, aim to protect markets and investors within the regulating state's boundaries from the effects of private activities or practices abroad.

Securities law is dominated by unilateralism. Until recently, national securities regimes developed largely independently of each other, although there are now signs of growing convergence in some areas.

Much of the discussion about the "extraterritoriality" of securities regulation tends to overlook the territorial connections between the regulating state and the firms involved (e.g. in seeking a cross listing, or in carrying on investment business). Indeed, much securities regulation affecting foreign firms does not actually involve direct extraterritorial jurisdiction over foreign conduct. These requirements are better regarded as domestic measures with extraterritorial implications. Difficulties may arise, though, when companies are subjected to overlapping or conflicting requirements by different states.

Direct extraterritorial jurisdiction has, however, been controversial in the context of securities fraud litigation, especially where the territorial connections between the actors, the conduct and the regulating state appear slight.

Sometimes it is the mode of regulation, rather than attempts to apply standards to foreign companies as such, that can be most controversial. Regulation that is "principles-based" and "outcomes-oriented" appears to be less problematic for companies and their home states than highly prescriptive regulation. While there appears little appetite at present for an international regulatory regime, international cooperation in the securities arena appears to be increasing, motivated perhaps partly by the 2008 economic crisis.

Chapter 3: Antitrust

Like securities regulation, antitrust regimes can also be characterized as "inward-looking" regimes, given they mainly aim to prevent anti-competitive effects within the regulatory state (e.g. on local markets).

Past assertions of direct extraterritorial jurisdiction over private actors or activities in the antitrust field have been controversial, especially where objecting states consider that attempts to enforce laws extraterritorially threaten their own key industries, or undermine their industrial, economic or national security policies. There now seems greater agreement on the extent to which a state can base direct extraterritorial jurisdictional claims solely on economic effects within its jurisdiction. Nevertheless, states are still likely to vigorously oppose regulatory action by other states that appears capable of damaging key interests, or seems motivated by political or protectionist concerns.

Much of the existing academic commentary about the use of direct extraterritorial jurisdiction, and its implications for state sovereignty, has focused on its use in the antitrust field. Certainly, the use of direct extraterritorial jurisdiction here, especially where based on the "effects doctrine", has contributed to inter-state tensions. While there now appears to be greater acceptance of this jurisdictional basis, problems remain, including inconsistent standards between states, which can create compliance

challenges and uncertainties for companies. On the other hand, states have exhibited greater consistency and cooperation regarding conduct that they can agree is pernicious or immoral, such as participation in illegal cartels. This chapter also highlights the importance of international dialogue and soft law standards in building greater convergence of standards and approaches.

Chapter 4: Criminal jurisdiction generally

This study suggests that states are increasingly supportive of direct extraterritorial jurisdiction regarding criminal matters, especially where they threaten national security, such as terrorism and terrorist financing. However, states have also been motivated by “outward-looking” concerns about the welfare of vulnerable people in other states, as well as the need to outlaw egregious harm. Several states, for instance, assert direct extraterritorial jurisdiction over their own nationals for child sex offences committed abroad. Additionally, states parties to the Rome Statute of the International Criminal Court have generally established direct extraterritorial jurisdiction over international crimes, including, in some cases, jurisdiction that may potentially be exercised over corporate, as well as individual, defendants.

Historically, assertions of direct extraterritorial criminal jurisdiction over private foreign actors and conduct have largely been unilateral. However, they are now also an important part of many international and regional cooperative regimes. For instance, several international conventions now authorise, if not require, the taking of direct extraterritorial jurisdiction in relation to serious crimes such as terrorism, hostage taking and drug trafficking.

Domestic measures with extraterritorial implications also play a part in criminal enforcement. A prosecution of a local individual or company for contributing to a foreign criminal offence, based on actions or decisions at home, is an example. There are also cases (e.g. in the field of money laundering) where locally-incorporated parent companies have positive legal obligations regarding the conduct of foreign subsidiaries.

This chapter highlights the growing use of direct extraterritorial criminal jurisdiction in both unilateral and multilateral responses to globalized threats. However, these regimes’ effectiveness depends on international cooperation in the investigation and prosecution of offences. States appear to regard the nationality principle as the strongest basis for direct extraterritorial criminal jurisdiction, although other bases of jurisdiction, such as the protective and universality principles, are occasionally used. States do not, however, appear to regard the foreign subsidiaries of locally-incorporated companies as their own “nationals” for jurisdictional purposes; these are usually treated, instead, as foreign nationals.

Chapter 5: Civil jurisdiction generally

Civil jurisdiction (i.e. domestic courts’ jurisdiction over private law claims) differs from public law jurisdiction, on which this study otherwise focuses. Firstly, the jurisdictional rules in civil law cases involving private foreign actors or conduct appear more flexible, focusing on the “connecting factors” between the dispute and the forum state, rather than the idea of geographical scope. Secondly, civil jurisdiction

is generally regarded as a matter for domestic law, whereas criminal law jurisdiction is governed by international law rules.

Some degree of direct extraterritorial civil jurisdiction is often necessary for courts to be able to determine private disputes with a foreign element. However, such claims can still raise important policy issues for different states. Several legal theories have been developed to deal with this problem, to help balance the litigants' needs with public policy concerns, and to help resolve competing jurisdictional claims.

The law relating to civil jurisdiction over multinational groups of companies is complex. Many legal systems seem to adopt the stance that the mere fact that individuals or companies domiciled within their own territory may have a controlling interest in a foreign subsidiary will generally not, of itself, justify taking direct extraterritorial jurisdiction over the foreign subsidiary. However, such jurisdiction may be taken where the foreign subsidiary is an appropriate co-defendant (i.e. where there are genuine territorial connections between the foreign subsidiary and the forum state, in addition to any ownership links).

The jurisdictional rules of many states impose limits on the ability of courts to take – and keep – direct jurisdiction over foreign companies in relation to their conduct outside the territory of the forum state. Jurisdiction based on tenuous territorial links with the forum state is frequently contested. On the other hand, a number of recent cases in the US and the UK have tested the extent to which parent companies may be sued in their home states in relation to harm allegedly arising from the activities of subsidiaries or contractors abroad. To the extent that this litigation focuses on a parent company's failings within the forum state, this does not necessarily involve the use of direct extraterritorial jurisdiction. Rather, it may illustrate a domestic measure with extraterritorial implications.

Chapter 6: Environmental regulation

Although environmental problems are frequently transboundary in nature, states do not typically apply their domestic environmental rules directly to actors operating in other states. Instead, “outward-looking” environmental regulation of private actors and activities largely comprises domestic measures with extraterritorial implications, such as notification requirements, reporting obligations, and import and export controls. Occasionally this is done unilaterally but, more often, multilaterally under an international treaty regime.

There are a small number of environmental regimes that permit – and indeed require – the use of direct extraterritorial jurisdiction over private actors and conduct abroad. The MARPOL regime on maritime pollution is probably the best-known example. In codifying relevant states' regulatory responsibilities, this regime has fostered a more even and consistent international regulatory system for an industry with global environmental implications.

This chapter highlights the importance of international cooperative responses to transboundary problems. It also highlights the growing importance of the notion of “shared responsibility” regarding the export of environmental risks, especially where some affected states may lack the ability to cope with those risks. Finally, it

demonstrates the need for proper consultation with all states, developed and developing, whose interests may be affected by regulatory proposals.

Conclusion: Lessons for the B&HR sphere

As this study shows, the use of direct extraterritorial jurisdiction by states in relation to private foreign actors and activities has been opposed by other states in some areas on the grounds that it constitutes an interference in their own domestic affairs, including their ability to implement their own policy choices. It has also been opposed by companies (and their home states in some instances) for the extra risk, uncertainty and expense that it may create for commercial actors. Nevertheless, direct extraterritorial jurisdiction continues to be utilized in a range of different regulatory areas, and especially in criminal law areas such as anti-corruption, counterterrorism, money laundering, international crimes and sex tourism. When exercised with other states' concerns in mind, the use of direct extraterritorial jurisdiction has been recognised as useful in closing regulatory and accountability gaps, and delivering justice. As noted above, several international treaties now authorise, encourage, and sometimes require, the use of direct extraterritorial criminal jurisdiction, provided certain links exist between the defendant and the regulating state.

International law places limits on the use of direct extraterritorial jurisdiction. As well as having to rely on one or more established jurisdictional principles (i.e. relevant territorial connections, nationality connections, or the more controversial passive personality, protective or universality principles), it is generally agreed that the use of direct extraterritorial jurisdiction is subject to an overarching "reasonableness" requirement. This requirement is only vaguely defined in international legal discourse.

Nevertheless, this study provides clues as to the kinds of extraterritorial regulatory measures that the international community considers more or less "reasonable." These lessons, many of which are indicated in the italicized sections above, are assembled in the study's final chapter into a summary of possible "red lights" and "green lights" for regulatory initiatives potentially involving the use of direct extraterritorial jurisdiction over private actors and activities abroad.

It is not easy to see whether or how considerations of "reasonableness" have played a part in the design of domestic measures with extraterritorial implications, and there is a lack of guidance from international law sources on this. Because such measures are based on territorial jurisdiction, the starting assumption may be that they do not create an "interference" in the domestic affairs of another state. Moreover, domestic measures with extraterritorial implications have the potential to reduce the negative impacts of the foreign activities of private actors based in the regulating state. However, in the interests of international cooperation, states implementing such measures should take account of how and the extent to which their actions may in fact impact, or be perceived to impact, on other states' interests. They should also consider working with those states to minimize any adverse impacts - on other states and on affected stakeholders.

Preface

In 2005, Professor John Ruggie of the Harvard Kennedy School was appointed Special Representative of the UN Secretary-General (SRSG) on Business and Human Rights, pursuant to a mandate from the then UN Commission on Human Rights to identify and clarify standards of corporate responsibility and accountability regarding human rights. In June 2008, after extensive consultation with governments, business and civil society, the SRSG proposed a policy framework for better managing business and human rights challenges (the 'Protect, Respect and Remedy' Framework) to the Commission's successor, the Human Rights Council. The Council unanimously welcomed the Framework, the first time the Council or its predecessor, the Commission on Human Rights, had taken a substantive decision on this topic. Now widely referred to as the UN Framework, it rests on three pillars: the state duty to protect against human rights abuses by third parties, including business, through appropriate policies, regulation, and adjudication; the corporate responsibility to respect human rights, which means to act with due diligence to avoid infringing on the rights of others; and greater access by victims to effective remedy, judicial and non-judicial. These three pillars are distinct yet complementary parts of a dynamic system, intended to advance the enjoyment of human rights.

The Council extended the SRSG's mandate to 2011, with two main tasks: "operationalizing" the Framework—that is, providing concrete guidance and recommendations to states, businesses and other social actors on the practical meaning and implications of the three pillars and their interrelationships; and "promoting" the Framework with relevant international and regional organizations and other stakeholders. To date, the UN Framework has enjoyed considerable uptake by states, business and civil society, as well as support from other actors within the UN system and regional bodies. More information about the SRSG's mandate, the UN Framework, and its uptake is available via the SRSG's website, hosted by the Business and Human Rights Resource Centre: <http://www.business-humanrights.org/SpecialRepPortal/Home>.

This study is intended to assist the SRSG as he works to operationalize the UN Framework. It explores the extraterritorial dimensions of six different regulatory areas: anti-corruption, securities, antitrust, criminal law, civil cases generally and the environment. The study seeks to understand better the legal frameworks through which states attempt to influence private actors and conduct abroad, and the various legal and practical problems that have been encountered, in order to draw some lessons for the business and human rights sphere. In doing so, it adopts the distinction made by the SRSG between the use of domestic measures with extraterritorial implications and the direct exercise of extraterritorial jurisdiction over private actors or activities abroad. These and other relevant terms are discussed in more detail in the Introduction.

Introduction

The use of extraterritorial jurisdiction by states to influence private foreign actors and activities is frequently controversial and has contributed to tensions between states. It has also raised concerns for companies.¹ In reality, though, states seek to regulate individuals, companies and their activities abroad in many different ways and for many different reasons. While the more overt assertions of extraterritorial jurisdiction often get the most media and academic attention, this has tended to obscure the diversity of state practice and, as a result, the discussion has become over-simplified.

This study concerns the use by states of extraterritorial jurisdiction in six different regulatory areas: anti-corruption, securities, antitrust, criminal law, civil cases generally and the environment. The aims of the research were to better understand the extent to which states attempt to regulate private foreign actors and conduct, the different ways this is achieved, and the various problems that have been encountered, in order to draw some lessons for the business and human rights (“B&HR”) sphere.

As will be seen in the chapters that follow, the use of direct extraterritorial jurisdiction in relation to private foreign actors and activities is fairly commonplace. Certainly, it has given rise to tensions between states in some areas. However, the tensions, impacts and problems associated with extraterritoriality have not been uniform. Firstly, as this report will show, much depends on the subject matter involved, the degree of consensus about the right regulatory response, and levels of international consultation and cooperation in detecting and dealing with breaches. From this it is possible to identify some elements of regulatory best practice by states, defined in this report as the regulatory responses least likely to create tensions between states and most likely to deliver effective outcomes for affected stakeholders.

Secondly, extraterritorial jurisdiction is less likely to give rise to problems between states where the regulation has been introduced as a result of an internationally agreed regime. As will be seen, there are many international treaty regimes in place that authorise or require either: (a) the use of direct extraterritorial jurisdiction; or (b) the introduction of specific domestic measures designed to combat extraterritorial, cross-border or even global problems. In many cases these cooperative regimes represent an attempt to close the “regulatory gaps” that would otherwise exist in a territorially-based system. However, the need to create a “level playing field” for international actors has also been an influential argument in favour of the harmonisation of standards and the convergence of regulatory methods.

Thirdly, states do not only rely on direct extraterritorial jurisdiction to influence private actors abroad. Increasingly, both in the context of unilateral and multilateral regimes, states are making use of a regulatory technique referred to in this report as

¹ See further International Chamber of Commerce, Policy Statement ‘Extraterritoriality and Business’ The ICC Task Force on Extraterritoriality, July 13, 2006. Copy available at <http://www.iccwbo.org/uploadedFiles/ICC/policy/trade/Statements/103-33%205%20Final.pdf>. See also an “Issues Paper” produced by the Australian Chamber of Commerce and Industry, ‘The Extraterritorial Application of National Laws: An Unwarranted Burden for International Business’, August 2006, copy available at http://www.acci.asn.au/text_files/issues_papers/Trade/Extraterritorial%20Application%20of%20National%20Laws%20August%202006.pdf

“domestic measures with extraterritorial implications.” These are measures that rely on the territorial jurisdiction of a state over private actors, including companies operating from that state. Such actions tend to be less controversial than the exercise of direct extraterritorial jurisdiction, and are not subject to the same legal constraints under international law. However, they may still raise concerns where in practice they create legal uncertainty or overlaps, or are perceived to impact on other states’ interests.²

While complaints are sometimes made that the use of direct extraterritorial jurisdiction can amount to “interference” with the domestic affairs of other states, this is not always the case. Similarly, domestic measures with extraterritorial implications do not necessarily involve any interference in the domestic affairs of other states. While there may be extraterritorial *implications*, this will not necessarily amount to *interference*.³ Much depends, however, on how the regulation is done. And there have been cases, outlined further in the body of this report, where states have preferred domestic measures with extraterritorial implications to direct assertions of extraterritorial jurisdiction precisely because of concerns that use of the latter might over-step the mark.

What is extraterritorial jurisdiction?

Extraterritorial jurisdiction refers to the ability of a state, via various legal, regulatory and judicial institutions, to exercise its authority over actors and activities outside its own territory. In this report, extraterritorial jurisdiction is divided into three types of jurisdiction, i.e.:

Prescriptive (or “legislative”) jurisdiction, which concerns the ability of states to prescribe laws for actors and conduct abroad;

Enforcement jurisdiction, which concerns the ability of states to ensure that their laws complied with; and

Adjudicative (or “judicial”) jurisdiction, which concerns the ability of courts to adjudicate and resolve private disputes with a foreign element.

The geographic scope of extraterritorial prescriptive and enforcement jurisdiction – i.e. the extent to which states can prescribe and enforce their laws extraterritorially – is governed by public international law. On the other hand, adjudicative jurisdiction, as defined above, is largely governed by the domestic law of the forum state.⁴ This body of domestic law is variously referred to as “conflicts of law” or “private international law.” The reason for this difference in treatment is that “prescriptive” and “enforcement” jurisdiction relates to the scope of *public laws* (including criminal laws), and adjudicative jurisdiction relates to the extent to which courts have jurisdiction over *private law* cases with a foreign element. As discussed in chapter 5 below, different jurisdictional rules apply, depending on whether the case is a public law, or a private law, matter.

² See p. 215 below.

³ See further pp. 215-216 below.

⁴ See further pp. 146-147 below.

Of course, the distinction between public law and private law is not always so clear-cut. In some cases, for example, private law rights are derived from public laws, or public laws may be privately enforced.⁵ Here, adjudicative jurisdiction is employed for purposes relevant to the public law sphere.⁶ Nevertheless, for the purposes of this study, prescriptive and enforcement jurisdiction is associated with the public law domain (regardless of whether such laws are enforced publicly or privately) and adjudicative jurisdiction is treated, by and large, as relating to the private law domain (see further chapter 5 below).

This report draws a distinction between direct extraterritorial jurisdiction and domestic measures with extraterritorial implications. As explained below, measures falling in the second category do not involve the use of extraterritorial jurisdiction. But they are capable of influencing private foreign actors and their conduct nevertheless. These kinds of regulatory tactics (which include “parent-based” methods of regulating corporate actors) are discussed further below.

Why is extraterritorial jurisdiction such a difficult concept?

Superficially, extraterritorial jurisdiction is easy to define (see above). But in applying it to different regulatory areas, problems often emerge, especially in relation to abstract legal entities like companies.⁷ First, the nature of the regulation – whether it is extraterritorial or territorial – is not always analysed correctly. For instance, in the securities field, imposing requirements on foreign companies that wish to trade their securities on domestic markets is often referred to as “extraterritorial” regulation. But this reflects a misunderstanding about what extraterritorial jurisdiction entails. Not all assertions of jurisdiction over foreign entities are “extraterritorial.” If the regulation concerns the terms on which that foreign party may act or operate *within* the regulating state, the regulating state is able to rely on its territorial jurisdiction. Here, to return to our securities regulation example, the regulating state is concerned with how that company interacts with local markets, not how it conducts itself abroad. Technically speaking, this regulation is only “extraterritorial” in terms of its implications, not in the taking of jurisdiction.

Similarly, the taking of civil jurisdiction over a local parent company in relation to harm suffered in another state is often referred to as “extraterritorial jurisdiction.” But while the litigation may have extraterritorial implications, no assertion of extraterritorial jurisdiction is made if the litigation relates solely to the role of the parent company (e.g. its acts and omissions) within the territory of the regulating state. This is why the distinction drawn in this report – between (a) the “direct use of extraterritorial jurisdiction” and (b) “domestic measures with extraterritorial implications” – is so important. In addition, a court may take jurisdiction over a private matter with tenuous links with the forum state because of the agreement of the

⁵ Many examples of this are mentioned in this study, See, for instance, p. 64 and pp. 69-73 below in relation to the private enforcement of securities laws, and p. 184 below in relation to the private enforcement of public environmental laws. See also p. 93 below and p. 108 below in relation to private enforcement of antitrust laws.

⁶ See further V. Lowe, ‘Jurisdiction’ in M. Evans (ed) *International Law* (Oxford University Press, 2006) who argues that adjudicative jurisdiction may be treated as an aspect of prescriptive or enforcement jurisdiction, as appropriate.

⁷ See further pp. 22-23 below.

parties, or may in any case decide to apply foreign law to the dispute.⁸ In cases such as these, is it inaccurate to describe the jurisdiction taken by the courts as “extraterritorial.”

Second, a course of conduct can span national borders. For example, a conspiracy to bribe a foreign public official may involve actors, intermediaries and financial transactions in many different jurisdictions. An illegal cartel may be the result of arrangements between companies, and individuals, in several different countries, and its effects can be even more wide-ranging. Where a state takes jurisdiction over such a course of conduct, this jurisdiction can seem both “territorial” in relation to those elements taking place within that state’s territory, and “extraterritorial” in relation to those elements taking place outside it. Where that taking of jurisdiction is based on seemingly minimal contacts between the course of conduct and the regulating state, the jurisdiction is often described as “extraterritorial.” But this tends to obscure the territorial links between the conduct and the regulating state. Although these links may be slight, they do exist.⁹ Here, “extraterritoriality” is not a black and white issue, but a question of degree.

Third, the concept of “extraterritorial jurisdiction” sometimes requires adaptation from one regulatory context to another in order to make it work. For example, definitions of extraterritoriality that refer to “foreign conduct” or “foreign activities” do not work particularly well in relation to some aspects of antitrust regulation (e.g. merger control) where the focus of regulation may not be “conduct” so much as concentrations of power within markets.

To avoid confusion as much as possible, the general approach taken in this report is to treat only *direct assertions of jurisdiction over the foreign conduct of individuals and companies* as extraterritorial jurisdiction. The controls over the conduct of foreign actors within the territory of the regulating state involve the use of territorial, not extraterritorial, jurisdiction. But these domestic measures can still have, geographically speaking, far reaching effects. Where they do, they are referred to as “domestic measures with extraterritorial implications.”

Domestic measures with extraterritorial implications

The use of direct extraterritorial jurisdiction is the most obvious way that states can regulate private actors and conduct abroad, subject to the international law constraints discussed below. However, as this report will show, there are many different ways that states have acted to try to influence conditions, standards and behavior in other countries using *domestic* measures. An import ban on products produced using environmental standards unacceptable to the regulating state is one example.¹⁰ A prohibition on the provision of export assistance to local companies investing in foreign projects obtained by corruption is another.¹¹ A requirement that all companies ensure that not only they, but their foreign subsidiaries also, adhere to certain customer identification procedures designed to expose money laundering

⁸ See further pp. 160-161 below.

⁹ See, for instance, the US DoJ’s approach to foreign bribery offences discussed at para. 1.3 below. See also para. 2.3 below in relation to securities regulation.

¹⁰ See para. 6.4 below.

¹¹ See para. 1.9 below.

transactions¹² is a further example of a regulatory method that uses a state's territorial jurisdiction over a local actor (in this case a local company) to influence the behavior of private entities abroad.

These regulatory methods do not involve the use of extraterritorial jurisdiction. However, as this report will show, they can still make a difference in how people and companies conduct themselves abroad. Therefore, in each of the chapters that follow, the use of these less direct methods of influencing private actors, conduct and standards abroad is considered alongside assertions of direct extraterritorial jurisdiction. As noted above, the former are referred to in this report as "domestic measures with extraterritorial implications."

One example of "domestic measures with extraterritorial implications" is where requirements are addressed to a locally incorporated parent company, which the parent is then required, as a matter of law, to implement throughout a multinational group (as in the anti-money laundering example above). This regulatory tactic is referred to in this report as "parent-based" regulation. As will be seen, parent-based regulation may specifically be aimed at regulating the behavior of foreign individuals or companies, or this may be a consequence of regulation for some other purpose (e.g. access by investors to accurate information material to the financial performance and prospects of a multinational group).¹³

Formal and informal methods of regulation

Individuals and companies are regulated in many different ways. Regulation happens, not only through formal regulatory supervision and enforcement but through other, informal, means, such as policies and guidance. These may not be enforced in any formal way, but the relevant actor may nevertheless feel compelled to comply with them in the interests, say, of remaining in good standing with different stakeholder groups, such as investors, customers and the wider public. At a speech given to the EU Presidency Conference on the 'Protect, Respect and Remedy' Framework in Stockholm on November 10, 2009, the SRSG suggested imagining a matrix as a way of helping to understand and categorize the diverse ways in which states can and do "regulate" (in the widest sense of the word) private actors and conduct abroad in the business and human rights space. In doing so, he highlighted that extraterritoriality is not a binary matter but constitutes a range of measures.¹⁴ This idea is elaborated upon further in the SRSG's 2010 report to the Human Rights Council¹⁵:

"Indeed, one can imagine a matrix, with two rows and three columns. Its rows would be domestic measures with extraterritorial implications; and direct extraterritorial jurisdiction over actors or activities abroad. Its columns would be public policies for companies (such as CSR and public procurement policies, ECA criteria, or consular support);

¹² See Box 8 at pp. 127-128 below.

¹³ See further paras. 2.1 and 6.1 below.

¹⁴ The SRSG's Keynote Presentation is available at <http://www.reports-and-materials.org/Ruggie-presentation-Stockholm-10-Nov-2009.pdf>.

¹⁵ Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, A/HRC/14/27. <http://www.reports-and-materials.org/Ruggie-statement-to-UN-Human-Rights-Council-1-June-2010.pdf>

regulation (through corporate law, for instance); and enforcement actions (adjudicating alleged breaches as well as enforcing judicial and executive decisions). Their combination yields six cells—six types of “extraterritorial” form, each offering a range of options. Not all are equally likely to trigger objections under all circumstances.”¹⁶

The matrix can be illustrated graphically as follows:

Fig 1: An extraterritoriality matrix

	Public policies	Prescriptive regulation	Enforcement action
Domestic measures with extraterritorial implications	Cell 1	Cell 2	Cell 3
Direct extraterritorial jurisdiction	Cell 4	Cell 5	Cell 6

As the material below highlights, this matrix is just as applicable beyond the B&HR sphere. Importantly, it indicates a spectrum of possible measures depending on the circumstances. This is so both across and within its cells. Moreover, each cell is not siloed from the next – as this report will show, there are situations where different measures may link into, and impact on, one another.

Much of the political and academic discussion around the topic of extraterritoriality has generally tended to focus on the more formal end of a possible spectrum of extraterritorial regulatory measures, primarily the kinds of measures and action that would fall broadly in Cells 5 and 6. As noted above, the failure of most commentators to take account of state practice in relation to other regulatory methods (e.g. the kinds of measures that would fall mainly in Cells 1, 2, 3 and 4), as well as to consider the linkages between different methods, has arguably caused the debate about extraterritoriality to become polarised, over-politicised, and over-simplified.

This report aims to widen and enhance the debate by considering examples of regulatory practice in other domains that would fall broadly within Cells 2 and 3 in particular, alongside Cells 5 and 6. This should provide some insights with respect to methods of influencing private foreign actors and conduct that are often overlooked, but which may contain some important lessons for the B&HR sphere. Cells 1 and 4 are included above to complete the matrix. However, because the starting point for

¹⁶ Ibid, at para. 50.

this project was existing legal frameworks rather than policies, a detailed consideration of state practice in relation to Cells 1 and 4 was beyond the scope of the present study.

What limits does international law place on the ability of states to regulate actors or activities abroad?

The extent to which states are **required** to regulate the human rights standards of companies beyond their own territorial boundaries is beyond the scope of this study. The SRSG in this regard has said the following:

“The extraterritorial dimension of the duty to protect remains unsettled in international law. Current guidance from international human rights bodies suggests that states are not required to regulate the extraterritorial activities of businesses incorporated in their jurisdiction, but nor are they generally prohibited from doing so provided there is a recognized jurisdictional basis and that an overall reasonableness test is met. Within those parameters, some UN Treaty Bodies are encouraging home states to take steps to prevent abuse abroad by corporations within their jurisdiction. [footnote omitted]”.¹⁷

The main focus of this study, however, is the extent to which states are **permitted** to use extraterritorial jurisdiction. Part of this inquiry concerns the various motivations for states to do so and the different justifications for extraterritorial jurisdiction used by states in practice in the various different regulatory areas covered in this report. As discussed further below, some of these justifications seem to have resonance for the B&HR sphere as well. This study also considers the extent to which states have begun to work together to control the use of extraterritorial jurisdiction, and in some cases domestic measures with extraterritorial implications, in different regulatory areas. This may be done, for instance, through international treaties that require states to take certain regulatory steps, for instance in relation to local actors with regard to their extraterritorial conduct or impacts. As discussed below, some of these collective arrangements may be useful to take into account when considering options in the business and human rights space.

It is generally agreed that under customary international law, direct assertions of jurisdiction over foreign actors and conduct must be justified according to one or more internationally recognised bases of jurisdiction. These are:

Territoriality: This is by far the most commonly used basis of jurisdiction. Each state has jurisdiction over actors and activities taking place within its own territorial boundaries. However, sometimes activities can cross state borders. A criminal conspiracy, for instance, may involve actors and transactions in several different states. The consequences of a wrongful act may spill over from the territory of one state to the territory of another. In cases like these, more than one state may have

¹⁷ Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, ‘Business and Human Rights: Towards operationalizing the “protect, respect and remedy” framework’, April 22, 2009, A/HRC/11/13, copy available at <http://www2.ohchr.org/english/bodies/hrcouncil/docs/11session/A.HRC.11.13.pdf>, at para. 15.

jurisdiction over the wrongful act under the principles of *subjective territoriality* and *objective territoriality*. The principle of subjective territoriality gives State X the right to take jurisdiction over a course of conduct that commenced in State X and was completed in another state. A terrorist plot that was hatched in State X and executed in State Y could fall into this category. The principle of objective territoriality gives State X the right to take jurisdiction over a course of conduct that began in another state and completed in State X. A conspiracy in State Y to defraud investors in State X could give rise to jurisdiction based on this principle. A further refinement of the principle of objective territoriality appears to be gaining acceptance, in the antitrust field at least. This doctrine, known as the *effects doctrine*, argues that states have jurisdiction over foreign actors and conduct on the basis of “effects” (usually economic effects) produced within their own territorial boundaries, provided those effects are substantial, and a direct result of that foreign conduct. Jurisdiction taken on the basis of the effects doctrine is often classed as “extraterritorial jurisdiction” on the grounds that jurisdiction is asserted over foreign conduct. It is important, though, not to lose sight of the territorial connections that do exist (i.e. in terms of “effects”) over which the regulating state arguably does have territorial jurisdiction. Nevertheless, while this doctrine has become increasingly accepted in principle as more states adopt it, its scope remains controversial, especially in relation to purely economic (as opposed to physical) effects.

Nationality: Under the nationality principle, states may exercise jurisdiction over their own nationals, wherever they are in the world. So, a serious crime committed by a national of State X in State Y could potentially be punished under the laws of State X or State Y. This is an accepted basis of extraterritorial jurisdiction in theory, although not all states make extensive use of it in practice. As discussed in chapter 6, the nationality principle is widely used in maritime law, as a basis for the jurisdiction enjoyed by states over ships flying their flag. However, in other areas, its use is generally more associated with civil law jurisdictions than common law jurisdictions,¹⁸ though common law states are now utilising it to a greater extent than has historically been the case. Common law states appear to be making use of the nationality principle in relation to sex tourism offences, for example, and also in relation to bribery and terrorism offences in the context of international regimes. And, as discussed further in chapter 4, many states (common law and civil law) have long asserted jurisdiction over very serious crimes committed in other countries, such as murder and war crimes, if committed by their own nationals.

The protective principle: The protective principle gives a state the right to take extraterritorial jurisdiction over actors or conduct abroad that affect its vital interests. Under the law of the sea, for instance, coastal states have the right to enforce internationally agreed anti-pollution standards within their Exclusive Economic Zone (“EEZ”).¹⁹ However, in other areas, involving assertions of jurisdiction over actors and conduct within another state’s territory, it is more controversial than the two bases of jurisdiction discussed above, and therefore tends to be limited in scope. It tends to be reserved for conduct that poses a very serious threat to national security.

¹⁸ See further p. 115 below.

¹⁹ Note that, under international law, the EEZ is not part of the sovereign territory of coastal states (unlike the territorial sea, which is treated as part of a state’s sovereign territory).

The passive personality principle: This principle, also controversial in practice, gives a state the right to assert jurisdiction over actors and conduct abroad where there has been an injury to a national of that state. Under this principle, a national of State X (we will name him “N”) carries the protection of the laws of State X with him wherever he travels. It is controversial because of its potential to create legal uncertainty (an actor in State Y may not be aware of the nationality of N when he acts, and therefore will not be in a position to assess the legal implications of his actions) and because of the challenge it poses to the territorial-based system of regulation where each state has sovereignty over its own territory. However, as discussed in chapter 4, it remains an accepted basis of jurisdiction under a number of international regimes on counterterrorism.

Universality: The “universality principle” refers to the international law doctrine that gives states the right to assert jurisdiction over certain very serious international crimes (and their perpetrators) wherever in the world they have taken place. The idea behind universal jurisdiction is that such crimes are so offensive, and such a threat to international peace and security, that all nations are regarded as having an interest in their prevention and enforcement. International crimes such as war crimes, crimes against humanity and genocide are arguably subject to universal jurisdiction as a matter of customary international law. In addition, states have entered into treaties under which states parties are obliged to “prosecute or extradite” perpetrators of very serious crimes such as terrorism and torture, regardless of where in the world the crime actually takes place. In practice, though, states are wary of asserting universal jurisdiction in the absence of some territorial connection with the perpetrator or his or her crimes. Most states would regard the presence of the perpetrator within their territory as a minimum requirement. As will be discussed further in chapter 4, assertions of *in absentia* jurisdiction by some countries over foreign individuals in relation to allegations of foreign crimes have been extremely controversial.²⁰

The qualifying concept of “reasonableness:” In addition to requiring a legal basis, all assertions of direct extraterritorial jurisdiction over actors and activities in other states are generally agreed to be subject to an overarching requirement of “reasonableness.” This idea is rooted in the fundamental international law principle of the sovereign equality of states,²¹ the corollary of which is that no state may interfere in the domestic affairs of another state.²² Obviously, for these purposes, understanding which matters fall within the category of “domestic affairs” is key. There is surprisingly little guidance in international law on this point. The US Third Restatement on Foreign Relations Law defines “predominantly local activities” (a concept that appears similar to “domestic affairs”) as including matters such as “industrial or labour relations, health and safety practices, or conduct related to the

²⁰ See case study 12, at p. 120 below.

²¹ See the Charter of the United Nations, Article 2(1).

²² See the *Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations*, UNGA/Res/2625/(XXV): “No State or group of States has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other state.”

preservation or control of the local environment.”²³ However, the Third Restatement is not generally regarded as a statement of international law.²⁴

The second issue concerns the question of “interference.” What does and does not constitute “interference” in any given case? The answer seems to be that although extraterritorial jurisdiction may be justified in many cases, it becomes “interference” at the point at which it becomes “unreasonable.” Unfortunately, there is still little clarity in international law on this point, and little guidance to help us move beyond the circularity inherent in the current legal discourse (where extraterritorial jurisdiction is “unreasonable” if it is “interference,” and “interference” if it is “unreasonable”). Again, international law statements on the subject are frequently vague. However, one suggested way forward has been to try to test the relative weight of different states’ interests in, and links to, the activity to be regulated as well as the likelihood of conflict arising from the exercise of jurisdiction.²⁵ These are referred to as “balancing tests.” As will be seen, balancing tests have been used by the US courts in the context of antitrust cases. Balancing tests also play a crucial role in judicial assessments of when it is and is not appropriate to take jurisdiction over private law claims that have a “foreign element”.²⁶

Of course these criteria will not help avoid international disputes over the use of direct extraterritorial jurisdiction altogether. Determining the relative strength of each states’ links with a particular activity, and the relative weight of different states’ interests, involves some highly subjective judgments. Affected states have taken little comfort from these kinds of balancing tests, and many commentators have expressed doubts as to whether national legislators, regulators and courts are qualified or adequately equipped to give proper weight to the policy priorities and interests of states other than their own. However, growing convergence of regulatory standards, together with increased levels of enforcement cooperation between national authorities, does appear to be helping to reduce some of the international tensions over the use of extraterritorial jurisdiction in some areas, such as anti-corruption and money-laundering.

The conclusion of this study sets out various factors that may be taken into account in deciding the reasonableness of exercises of direct extraterritorial jurisdiction, based on the lessons learned from the various regulatory areas under exploration. These factors may also be useful in considering domestic measures with extraterritorial implications.

Criminal vs civil jurisdiction: There is a further point that needs to be emphasised here. The above discussion relates primarily to the use of criminal jurisdiction, and

²³ American Law Institute, ‘Restatement of the Law, Third, Foreign Relations’, 1987, § 213.

See commentary on § 414, (c).

²⁴ See C. Ryngaert, *Jurisdiction in International Law* (Oxford University Press, 2008), pp. 178-79; W. Dodge ‘Extraterritoriality and Conflict-of-Laws Theory: An Argument for Judicial Unilateralism’, (1998) 39 *Harvard Journal of International Law* 101, 139 (1998); P. Trimble, ‘The Supreme Court and International Law: The Demise of Restatement Section 403’, (1995) 89 *American Journal of International Law* 53, 55; C. Olmstead, ‘Jurisdiction’, (1989) 14 *Yale Journal of International Law* 468, 472.

²⁵ For a US statement on “reasonableness” in relation to extraterritorial jurisdiction, see n.23 above, at § 403.

²⁶ See further chapter 5 below.

the enforcement of *public laws* (whether by public authorities or through private rights of enforcement). In the case of *private law* claims (i.e. claims derived from private law rights such as tort or contract) a different set of rules apply. These rules derive, not from customary international law, but from the domestic law of the state in which the case is being decided (i.e. the “forum state”). This branch of domestic law is known as “conflicts of law” or “private international law” and involves the use of *adjudicative* jurisdiction (as defined for the purposes of this study).²⁷ The reasons for this difference, and its implications for extraterritorial jurisdiction in the private law sphere, are explored in more detail in chapter 5.²⁸ However, it is worth noting that the idea of “reasonable” jurisdiction is important in the private law context, and finds expression in a number of different checks on extraterritorial civil jurisdiction, including the doctrine of *forum non conveniens* and rules on “choice of law.”²⁹

The extraterritorial regulation of corporate actors: key issues and problems

As abstract legal entities, companies pose particular regulatory challenges. The first challenge concerns the problem of corporate criminal liability. As noted in chapter 1 in relation to anti-corruption measures, the concept of corporate criminal liability is not universally recognised, and is even prohibited under some states’ constitutions. Under some domestic systems, companies may only be subject to regulatory or administrative sanctions, although criminal sanctions can be imposed on individual officers. However, corporate criminal liability is becoming more widespread, due in part to the OECD anti-bribery regime, which requires that each State Party establish the liability of legal persons “in accordance with its legal principles.”

The next difficulty concerns the application of the traditional jurisdictional principles discussed above (and particularly the principles of “nationality” and “territory”) to corporate activities. For instance, how do you determine whether a company is “present” in a jurisdiction? And which companies may a state treat as its own “nationals” and which companies are “foreign”?

For jurisdictional purposes, companies are usually treated as being “present” in the states in which they are domiciled and often, in the context of private law claims (see chapter 5), where they have branches or agents. As discussed in chapter 5, some states, notably the US (and its constituent states), have extremely flexible criteria for establishing “presence” which include merely “doing business” within a particular jurisdiction.³⁰ Based on this idea, US courts have asserted far-reaching extraterritorial civil jurisdiction over foreign companies.

Rules on corporate nationality are generally stricter. There is no single test for corporate nationality in domestic or international law. This can vary from context to context, although jurisdiction over companies tends to be based on domicile. Generally speaking, the place of incorporation is taken as the best indication of domicile, followed by the “real seat” of the company (or the place from which day-to-day decision-making is made). It will be clear from the chapters that follow, though,

²⁷ See p. 13 above.

²⁸ See esp. paras 5.2, 5.3 and 5.3A below.

²⁹ See further paras 5.4 and 5.7 below.

³⁰ Although this is usually qualified by additional requirements regarding “due process.” See further p. 149 below.

that states do not generally regard foreign subsidiaries of parent companies domiciled within their own jurisdiction as their own nationals. Even if the foreign subsidiary is a wholly owned subsidiary, it is not a “corporate expatriate,” but a foreign corporate national with a separate legal existence. Here, the idea of the “corporate veil,” arising from the concept of separate legal personality, has clearly been very influential. Only very rarely, it seems, do states assert direct extraterritorial jurisdiction over foreign subsidiaries of parent companies domiciled in their territory on the basis of the nationality principle. This appears largely to be confined to US export control laws – and it is almost always controversial. Consideration of the principle of separate corporate personality is beyond the scope of this study. Therefore the rationale for, and implications of, these exceptions is not considered in detail in this report, although some information is given in later chapters.

Study methodology and sources

Methodology

Six areas of regulation were selected for inclusion in this study – anti-corruption, securities, antitrust, criminal jurisdiction, civil jurisdiction and the environment. Each of these areas of regulation contains examples of both direct extraterritorial jurisdiction and domestic measures with extraterritorial implications dealing with private actors and activities abroad. They also represent a mix of “inward-looking” and “outward-looking” regimes. Inward-looking regimes, for the purposes of this study, are regimes aimed at addressing problems and protecting interests within the territory of the regulating state. “Outward-looking” regimes, as the name suggests, refer to regimes that are concerned with the improvement of standards or the protection of resources outside the regulating state.

Most of the regulatory areas considered in this report are both inward-looking *and* outward-looking, though to differing extents. Anti-corruption regimes, for instance, can be both inward-looking and outward-looking, although the OECD anti-bribery convention provides the framework for largely outward-looking domestic regimes. This is because it focuses entirely on the bribery of foreign public officials, which is normally committed in the foreign public official’s jurisdiction. Securities regulation, on the other hand, is overwhelmingly inward-looking, although there are scattered examples of measures that are outward-looking” too. Antitrust regulation is largely inward-looking. However, environmental regulation tends to be inward-looking when done unilaterally, and overwhelmingly outward-looking when done in the context of a multilateral regime.

In order to be able to draw comparisons across a diverse range of regulatory areas, a questionnaire was developed and applied to each area. A copy of this template questionnaire is attached as Annex 2 to this report. Examples of state practice were drawn from as many jurisdictions as possible but resource constraints as well as available information in relation to particular regulatory regimes meant that more examples were provided from common law states. Also, as the US appears to be the most frequent user of extraterritorial jurisdiction in many of the regulatory areas covered in this study, there are more examples of US state practice in this report than any other jurisdiction. But these US examples should not be taken as indicative of the current state of international law in relation to extraterritorial jurisdiction, or the direction in which the international law may be heading. This is because international

law on the use of extraterritorial jurisdiction by states is shaped, as in other areas, not merely by the claims of individual states, but also (and in many cases more importantly) by the reactions of other states.

A comparison was then made between each regulatory area covered by this study and the B&HR sphere. Once the similarities and differences were noted, each chapter concludes with a number of “lessons” relating to the use of extraterritorial jurisdiction (and other regulatory tactics aimed at the improvement of standards abroad) that can be drawn from state practice in each of these areas. The conclusion to this study (at chapter 7) sets out the key overarching-lessons for stakeholders in the B&HR sphere that may be drawn from this study.

Sources

A good deal of extremely valuable material was drawn from the International Bar Association’s Report of the Task Force on Extraterritorial Jurisdiction (“IBA Task Force Report”).³¹ This report, published in 2009, contains an extensive discussion of recent and current state practice in relation to extraterritorial jurisdiction: when it can be used; when it is appropriate for states to show restraint; and how jurisdictional conflicts may be resolved. These questions are highly relevant to the present study too. However, as the purpose of the present study was to consider the lessons that might be learned for the B&HR sphere in particular, it was necessary to look more closely at the political motivations behind attempts by states to regulate extraterritorially, and the practical problems they have encountered, to get a more realistic picture of what may and may not constitute “reasonable” regulation in the B&HR sphere. So this report focuses less on the traditional legal bases for jurisdiction (although these are still identified for the purposes of comparison) and more on the detail of the different regulatory methods employed, how they work in practice, the extent to which they amount to extraterritorial jurisdiction or “domestic measures with extraterritorial implications,” whether any objections have been made to any particular regulatory methods (and the nature of those objections) and the extent to which different regulatory areas are now moving towards greater harmonisation and convergence.

Additional material was drawn from on-line and library sources, and from one-on-one discussions with individual experts. These experts all have direct experience of extraterritorial regulation from a range of different perspectives and included prominent legal practitioners, academics, policy makers, advisers to international institutions, and representatives of national law enforcement bodies.

How to read this report

This is a lengthy report – but it is also a very user-friendly one. Here is some guidance to help you find your way around it, so you can get as much out of it as possible.

Template: As noted above, each chapter follows a standard format. The format is provided by the template (see Annex 2), which sets out a set of questions that were applied to each regulatory area. In each chapter, the number given to each section

³¹ International Bar Association, ‘Report of the Task Force on Extraterritorial Jurisdiction’, February 6, 2009 (the “IBA Task Force Report”). A copy of this report can be downloaded from <http://www.ibanet.org/Article/Detail.aspx?ArticleUId=597D4FCC-2589-499F-9D9B-0E392D045CD1>.

corresponds to the number of the relevant template question. So question 1 of the template is answered at section 1.1 (in relation to anti-corruption), 2.1 (in relation to securities) and 3.1 (in relation to antitrust) and so on. Thus, if you wish to focus on a particular aspect of extraterritoriality, you can identify the relevant question in the template questionnaire and, using the numbering system above, see how the question was answered in relation to each of the regulatory areas considered in this report.

Note. The template questions are not always phrased exactly the same way in relation to every regulatory area. Some slight adjustments have been made in some cases to ensure that the question was phrased in a way that was relevant and appropriate to the regulatory context. Also, not all questions are relevant to all areas. Where a question does not apply (e.g. template question 8 relates to public law enforcement and therefore is not relevant to chapter 5 – civil jurisdiction), the question is simply noted as “omitted,” e.g. 5.8 [omitted]. Also, some chapters (i.e. antitrust, securities and antitrust) open with an unnumbered introductory section to help put the questions and answers into context.

Lessons: The key lessons drawn from each regulatory area for the B&HR sphere are listed at the end of each chapter. Overarching lessons are set out in the conclusion to this report (chapter 7).

Case studies: A number of illuminating case studies are provided to illustrate some of the key points and problems identified in this study. A list of case studies used in this study, and their page references, appears at Annex 3.

Key concepts: This report contains some technical discussion, and uses some terminology that may be familiar to some readers but not to others, or which may have different meanings in different contexts. To avoid any confusion over the use of any legal or other terminology in this study, a dictionary of “key concepts” is provided at the end of this introduction. Please do refer to it if you are in any doubt as to how a term or phrase is being used.

Abbreviations: A table of abbreviations used in this report, and what they stand for, appears at Annex 1.

Colour coded chapters: Each substantive chapter has been assigned a color (see Table of Contents for color code), indicated as a stripe down the right-hand side of each page, so you can see at a glance where the different chapters begin and end.

Box 1: Key concepts used in this report

“Civil jurisdiction” means the jurisdiction of a court over private law claims (see “private law” below).

“Civil law state” means a state whose legal system is based on civil law traditions, i.e. a legal system, deriving from Roman law, which emphasises the codification of legal obligations over judicial determinations (compare with “common law state”).

“Common law state” means a state whose legal system is based on common law traditions, namely a system of law that relies on the development of law through judicial determinations rather than extensive legislative codification (compare with “civil law state”).

“Convention.” See “Treaty.”

“Corporate national” means, in relation to a state, a company that is domiciled in that state.

“Corporate veil” refers to the legal separation that exists in law between the owners of a company and the company itself (including a parent company and its subsidiaries). See also “separate legal personality”.

“Criminal jurisdiction” means the ability of a state to prescribe and enforce public laws criminalizing certain conduct.

“Domestic” means, in relation to a state, things that are located in or take place in that state.

“Domestic measures” are measures based on the territorial jurisdiction of a state over people or activities located within its own territorial boundaries.

“Domicile” means, in relation to a company, the place where that company is incorporated or has its base of operations.

“Double actionability rule” refers to the requirement under private international law that a court may only take civil jurisdiction over a wrongful act committed in another state if the wrongful act was also actionable under the laws of both states.

“Double criminality” (or “dual criminality”) exists where a criminal offence against the laws of one state would also attract criminal liability under the laws of another state if committed in that state also.

“Effects doctrine” refers to a sometimes contested application of the objective territoriality principle which says that each state has the right to regulate conduct abroad which is directly capable of producing serious (or “substantial”) effects (usually economic effects) within the territory of the regulating state (see further p. 19 above).

Box 1: Key concepts used in this report, continued

“Extraterritorial implications” refers to the implications (including the potential impacts) of a domestic regulatory initiative beyond the territorial boundaries of the regulating state.

“Foreign company” means, from the point of view of a regulating state, a company incorporated or domiciled in a state other than the regulating state.

“Forum state” means, in relation to a set of legal proceedings, the state in which those proceedings are being heard.

“Home state” means, in relation to a multinational group of companies, the state in which the parent company is domiciled.

“Host state” means, in relation a multinational group of companies, any state other than the home state in which that group operates or invests, or which is a significant source of goods or services for the group or its constituent companies.

“Inward-looking regime” means a regulatory regime that is concerned primarily with the protection of the regulating state’s own national interests, including markets or resources located inside the territorial boundaries of the regulating state.

“Local” means, in relation to a state, an individual or company domiciled in, or an activity taking place within, that state.

“Nationality jurisdiction” means jurisdiction exercised under the nationality principle.

“Nationality principle” refers to the international law doctrine that gives states the right to assert criminal jurisdiction over their own nationals, wherever they are in the world.

“Objective territoriality jurisdiction” means jurisdiction exercised under the objective territoriality principle.

“Objective territoriality principle” refers to the international law doctrine that gives each state the right to assert jurisdiction over a crime or course of conduct that was commenced within the territory of another state but completed within its own territory.

“Outward-looking regime” means a regulatory regime that is concerned primarily with issues outside the territorial boundaries of the regulating state.

“Parent-based regulation” is one of a number of possible domestic measures with extraterritorial implications that relies on a state’s nationality and/or territorial jurisdiction over a parent company.

Box 1: Key concepts used in this report, continued

“Passive personality” refers to the sometimes controversial international law doctrine that permits states some jurisdiction over foreign nationals in relation to foreign crimes where the victim is a national of the regulating state.

“Personal jurisdiction” means the jurisdiction enjoyed by the state over a natural or legal person (compare with “subject matter jurisdiction”).

“Predicate offence” means a criminal offence underlying another offence. For instance, the criminal activity that gave rise to funds which are then “laundered” is referred to as the “predicate offence” underlying that money laundering.

“Primary liability” means the liability of a person based on that person’s role as the most direct or main perpetrator of a tort or crime (compare with “secondary liability”).

“Private enforcement” means the enforcement of public laws by individual or citizen suit (rather than by public regulatory authorities).

“Private law” refers to the law that governs the rights and responsibilities of private citizens vis-à-vis each other, such as the law of tort and contract.

“Protective principle” refers to the international law doctrine that says that states may exercise some jurisdiction in relation to an actor or conduct abroad that threatens their vital (usually security) interests.

“Public law” means the laws and rules promulgated and enforced by governments and public regulatory authorities.

“Regulating state” means the state either asserting direct extraterritorial jurisdiction or otherwise seeking to influence private actors or conduct abroad through domestic measures with extraterritorial implications.

“Secondary liability” means the liability of a person (“P”) for the crime or tort of another person, based on P’s contribution to that crime or tort.

“Separate legal personality” means the legal doctrine that says that corporate entities are legally distinct from their owners.

“Soft law instrument” means a non-legally binding international agreement entered into by states, or a statement or set of recommendations promulgated by an international body, which may set out a set of aspirational goals, or contain a statement of best regulatory practice in a particular area.

“Subject matter jurisdiction” means the jurisdiction enjoyed by a state over the subject matter of a legal complaint or dispute (compare with “personal jurisdiction”).

Box 1: Key concepts used in this report, continued

“Subjective territoriality jurisdiction” means jurisdiction exercised under the subjective territoriality principle.

“Subjective territoriality principle” refers to the international law doctrine that gives each state the right to assert jurisdiction over a crime or course of conduct that was commenced within its territory, although completed within the territory of another state.

“Territorial jurisdiction” means jurisdiction based on the territoriality principle.

“Territoriality principle” refers to the international law doctrine that says that each state has the right to exercise jurisdiction over actors and conduct within their own territorial boundaries.

“Treaty” means a binding international agreement entered into by states.

“Universal jurisdiction” means jurisdiction based on the universality principle.

“Universality principle” refers to the international law doctrine that gives states the right to assert jurisdiction over certain very serious international crimes (and their perpetrators) wherever in the world those crimes have taken place.

Chapter 1: Anti-corruption

Introduction: A brief description of the current legal framework

The international legal framework governing bribery and corruption is a complex mix of domestic legislation and international treaties. Until the 1990s, domestic bribery and anti-corruption legislation was largely limited to offences within the borders of the regulating state. A notable exception, though, was the US Foreign Corrupt Practices Act (“FCPA”) enacted in 1977.¹ As its name suggests, this legislation was aimed at the bribery of foreign public officials, including bribery taking place outside the US.

Since the early 1990s there have been increasing efforts at the international level to deal with corruption, particularly in international business transactions. There are now six major treaties.² This chapter focuses on the best known of these: the 1997 OECD Convention and the 2003 UN Convention (although the others are mentioned too, where relevant).

All of these international treaties either require or permit some degree of extraterritorial jurisdiction over foreign private entities or conduct.³ However, these treaties have differing scopes in terms of the activities and actors covered.⁴ In addition, these treaties offer states a fair amount of flexibility regarding the implementation of their treaty obligations.⁵ The result is a very complex regulatory picture, with different states regulating foreign bribery to different degrees, with varying definitions of what will (and will not) constitute an offence and a wide variety of sanctions, but all under the umbrella of a number of different, but overlapping, multilateral regimes.

¹ Foreign Corrupt Practices Act of 1977, 15 USC § 78dd-1 (“FCPA”).

² The OECD Convention on Combating the Bribery of Foreign Public Officials in International Business Transactions 1997 (the “OECD Convention”); The United Nations Convention Against Corruption 2003 (the “UN Convention”); The Inter-American Convention Against Corruption 1996 (“OAS Convention”); The Criminal Law Convention on Corruption 1999 (the “COE Criminal Law Convention”) and its Additional Protocol; The European Union Convention on the Fight Against Corruption Involving Officials of the European Communities or Officials of Member States 1997 (EU Convention”); and The African Union Convention on Preventing and Combating Corruption 2003 (“AU Convention”).

³ See IBA Task Force Report, pp. 227-229 for a useful summary of the jurisdictional provisions of the major international treaties. See further para. 1.2 below.

⁴ For instance, whereas the OECD Convention only seeks to regulate the “supply side” of the bribery of foreign officials, the UN Convention requires state parties to take steps to address both the “supply side” and the “demand side”(i.e. both the person who offers the bribe and the recipient) of the bribery of domestic public officials. State parties to the UN Convention are also required to address the “supply side” of the bribery of foreign public officials (although addressing the “demand side” of such bribery is not mandatory).

⁵ For instance, the OECD Convention “seeks to assure a functional equivalence among the measures taken by Parties to sanction bribery of foreign public officials, without requiring uniformity of changes in fundamental principles of a Party’s legal system.” See Commentary to the OECD Anti-Bribery Convention, copy available at <http://www.oecd.org/dataoecd/4/18/38028044.pdf>, para. 2.

1.1 In what ways can anti-corruption measures be regarded as “extraterritorial”? For instance, does the regulation involve direct assertions of extraterritorial jurisdiction over foreign parties or activities? Or does it merely have extraterritorial implications?

Anti-corruption measures make use both of direct extraterritorial jurisdiction and domestic measures with extraterritorial implications (see Table 1 below). Examples of the latter include imposing requirements on parent companies as regards the management of foreign subsidiaries, or making them responsible for any false statements in a subsidiary’s books or accounts.⁶

But there are also many examples of cases where jurisdiction has been asserted directly by a State (which we shall call “State A”) over the foreign conduct of individuals or companies, or both. Table 1 sets out some examples of cases where states may assert direct extraterritorial jurisdiction in the context of corruption offences, along with some examples of the key domestic measures that have been used in an attempt to reduce instances of foreign corruption (i.e. domestic measures with extraterritorial implications).

In practice, where corrupt practices are taking place in another state (i.e. “State B”), State A will not normally assert jurisdiction over non-nationals (or non-residents) of State A directly.⁷ However, State A may punish bribery offences committed by its own nationals⁸ in State B (and indeed may be required to do so under some international regimes, see further para 1.2 below). State A might be required to impose sanctions on its own nationals for their involvement in bribery offences committed in State B by third parties (e.g. on the basis that State A’s own nationals had “authorised,” or “directed” or “controlled” or “aided” or “abetted” the foreign corrupt practices)⁹ or because of their failure to take proper steps to prevent a foreign bribery offence.¹⁰

As noted in para. 1.2 below, the taking of jurisdiction on the basis that an offence was committed “in part” within the territory of a state (i.e. in the basis of either subjective or objective territoriality) is actually a requirement of states parties under most international anti-bribery treaties. In these cases, more than one state may have

⁶ See further the discussion at para. 1.12 below.

⁷ The US is a notable exception, however. Under the US FCPA, the US authorities have taken jurisdiction over foreign nationals involved in conduct “in furtherance of” a foreign bribe where that conduct has taken place within US territory. See case study 1 below. The US authorities have also taken jurisdiction over foreign companies accused of “aiding and abetting” violations of books and records provisions of the FCPA. See case study 4 below. Finally, foreign companies have been prosecuted under the “books and records” provisions of the FCPA on the basis that they are US “issuers,” see further n. 8 below. See case study 3 below. But see further para. 2.1 as to the extent to which this kind of regulation really amounts to a direct assertion of extraterritorial jurisdiction.

⁸ Note that the US has extended parts of its domestic anti-bribery regime to US “issuers.” The term “issuer” is derived from US securities law and means a legal entity (usually a company) that is either registered or which is required to file reports under US securities law. See further para. 1.12 below, and also chapter 2 below in relation to securities regulation generally.

⁹ This is a potential basis of liability for parent companies for the acts of their subsidiaries under the FCPA. See further para. 1.12 below. See also p. 139 below in relation to criminal liability generally.

¹⁰ See, for instance, section 7 of the UK Bribery Act 2010, copy available at http://www.opsi.gov.uk/acts/acts2010/ukpga_20100023_en_1. See further pp. 52-53 below.

jurisdiction over the course of conduct on the basis of different applications of the territorial principle.

In the US, jurisdiction has been taken over non-US entities in relation to activities outside the US on the basis of seemingly minimal contacts with the US. For example, in cases involving Siemens and Halliburton, enforcement action was taken against foreign subsidiaries of US parent companies on the basis of dollar-based wire transfers between foreign banks alleged to have been routed through US banks.¹¹ (See further case studies 1 and 3 below).

Table 1: Use of (a) direct jurisdiction over foreign actors and conduct and (b) domestic measures with extraterritorial implications in the anti-corruption field

Scenarios involving assertions of jurisdiction over foreign actors or conduct	Scenarios involving domestic measures with extraterritorial implications
<p>State A asserts jurisdiction over one of its own nationals in relation to her involvement in a corrupt course of conduct taking place partly in State A and partly in State B (State A may rely on nationality jurisdiction over the accused, see further para. 1.3 below, as well as applications of the territorial principle).</p> <p>State A asserts jurisdiction over a foreign national in respect of a corrupt course of conduct taking place partly in State A and partly in State B (Here, State A does not rely on nationality jurisdiction, but may rely on the territorial connections between the course of conduct and State A, see further para. 1.3 below. See also case study 1 below).</p> <p>State A asserts jurisdiction over a foreign national in relation to foreign conduct amounting to a conspiracy to commit violations of State A’s anti-bribery laws (see case study 4 below).</p>	<p>State A asserts jurisdiction over one of its own nationals (individual or corporate) in relation to the steps taken within the territory of State A to pay a bribe to an official of State B (whether directly or through an intermediary).</p> <p>State A takes jurisdiction over a corporate national of State A (and possibly its officers to) in relation to that company’s failure to put in place proper controls (or to take the necessary action) <i>in State A</i> to prevent bribery taking place in State B (e.g. see Aon case, p. 52 below).</p> <p>State A takes jurisdiction over a (corporate) national of State A in relation to a failure to comply with accounting and book-keeping requirements requiring disclosure of foreign bribes.</p>

¹¹ See SEC Press Release, February 11, 2009, ‘SEC Charges KBR and Halliburton for FCPA Violations’, <http://www.sec.gov/news/press/2009/2009-23.htm>.

1.2 Has the regulation been adopted unilaterally by states? Or in order to implement an international regime? Or both, and if so, which came first? To what extent do the international regimes require the use of extraterritorial jurisdiction by states?

The first extraterritorial anti-corruption regime was a unilateral one. The 1977 US FCPA was passed by US Congress in 1977 and forbade bribes to foreign government officials in order to obtain or retain business. The Act applied to US nationals (including corporate nationals), individuals acting on behalf of US companies, and also US “issuers”. An “issuer” is any company that has issued shares that are registered in the US or which is required to file periodic returns with the SEC under federal securities law, and therefore obviously includes non-US companies that are listed on US stock exchanges.¹²

There were several attempts to create an international regime on foreign bribery during the late 1970s and 1980s. Unsuccessful attempts were made to negotiate an international anti-corruption treaty under the auspices of the UN Economic and Social Council (“ECOSOC”). In the meantime, the International Chamber of Commerce (“ICC”) was working on a “soft law” standard to help provide guidance to companies.¹³ Eventually, in 1989 an OECD Working Group of Experts was created to draft and then monitor a new Recommendation on Combating Bribery in International Business Transactions. The Recommendation was adopted in 1994 and subsequently revised in 1997. This Recommendation, with revisions, became the basis of negotiations for an international convention covering the OECD state members, requiring increased efforts to criminalize, detect and punish acts of bribery in business transactions. The OECD Convention was adopted on November 27, 1997 and entered into force on February 15, 1999.

At the same time, work on a number of other international and regional initiatives was already underway. Two regional conventions – the OAS Convention and the EU Convention – were signed in 1996 and 1997, respectively. These were followed by the UN Convention and the AU Convention, both signed in 2003.

Over time, extraterritorial anti-corruption regulation has progressed from a single unilateral regime to a series of overlapping multilateral ones. The OECD Convention currently has 38 state parties (the 31 OECD member states and seven non-member states)¹⁴ and the UN Convention has 140 signatories. Each state party to these Conventions is required to take steps to bring their own domestic laws in line with their treaty commitments. In some cases, new laws have been necessary. In other cases, alterations and extensions to existing bribery laws were made. The US, despite being the main promoter of the OECD regime, was not immune from this process. A

¹² See further chapter 2 below, and esp. para. 2.5.

¹³ See the ICC Rules of Conduct and Recommendations for Combating Extortion and Bribery. First published 1977. Revised version available at http://www.iccwbo.org/uploadedFiles/ICC/policy/anticorruption/Statements/ICC_Rules_of_Conduct_and_Recommendations%202005%20Revision.pdf.

¹⁴ As of 17 May 2010, the OECD non-member states that are party to the OECD Anti-Bribery Convention are: Argentina, Brazil, Bulgaria, Estonia, Israel, Slovenia and South Africa (although note that some of these states – Estonia, Israel and Slovenia – are currently in negotiations to join the OECD as new state members).

number of changes were made to the FCPA in 1998 to bring it in line with the OECD regime. These changes included expanding the scope and range of FCPA offences to reflect the language of the OECD Convention, expanding the range of persons who come within the ambit of the Act, and expanding the definition of “public official.”¹⁵

The international regimes require the use of extraterritorial jurisdiction by states to differing degrees (see Table 2 below). Four of the six main treaties require the exercise of jurisdiction where the bribery offence is committed “in whole or in part” within the territory of a state party. However, the OAS Convention and the UN Convention only require jurisdiction to be taken where the offence is committed within the state party’s territory, implying it must occur wholly in that territory.¹⁶ The OECD is one of the treaties that explicitly requires the taking of jurisdiction by state parties over bribery offences committed only partly within their respective territories.¹⁷ According to the commentary to the OECD Convention, this jurisdictional provision is to be “interpreted broadly so that an extensive physical connection to the bribery act is not required.”¹⁸

As far as nationality jurisdiction is concerned, there are positive legal requirements to regulate on this basis in three of the six key regimes.¹⁹ Under the COE, EU and AU Conventions, states must exercise jurisdiction over their own nationals for treaty offences, regardless of where they occur. The wording of the OECD Convention, on the other hand, appears more flexible. Under Article 4(2) of the OECD Convention states parties are only required to take steps in relation to bribery offences committed entirely outside their respective territories to the extent that the concept of nationality-based extraterritorial jurisdiction is recognized by their own domestic legal systems. In practice, however, the OECD Working Group on Bribery has interpreted this requirement quite strictly, and all states parties except for one have established nationality jurisdiction over their foreign bribery offences. In addition, each state party is required to “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.”²⁰

Compared to the OECD Convention, the UN Convention is less strict about the use of nationality jurisdiction over conduct taking place beyond territorial boundaries. Although Article 16 of the Convention requires state parties to criminalize the bribery of foreign officials in international business transactions, state parties are only *obliged* to take jurisdiction over offences committed “in the territory of that State party”²¹ or on a vessel or aircraft registered to that state.²² Use of “nationality” jurisdiction in

¹⁵ For further information see

<http://www.usDoJ.gov/criminal/fraud/fcpa/history/1998/amends/leghistory.html>.

¹⁶ See IBA Task Force Report, p. 227

¹⁷ See OECD Convention, Article 4(1).

¹⁸ The OECD’s commentary is annexed to the copy of the OECD Convention available at <http://www.oecd.org/dataoecd/4/18/38028044.pdf>.

¹⁹ See further para. 1.3 below.

²⁰ Ibid, Article 4(4).

²¹ UN Convention, 42(1)(a).

²² Ibid, Article 42(1)(b).

relation to *extraterritorial* offences is permitted, though not required.²³ The OAS Convention takes a similar approach.²⁴

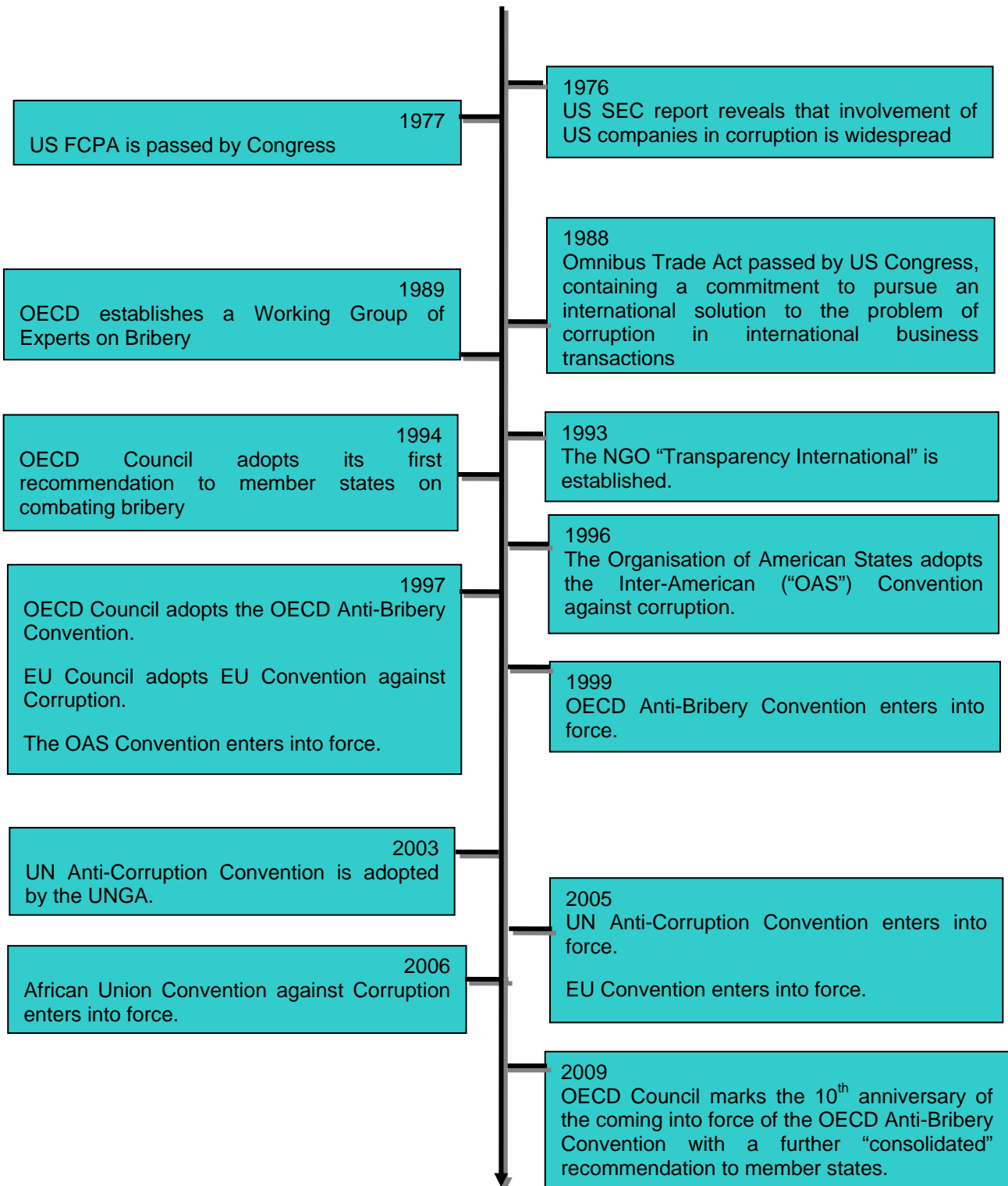
Table 2: Extraterritorial regulatory requirements under international anti-corruption regimes

Treaty	Nature of extraterritorial regulatory requirements
OECD Convention	States must take jurisdiction over offences committed in whole or in part in their territory (i.e. “subjective” and “objective territorial jurisdiction). States that have jurisdiction to prosecute their nationals for offences committed abroad shall take such measures as may be necessary to establish jurisdiction in respect of the bribery of a foreign public official, according to the same principles.
UN Convention	States are only obliged to punish offences taking place within their own territory (“territoriality” principle). Use of extraterritorial “nationality” based jurisdiction is permitted though not required.
OAS Convention	Similar to UN Convention, use of extraterritorial “nationality” based jurisdiction is permitted though not required.
COE Convention	States must take jurisdiction over offences committed in whole or in part in their territory (i.e. “subjective” and “objective” territorial jurisdiction). Requires use of extraterritorial jurisdiction based on “nationality.”
EU Convention	States must take jurisdiction over offences committed in whole or in part in their territory (i.e. “subjective” and “objective” territorial jurisdiction). Requires use of extraterritorial jurisdiction based on “nationality.”
AU Convention	States must take jurisdiction over offences committed in whole or in part in their territory (i.e. “subjective” and “objective” territorial jurisdiction”). Requires use of extraterritorial jurisdiction based on “nationality.”

²³ Ibid, Article 42(2)(b).

²⁴ See further IBA Task Force Report, pp. 227-229.

Fig 2: Significant milestones in the development of an international response to bribery in international business transactions



1.3 Is the jurisdiction claimed primarily prescriptive, adjudicative or enforcement jurisdiction? And what internationally recognized bases for jurisdiction are claimed (e.g. territory, nationality, “effects” doctrine, “universality” etc.)?

The jurisdiction claimed by states in relation to extraterritorial corrupt practices is primarily legislative and enforcement jurisdiction. However, insofar as authorities have the powers to seek civil remedies (e.g. through applications for “disgorgement” of funds, or for injunctions preventing defendants from committing further violations of anti-corruption laws)²⁵ then adjudicative jurisdiction can be relevant too. Adjudicative jurisdiction is also relevant where private enforcement of bribery laws is permitted. This is the case in the US, where breaches of the FCPA can also give rise to actions under the Racketeer Influenced and Corrupt Organisations Act (“RICO”), e.g. by a competitor who has unfairly missed out on a contract because of corruption.²⁶

The most invoked bases for extraterritorial jurisdiction in this field are (a) the principle of subjective territoriality (e.g. where a course of conduct has taken place partly in State A and partly in State B) and (b) the nationality principle (i.e. where the person or company committing the extraterritorial offence is a national of State A). As will be clear from the case studies below, US authorities take a wide view of subjective territoriality, and of the kinds of territorial connections needed to prosecute non-US nationals under the FCPA. The DoJ interprets the FCPA as giving jurisdiction where a non-US national, acting outside the US, causes an act to be done within the US in breach of the FCPA.²⁷

Other possible bases of jurisdiction (e.g. passive personality or “universality”) are not regarded as relevant to this particular context, and the “effects doctrine” (also known as “objective territoriality”) has not explicitly been invoked in this context either.

1.4 Have any legal objections been raised (at the national or international level) in relation to the anti-corruption measures adopted by states (whether unilateral or multilateral)? Are those objections still being raised?

Extraterritorial measures in relation to the bribery of foreign public officials do not appear to have generated nearly the same level of public opposition from affected states as has been the case in other areas discussed in this report, such as securities regulation (see chapter 2 below) and antitrust (see chapter 3 below). Obviously, the US FCPA attracted a certain amount of international interest at the time it was passed. It was, after all, an unprecedented piece of unilateral extraterritorial regulation aimed specifically at activities outside the US. And the fact that the US government introduced the FCPA without any real consultation with the US’s main trading

²⁵ This is a possibility under the US FCPA, for instance.

²⁶ See US Department of Justice ‘Lay-person’s Guide to the FCPA’, copy available at <http://www.justice.gov/criminal/fraud/docs/DoJdocb.html>.

²⁷ See US Department of Justice, ‘US Attorney’s Manual’, Title 9 (Criminal), para 1018, ‘Prohibited Foreign Corrupt Practices’, copy available at http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/crm01018.htm.

partners has been remarked upon.²⁸ However, the decision of US legislature not to apply the prohibitions in the FCPA to foreign companies directly (including foreign subsidiaries of US companies)²⁹ is likely to have headed off at least some potential areas of concern.

Instead, the main opposition to the FCPA appears to have come, not from other states, but from US companies. Companies objected on the basis that extraterritorial regulation increases regulatory complexity and exposes companies originating from states with strong extraterritorial regimes to an “uneven playing field.” These specific policy objections are discussed in more detail at para. 1.6 below. Noted there, these objections – and particularly objections about the commercial disadvantages faced by US companies – began to subside once the governments of other states had begun to appreciate the need for a multilateral approach to the problem of bribery. Nevertheless, concerns about the possible impacts of national anti-bribery laws on the “competitiveness” of local firms continue to be raised in response to domestic implementing measures.³⁰

Case study 1: Kellogg Brown & Root in Nigeria

In February 2009, Kellogg Brown & Root (“KBR”), a US company, pleaded guilty to FCPA violations in connection with the award of construction contracts in Nigeria and agreed to pay a US\$402 million criminal fine. KBR, together with its former parent company Halliburton also settled separate civil proceedings brought by the SEC in relation to alleged “books and records and internal control violations” by agreeing to pay US\$177 million to the Securities and Exchange Commission in “disgorgement.” The fine represents the largest to date in a FCPA prosecution of a US company.

KBR was party to a joint venture accused by the US authorities of being involved in a decade-long scheme allegedly to bribe Nigerian government officials and politicians to secure lucrative engineering and construction contracts relating to a US\$6 billion project to build a LNG plant on Bonny Island in Nigeria. Bribes in the region of US\$180 million were alleged to have been paid.

Indictments have also been filed against two UK nationals – Jeffrey Tesler and Wojciech Chodan – who are accused of conspiracy in the FCPA violations alleged to have been committed by KBR. There is no suggestion that either defendant was in the US at any time relevant to the alleged offences. Instead, jurisdiction is based on alleged relationships between the UK defendants and members of the KBR group (i.e. in acting as “agents” and “cultural advisers” to the Kellogg group) and on the allegation that they caused wire transfers of funds via US banks, and sent faxes and e-mails to the US. The payments were allegedly made through Tri-Star Investments (a Gibraltar corporation alleged to have been controlled by Tesler) and a Japanese company.

²⁸ See M. Pieth, ‘Introduction’ in M. Pieth, L. Low and P. Cullen, *The OECD Convention on Bribery: A Commentary* (Cambridge University Press, 2007) p. 8.

²⁹ See further para. 1.12 below.

³⁰ See, for example, CBI Parliamentary Briefing, ‘The Bribery Bill. Second Reading – House of Lords’, Confederation of British Industries, 9 December 2009, copy available at <http://www.cbi.org.uk/pdf/20091209-cbi-briefing-bribery-bill-second-reading-HOL.pdf>.

Case study 1: Kellogg Brown & Root in Nigeria (continued)

Investigations into the bribery scheme took five years and involved authorities in at least six different countries. First launched in France in 2003, the investigation was then taken up by a small US Department of Justice (DoJ) team. The DoJ, in a press release, also acknowledges assistance provided by authorities in Italy, Switzerland and the UK (including the Serious Fraud Office and the London Metropolitan Police). Tesler was arrested in London in March 2009 in response to a request by US authorities and now faces possible extradition to the US.

Of course, jurisdictional objections to anti-bribery prosecutions continue to be made at the level of individual cases. In the recent Tesler case in the UK (see case study 1 above), lawyers for Tesler have been arguing that his extradition to the US would be unfair, as there are insufficient connections between his alleged behavior and the US.³¹ At the policy level, however, there is by now broad acceptance among states as to the legitimacy, desirability and indeed the necessity of extraterritorial jurisdiction in this field, and therefore for international cooperation with regard to investigating and enforcing bribery offences (see further para. 1.7). This has been due, in large part, to changes in the legal environment brought about by the various international regimes.³²

1.5 What were the key policy drivers (political, economic etc.) underlying the development of current anti-corruption regimes and what were the policy obstacles? Are there still challenges to the regime along policy lines? If so, from where?

To understand how the current international regimes on anti-corruption have developed it is necessary to go back, first of all, to the US FCPA. This legislation emerged out of a series of bribery-related scandals involving US companies and US politicians. In response to the public outcry, the SEC set up a voluntary disclosure programme, in the course of which several hundred US companies admitted that they had made questionable payments in the past, ranging from corrupt payments to gain lucrative contracts to the so-called “facilitation” or “greasing” payments to lower level officials to speed or help things along.³³ This gave rise to serious concerns about the effects of corruption on competition and the reputation of US businesses abroad and, more broadly, on faith in democracy and the “integrity of the free market system.”³⁴

After the US FCPA was passed, the US government then tried to galvanise support for an international regime, recognising that the US FCPA may have exposed US companies to an “uneven playing field” in competing for international business

³¹ See ‘British Lawyer Laundered Bribes to Nigeria, Court Told’, *The Guardian*, November 23, 2009.

³² See para. 1.2 above.

³³ SEC “Report on Questionable and Illegal Corporate Payments and Practices,” May 12, 1976.

³⁴ See House Report No 95-640, which can be viewed at <http://www.usDoJ.gov/criminal/fraud/fcpa/history/1977/houseprt-95-640.pdf>. It is possible that the legislation may also have been motivated by a desire to limit the ability of private companies to undermine US foreign policy and national security interests. See Pieth, n. 28 above, p. 8.

contracts.³⁵ After an unsuccessful attempt to negotiate an international anti-corruption treaty under the auspices of ECOSOC, the OECD became the US's preferred institution to take this forward.³⁶ Initially, support from many OECD members was lukewarm. While member states already punished bribery of their own public officials taking place within their own territorial boundaries, there was little appetite (outside the US) for extending this prohibition to the bribery of foreign public officials, let alone establishing extraterritorial jurisdiction over such cases. Most member states did not view the bribery of foreign public officials as their concern.³⁷ However, other geo-political factors – specifically globalisation, and the opening of the Eastern bloc and Asia, began to play a part. States were becoming, on the one hand, more focused on addressing barriers to trade and, on the other hand, arguably less reliant on some of the more underhand ways of securing political influence around the world.³⁸ Political will to deal with the problem of foreign bribery began to grow. States wished to do more to discourage their companies from involvement in corruption, but, recognising the competitive pressures their companies were under, were unwilling to take further concrete steps without commitments from other states to do the same. In this way, consensus on the need for an international regime began to build.

1.6 Who were/are the main stakeholders driving (or opposing) the development of the various anti-corruption regimes (national and international)? Are particular stakeholders associated with particular viewpoints or arguments?

As discussed above, the first extraterritorial anti-corruption regime, the FCPA, responded to a domestic public outcry, which resulted from a series of media exposures of corporate wrongdoing. US legislators had talked of the need to restore confidence in US companies, markets and democracy. But these allegations had tainted US politics as well, so it is quite likely that more personal considerations – specifically, the need to be seen by voters to be “tough on corruption” – played a part in shaping the political response.

US businesses, however, were less than happy about the US decision to take unilateral action in relation to global corruption. They argued that this legislation would put them at a significant competitive disadvantages vis-à-vis companies that were not under the same constraints.³⁹ Concerns were also expressed about the “moral imperialism” underlying the US legislation. Who was the US to dictate business ethics to countries with different cultural traditions and different ways of getting things done? Other commentators noted the potential for foreign policy tensions as a

³⁵ See further para. 1.6 below.

³⁶ See further para. 1.2 above.

³⁷ Moreover, as Pieth, n. 28 above, points out, many states appeared ambivalent in the way they approached the problem of bribery. Whilst publicly condemning these practices, bribery payments were still, in many of these jurisdictions, tax deductible.

³⁸ Pieth, n. 28 above, pp. 5-6. Pieth argues that although these changes may not have *lessened* the problem of bribery, they were preconditions for states to want to do something about it.

³⁹ “[I]n 1981 the [US] General Accounting Office published the results of a questionnaire administered to a random sample of Fortune’s list of the 1000 largest US industrial firms asking about the consequences of the FCPA ... 30 per cent of the firms claimed they had lost some business as a result of the Act.” J. Andvig ‘International Corruption’ in M. Bull and J Newell (eds) *Corruption in Contemporary Politics* (Palgrave MacMillan, 2002), p. 209.

result of the disclosure requirements in the FCPA, as information might be published which could cause “embarrassment” for friendly regimes.⁴⁰

US companies lobbied hard for FCPA provisions to be relaxed, and were partially successful in 1988, when amendments were passed exempting “facilitation payments” (or “greasing payments”) from the FCPA regime. The 1988 package of amendments also included a commitment to US business by the US executive to redouble efforts to secure an international treaty.

Having taken the first unilateral step, the US clearly had a strong interest in seeing the international treaty project through. But support for an international anti-corruption treaty came from other quarters too. Several non-state actors campaigned hard for international action on corruption. Though operating from different perspectives, depending on the groups they represented, their overall objectives were fairly similar. The ICC’s main concern, for instance, was the impact of bribery on competition, and the difficulties it created for ethical businesses.⁴¹ Therefore there was no sustained opposition from business lobby groups to further regulation in principle, provided that it was sufficiently robust and consistent enough to place all companies on a “level playing field.” While there may initially have been some scepticism from some sections of the business community as to whether an international regime was (a) necessary or (b) feasible, by the mid to late 1990s, the corporate world seemed to be coming around to the view that if regulation was worth doing, it was worth doing properly.

Trade unions were also supporters of further regulation, having recognised the links between corruption and abuses of core labour rights such as freedom of association.⁴² For NGOs like Transparency International (“TI”), the economic and political damage done by corruption to developing countries was a key concern.⁴³

Sometimes separately and sometimes together, these different groups lobbied governments, mobilised businesses and trade unions, gave comments to the media, participated in consultation processes and published numerous studies and reports. TI has been credited with being particularly effective at getting reluctant states on board⁴⁴ - some describing the NGO as the OECD Convention’s “international norm entrepreneur.”⁴⁵ However, according to the OECD “[t]he support from representatives of the business community was particularly important as it countered the widely accepted idea that companies were the first to benefit from the existence of corruption

⁴⁰ Ibid, p. 208.

⁴¹ In fact, the ICC has been developing self-regulatory tools for companies since 1977. See ICC ‘Combating Bribery and Extortion: ICC Rules of Conduct and Recommendations’, 2005 edition, available on-line at

<http://www.edu.tw/files/list/B0006/Combating%20Extortion%20and%20Bribery-ICC%20Rules%20of%20Conduct%20and%20Recommendations%20.pdf>.

⁴² R. Jones ‘Why Trade Unions Have Mobilised Against Corruption: Views of the Trade Union Advisory Committee’ in OECD, *No Longer Business as Usual – Fighting Bribery and Corruption* (OECD, 2000), p. 181.

⁴³ OECD, *Fighting Corruption: What Role for Civil Society? The Experience of the OECD*, (OECD, 2003), copy available at <http://www.programaanticorruccion.gob.mx/OECD.pdf>, p. 10.

⁴⁴ See OECD, *ibid*, p. 11.

⁴⁵ E. Gutterman, ‘Domestic Sources of State Compliance with International Law: Evidence from the International Regime of Anti-Corruption’ (CPSA, 2008), copy available at <http://www.cpsa-acsp.ca/papers-2008/Gutterman.pdf>, p. 14.

in international transactions. It became possible to call on this voice against skeptical opponents, who argued that the OECD instruments would not succeed in leveling the playing field and would adversely affect export opportunities.”⁴⁶

1.7 What are the obstacles to states implementing international anti-corruption regimes, e.g. the procedural challenges involved in information sharing and joint enforcement activities? What cooperative arrangements are in place (formal and informal) between states? How are jurisdictional conflicts resolved?

Problems of implementation

Bribery offences are often difficult to prove, as the paper trail showing the transactions involved is often complicated, involving intermediaries such as foreign subsidiaries, third party beneficiaries, offshore centres, and shell companies. But prosecuting extraterritorial offences has additional complications. The main challenge to successful enforcement of extraterritorial anti-bribery laws is the difficulty in gathering evidence from other jurisdictions. The cooperation of other jurisdictions is needed in gaining access to witnesses, for instance, and documentary evidence such as bank and company records. However, this difficulty may now be easing, thanks to a combination of: (a) much greater consensus between states on the need for international cooperation with respect to bribery offences, and on the legitimacy and utility of extraterritorial jurisdiction in this area; (b) widespread law reform of corruption laws at the domestic level as a result of international treaties, giving rise to improved regulatory and investigatory powers; (c) greater agreement, developed in the course of international negotiations as to the broad regulatory objectives; and (d) the presence of more formalised arrangements for cooperation under the various international treaties.

Inter-state co-operation and mutual legal assistance

Mutual legal assistance provisions have been included in all of the key anti-bribery treaties. The OECD Convention, for example requires “prompt and effective legal assistance” to other parties “for the purpose of criminal investigations and proceedings” in relation to bribery offences.⁴⁷ This is followed up in a 2009 Recommendation with further requests to state parties to “consult and cooperate” with each other “through such means as sharing of information spontaneously or upon request, provision of evidence, extradition, and the identification, freezing, seizure, confiscation and recovery of proceeds of bribery of foreign officials.”⁴⁸ State parties are also asked to “ensure that their national laws afford an adequate basis for this co-operation.”⁴⁹ Moreover, the 2009 OECD Recommendation recognizes the importance of obtaining and sharing evidence with non-state parties.⁵⁰

⁴⁶ OECD, n. 44 above, p. 11..

⁴⁷ OECD Convention, Article 9(1).

⁴⁸ See the 2009 OECD Recommendation for Further Combating Bribery of Foreign Public Officials in International Business Transactions, December 9, 2009, copy available at <http://www.oecd.org/dataoecd/11/40/44176910.pdf>, (the “2009 Recommendation”), Recommendation XIII.

⁴⁹ Ibid.

⁵⁰ See 2009 OECD Recommendation, n. 48 above, Recommendation XIII v).

The UN Convention contains provisions on cooperation similar to those in the OECD Convention, and also calls for technical assistance to help developing states improve their detection and enforcement capabilities.⁵¹

In practice there are still significant problems with the coordination of state action under international anti-bribery treaties, not least because of variations in the way different bribery offences are framed, and divergent enforcement policies.⁵² National variations in the way offences are structured – even under international regimes – can create problems for the extradition of offenders.⁵³ It also encourages some states to “go it alone” in many cases creating an uneven and inconsistent pattern of enforcement overall.⁵⁴ However, international cooperation in the investigation and prosecution of bribery offences does appear to be increasing. The last few years have seen some new and innovative cooperation arrangements, including “joint-plea bargaining,” in which the national regulatory authorities of more than one state work together with the company to agree a suitable basis on which a matter can be settled, including the allocation of financial penalties (see further case study 2 below).

Resolving jurisdictional conflicts

Because of the multi-jurisdictional nature of international business transactions, and the likelihood that individuals and companies of different nationalities will be involved, it is inevitable that jurisdictional conflicts will arise. However, the Conventions are flexible on the question of how to deal with jurisdictional conflicts. Under the UN Convention, for instance, if state parties learn that more than one of them is investigating the same conduct, they are to “consult one another with a view to coordinating their actions.”⁵⁵

The OECD Convention regime has perhaps the greatest potential for jurisdictional conflicts, focusing as it does on the “supply side” of bribery offences. Whereas, in an international bribery transaction, there will usually be only one “demand side” jurisdiction, the “supply side” may involve actors and companies from many different states, for instance in cases involving bribery by consortiums and joint ventures. The OECD Convention itself provides little guidance on which state is to have priority, merely requiring that the relevant state parties, if requested, “consult with a view to determining the most appropriate jurisdiction for prosecution.”⁵⁶ On the other hand, the ability of a state to decline extradition on the basis that the defendant is a national of that state (on the condition that that person then be prosecuted under the laws of his

⁵¹ UN Convention, Article 60.

⁵² See IBA Task Force Report, p. 251.

⁵³ One difficulty is the requirement of “double criminality” (i.e. the activity must be a crime under the laws of the state where the person is located, as well as under the laws of the requesting state). The principle of “double jeopardy,” which says that a person should not be tried twice on the same set of facts, can also pose problems, e.g. where one state does not treat an offence with the same level of seriousness (and therefore deserving of the same level of punishment) as another. In cases like this, State A may not be satisfied with the sanctions levied by State B. This may have been an issue in the Statoil case, See IBA Task Force Report, p. 212. See case study 3 below. See, however, Article 9(2) of the OECD Convention, which says that the requirement for “double criminality” is satisfied as between state parties where the subject matter of the proceedings is covered by the Convention.

⁵⁴ IBA Task Force Report, p. 238.

⁵⁵ UN Convention, Article 42(5).

⁵⁶ OECD Convention, Article 4(3). However, see further guidance in 2009 OECD Recommendation, n. 48 above, Recommendation XIII i).

own state)⁵⁷ does imply a “priority of nationality jurisdiction when coupled with physical presence.”⁵⁸

Case study 2: International cooperation in action: the case of BAE

UK defense contractor BAE Systems had been under investigation in several jurisdictions concerning allegations of corrupt practices to secure deals in Saudi Arabia, Tanzania, the Czech Republic, South Africa and Hungary.

The investigations into dealings in Saudi Arabia were reported to have concerned the £40 billion “al-Yamamah” contract (dating back to 1985) to supply over 100 fighter jets to Saudi Arabia. In 2004, the UK Serious Fraud Office (“SFO”) began investigating BAE’s dealings in Saudi Arabia (including allegations that the company ran a “slush fund” to pay for “sweeteners” to members of the Saudi Royal family and their intermediaries). As part of this investigation, the SFO had requested assistance from the Swiss authorities regarding access to bank information. The investigation was abandoned (controversially) in December 2006, apparently after the UK government intervened. However, the SFO continued to investigate BAE dealings in other countries, including allegations surrounding a sale of Hawk training aircraft and Gripen fighters to South Africa in 1999, and a controversial £28 million contract to sell air traffic control facilities to Tanzania.

The SFO also began investigating a number of individuals connected to the company. In September 2008, Austrian authorities, at the SFO’s request, raided the home and offices of Count Alfons Mensdorff-Pouilly as part of an investigation into corruption allegations in relation to deals to supply fighter jet contracts for BAE in Hungary, Austria and the Czech Republic. Mensdorff-Pouilly had reportedly been working as an intermediary for BAE, though denied any wrongdoing. He was arrested in Austria in February 2009 after a joint investigation by the SFO, UK Ministry of Defence police and police and prosecutors in Vienna. On January 29, 2010 he was charged at a North London court under section 1 of the UK Criminal Justice Act 1977 with being party to a “conspiracy to corrupt.”

In 2007 BAE announced that the US DOJ was investigating “the company’s compliance with anti-corruption laws, including the company’s business concerning the Kingdom of Saudi Arabia.” Subpoenas were served on several senior executives, and its Chief Executive, and a senior colleague, were briefly detained while visiting the US in 2008.

On February 5, 2010, in what the SFO described as a “ground-breaking global agreement,” both the SFO and the DOJ agreed, in a joint “plea-bargaining” deal with BAE, to settle outstanding proceedings against the company. Under the deal, BAE had agreed to plead guilty to US charges relating to making false statements to US investigators with respect to the al-Yamamah contract, for which a fine of US\$400 million would be payable. The company also agreed with the UK SFO to pay £30 million for accounting breaches (contrary to UK companies legislation) relating to the Tanzanian air traffic control deal. This would comprise a financial penalty to the UK

⁵⁷ See OECD Convention, Article 10(3).

⁵⁸ IBA Task Force Report, p. 231.

Case study 2: International cooperation in action: the case of BAE (continued)

government (the precise amount to be settled by court judgment), with the balance to be paid as an ex gratia payment “for the benefit of the people of Tanzania.” In its press release, the SFO said that it had “taken account of the implementation by BAE Systems of substantial ethical and compliance reforms” in deciding that “no further prosecutions will be brought against BAE systems in relation to the matters that have been under investigation by the SFO.”

The same day the SFO announced that, in light of the guilty pleas by BAE, and its agreement to pay substantial penalties, it would no longer be in the public interest to continue to investigate individuals in relation to their involvement in these matters, and therefore that the charges against Mensdorff-Pouilly would be dropped.

As well as the problem of overlapping jurisdiction, there can be conflicts between states as to whether certain behavior is illegal at all. Here, states defer to some extent to the laws of the “host state.” For instance, under the US FCPA, an affirmative defense is available if “the payment, gift, offer, or promise of anything of value that was made, was lawful under the written laws and regulations” of the foreign official’s country. Under the OECD Convention, it is not an offence “if the advantage was permitted or required by the written law or regulation of the foreign public official’s country, including case law.”⁵⁹

Deference may also be shown to the regulatory interests of other states in the way prosecutorial discretions are exercised. For instance, in the Statoil case, the US authorities took account of the fines already paid by the company in Norwegian proceedings, in arriving at a settlement arrangement with the company (see case study 3 below). In a prosecution against a Dutch company, Akzo Nobel NV (also a US “issuer” and therefore subject to the FCPA), the settlement included, in addition to an agreement to pay US\$3 million in “disgorgement,” an agreement to pay a further US\$800,000 fine if one of its subsidiaries did not come to a suitable arrangement with Dutch prosecutors.⁶⁰

⁵⁹ See Commentary on the OECD Convention, n. 5 above, para. 8.

⁶⁰ The Dutch and US prosecutions arose out of allegations of improper payments to the Iraqi government in the context of the Oil for Food programme in order to gain contracts with Iraqi ministries. The matter was settled between the DOJ and Akzo Nobel in December 2007 by a settlement agreement in which the Dutch parent was reported to have acknowledged that improper payments had been made. The terms of the settlement agreement record the DOJ’s intention not to institute criminal proceedings against the Dutch parent company “in recognition of [the] anticipated resolution with the Dutch Public Prosecutor, Akzo Nobel’s disclosure of the improper payments to the [DOJ] ... and its thorough review of those payments.” US DOJ Press Release ‘Akzo Nobel Acknowledged Improper Payments Made by its Subsidiaries to Iraqi Government Under U.N. Oil for Food Program, Enters Agreement With Department of Justice’, December 20, 2007, copy available at http://www.justice.gov/opa/pr/2007/December/07_crm_1024.html

Case study 3: Competing jurisdictional claims: The Statoil Case

The Statoil case concerned an investigation into alleged payments of bribes by Norwegian company Statoil to a government official in Iran, in an attempt to secure oil concessions in that country. The Norwegian authorities commenced an investigation into the company for “trading in influence” offences, resulting in a successful prosecution of one executive of the company under Norwegian law, along with fines of around US\$3 million for the company itself. Statoil accepted these fines, but said that this should not be taken as an admission of guilt.

As Statoil was listed in the US, the US authorities also commenced an investigation and prosecuted the company under the accounting provisions of the FCPA, as well as under the bribery provisions of the FCPA, on the basis that payments to an agent of the company were wire-transferred through a New York bank account. A settlement with the US authorities was reached in late 2006, under which it was agreed that the company could have credit for the fines already paid to the Norwegian authorities, resulting in a fine to the US authorities of US\$21 million overall. This comprised US\$10.5 million under an administrative “cease and desist” order and a further US\$10.5 million under a deferred prosecution agreement. Under the terms of the deferred prosecution agreement, the company was required to appoint a compliance monitor, and to report findings of reviews to US government authorities. The criminal proceedings covered by the deferred prosecution agreement (which concerned allegations of making corrupt payments and then falsifying books and records) were dropped by the DOJ in November 2009 in recognition of “[t]hree years of diligent efforts by Statoil to address past misconduct and serious compliance failures.”*

*Source: DOJ Press Release: ‘Statoil ASA Satisfies Obligations Under Deferred Prosecution Agreement and Foreign Bribery Charges Are Dismissed’, November 19, 2009, copy available at <http://www.justice.gov/opa/pr/2009/November/09-crm-1257.html>

1.8 What considerations are taken into account by regulatory authorities in deciding whether or not to commence enforcement action in relation to extraterritorial activities? For instance, how serious or systemic must the offences be? And how great the connection with the regulating state?

A key consideration in deciding whether or not to commence enforcement action in relation to extraterritorial activities is whether or not sufficient evidence can be obtained. Obviously, as noted above, gathering evidence is particularly difficult in relation to foreign bribery offences, or international bribery schemes involving several different jurisdictions, and relies heavily on cooperation from the other states concerned. The practical and evidential difficulties in prosecuting an extraterritorial bribery offence mean that, in practice, prosecutions are more likely to be based on transparency, book-keeping and internal control provisions, than the bribery offences themselves.

But when bribery offences can be proved, the cases most likely to attract attention from prosecutors are large bribery payments to secure a lucrative contract, involving senior management – or repeated patterns of illegal behavior, where the payments

may be smaller, but which the company (and particularly the parent company) have not taken serious steps to address.

It must be remembered too, that many cases come to prosecutors' attention not because of outside investigations, but because of voluntary disclosure by companies, perhaps resulting from an internal investigation. Companies that discover bribery problems within their group may (and often do) take the view that it would be better to take responsibility for the wrongdoing and deal openly with the authorities, rather than risk a prosecution, and potentially much higher fines, later on. Companies that cooperate with investigators, and take a proactive approach, can usually expect to be treated more leniently by authorities. For instance, the United States (DOJ) Principles of Federal Prosecution of Business Organizations state that "in conducting an investigation, determining whether to bring charges, and negotiating plea or other agreements, prosecutors should consider" factors including "the corporation's timely and voluntary disclosure of wrongdoing and its willingness to cooperate in the investigation of its agents."⁶¹

As discussed above, the authorities may also take account of the extent to which extraterritorial behavior has already been dealt with in another jurisdiction (see discussion at para. 1.7 above) in deciding whether or not to launch their own prosecution. However, the fact that a matter is the subject of criminal prosecution in another state has not prevented the US authorities from acting, as demonstrated by the Statoil case (see case study 3). It has been suggested that the US proceedings in that case were motivated, in part, by US concerns that punishments imposed by the Norwegian authorities would not be severe enough.⁶²

Because of the complexity of bribery law, not to mention the inevitable interpretational difficulties, the US DOJ operates an "opinion procedure" whereby companies which are concerned about FCPA compliance issues can get an "opinion" from the Attorney General as to whether a proposed course of conduct is consistent with the FCPA. Any opinion given under this procedure is not binding on the DOJ, and does not guarantee that enforcement action will not be taken. However, it does create a "rebuttable presumption" in the company's favour in relation to the statutory or regulatory provision specifically cited in the particular FCPA Opinion.⁶³

As for the extent to which there must be "connecting factors" between the conduct and the regulating state, most states appear to require a strong nationality connection with the companies concerned before they will take action in relation to corrupt activities wholly outside their territory, although the US authorities have been known to base their jurisdiction on slighter connections, such as communications to the jurisdiction, or the use of US banks to wire illicit payments to foreign intermediaries

⁶¹ For a UK example, note the recent fine levied by the UK Financial Services Authority ("FSA") against Aon, in which the company agreed to settle with the FSA at an early stage, receiving the benefit of a 30% settlement discount. The eventual fine (of £5.25 million) was imposed on the company for failing to put in place adequate risk management systems to guard against the possibility of bribery overseas. However, the FSA's Final Notice to the company notes the high level of cooperation with authorities, and the efforts made to rectify the problems. See the FSA press release at <http://www.fsa.gov.uk/pages/Library/Communication/PR/2009/004.shtml>.

⁶² IBA Task Force Report, p. 212.

⁶³ See further US DOJ, 'Opinion Procedure Regulations', copy available at <http://www.justice.gov/criminal/fraud/fcpa/opinion/frgncrpt.html>

(see case study 1 above). It is difficult to make meaningful comparisons, though, as the US is *by far* the most vigorous and proactive domestic enforcer of international bribery offences.

1.9 Is domestic legislation based on: penalties, incentives, civil action, or transparency requirements? Or a combination of these?

States use a combination of tactics to combat bribery abroad. First, bribery offences may attract criminal liability, with the threat of fines, confiscation or imprisonment, or a combination of the three. This is the case under the US FCPA. However, transparency obligations (in the form of book-keeping requirements covering foreign subsidiaries as well as local companies) arguably play a more important role on a day to day level because of their function in the prevention and detection of bribery.⁶⁴ In the US, authorities have the power, in addition to launching a criminal prosecution, to commence civil proceedings against companies or individuals seeking injunctions as to future conduct, and also disgorgement of ill-gotten gains. Many proceedings against companies under the FCPA are settled by agreement (e.g. plea agreements, deferred prosecution agreements or non-prosecution agreements) between the authorities and companies concerned. When this occurs, it is not uncommon for the company to be required to pay a substantial fine, disgorge its profits, and to appoint a compliance officer, and to agree to additional reporting and monitoring requirements, as part of the settlement agreement (see case study 3 above and case study 4 below).

State authorities may also have other administrative remedies open to them, in the form of fines, de-listing companies found to have been in breach of anti-bribery regimes, denying them government procurement opportunities and denying them access to officially supported export credits.⁶⁵ The 2009 OECD Recommendation asks state parties to ensure that their laws permit authorities to suspend companies found to have been involved in bribery “from competition for public contracts or other public advantages, including public procurement contracts and contracts funded by official development assistance.”⁶⁶ It also recommends the denial of “public subsidies, licenses, public procurement contracts, contracts funded by official development assistance, officially supported export credits or other public advantages” as a sanction for bribery in appropriate cases.⁶⁷ States can take steps to ensure that companies involved in bribery do not benefit from government investment

⁶⁴ Transparency (i.e. accounting and book-keeping) requirements are key to the FCPA regime. The importance of accounting standards in the fight against bribery is also recognised in the OECD regime. See OECD Convention, Article 8, requiring state parties to tighten their accounting requirements to make questionable payments more difficult to conceal. See further 2009 OECD Recommendation, n. 48 above, Recommendation X.

⁶⁵ For example, in January 2008 it was reported that Norway’s Department of Defense had stopped doing business with Siemens, following an investigation of bribery allegations against the company (see further case study 4 below). And in October 2008, Norway’s national operator Telenor was reported to have banned the Chinese ZTE Corporation from participating in tenders for six months due to alleged breaches of Telenor’s Code of Conduct.

⁶⁶ 2009 OECD Recommendation, n. 48 above, Recommendation XI i). See also Recommendation X.C.vi. which asks state parties to encourage government agencies to take account of the extent to which companies have introduced adequate internal controls as part of the vetting process for public procurement contracts or investment support.

⁶⁷ 2009 OECD Recommendation, n. 48 above, Recommendation III vii).

support, e.g. in the form of export credit guarantees.⁶⁸ In the US, for example, FCPA violators may be ruled ineligible to receive export licences, suspended or barred from accessing programmes offered by OPIC, or barred from bidding for work under government procurement procedures.⁶⁹ But the ability of firms to claim some illicit payments as tax deductions under the laws of many states has raised questions about the level of commitment to the fight against bribery at domestic level. This has been the subject of two Recommendations by the OECD Council.⁷⁰

1.10 If the regulation is done pursuant to an international regime, does the regime primarily rely on administrative, civil or criminal remedial mechanisms – and at the international, regional or national level? Are non-judicial mechanisms relevant?

International anti-corruption regimes rely primarily on criminal enforcement. For instance, Article 1 of the OECD Convention requires each state party to take steps under its law to ensure that it is a criminal offence to offer bribes to foreign public officials. Similarly, the UN Convention requires state parties to “adopt such legislative and other measures as may be necessary” to make the bribery of national *and* foreign public officials criminal offences under their own domestic laws.⁷¹ However, the UN Convention also contemplates a range of other regulatory initiatives to deal with “demand side” problems, including improving systems for hiring public officials, developing codes of conduct for public officials, improving the way public finances are managed and improving governmental transparency. The UN Convention includes provisions specifically on “participation of society” in the fight against corruption, including greater public access to public decision-making processes and greater freedom of information.⁷²

There is some flexibility in the way bribery offences are to be enforced under these treaty regimes. For example, the OECD Convention takes account of the fact that some member states do not recognise the concept of corporate criminal liability. In this case, state parties are required to “ensure that legal persons shall be subject to effective, proportionate and dissuasive non-criminal sanctions.”⁷³ Under the UN

⁶⁸ See the OECD Council Recommendation to Deter Bribery in Officially Supported Export Credits 2006, which asks states to obtain undertakings from exporters as to their approach to bribery, and to check whether applicants appear on debarment lists. A copy of the Recommendation can be viewed at http://www.oecd.org/document/62/0,3343,en_2649_34177_37858750_1_1_1_1,00.html. Information regarding implementation is still being evaluated. However the failure of some states to weed corrupt companies out of their export support programmes in the past has been heavily criticised, see, for instance, S. Hawley ‘Turning a Blind Eye: Corruption and the UK Export Credits Guarantee Department’, The Corner House, June 2003. Copy available at <http://www.thecornerhouse.org.uk/pdf/document/correcgd.pdf>.

⁶⁹ US Department of Justice, ‘Lay-person’s Guide to the FCPA’, n. 26 above.

⁷⁰ See ‘OECD Recommendation on the Tax Deductibility of Bribes to Foreign Public Officials’ 1996, copy available at

http://www.oecd.org/document/46/0,3343,en_2649_34551_2048174_1_1_1_37447,00.html; ‘OECD Recommendation on Tax Measures for Further Combating Bribery of Foreign Public Officials in International Business Transactions’, May 25, 2009, copy available at <http://www.oecd.org/dataoecd/18/15/43188874.pdf>. And see finally the 2009 OECD

Recommendation, n. 48 above, Recommendation VIII which refers to the two tax recommendations.

⁷¹ See Articles 15 and 16.

⁷² UN Convention, Article 15.

⁷³ OECD Convention, Article 3(2).

Convention, state parties have the choice of “criminal, civil or administrative” liability for legal persons.⁷⁴

All of the Conventions provide for regular review of compliance by state parties.⁷⁵ The main consequence for states of non-compliance is a loss of credibility within their peer group. There are no mechanisms for “expulsion” of non-compliant parties (which would probably not, in any event, be a particularly constructive response). As in other areas, creating sufficient incentives to make states want to comply with (and indeed go beyond) their treaty obligations can be a difficulty. However, the “peer review” process used by the OECD Convention is widely regarded as one of the most effective compliance systems for any international treaty regime.

The peer review system involves periodic evaluations by experts appointed from two other “examining” member states chosen from a rota, although one examining state should have a similar legal system to the one being examined. The first part of the review process (phase 1) involves a review of the state parties’ relevant legislation, regulations and policy directives to assess their compliance with the Convention. The second phase (phase 2) focuses on practical implementation and enforcement. This phase involves an on-site visit to the country being examined to meet with police, prosecutors, relevant government ministries and agencies, the private sector and civil society. Draft reports including recommendations are prepared by the examination teams for both phases. They are discussed and adopted by the Working Group on Bribery and then published, including on the OECD’s own website. Implementation of the Phase 2 recommendations are followed-up twice at one-year junctures, and the second juncture involves a written report, which is also published. The third phase of examinations (phase 3) began in 2010, and will focus even more on enforcement, as well as Working Group on Bribery recommendations from previous phases that have still not been implemented. It is generally agreed that this system has produced important legislative amendments to strengthen state parties’ implementing legislation, increased investigations and prosecutions of foreign bribery cases, and generally raised the priority of fighting this form of bribery in the state parties. It also seems to facilitate a certain amount of cross-fertilisation between member states of regulatory expertise.

The “peer review” process is accompanied by a certain amount of peer pressure. As one of the OECD Convention’s key aims is a “level playing field,” non-compliant states risk undermining the whole system. All state parties, therefore, have a real interest in ensuring that other state parties comply and that they, themselves, have credibility within the system. Therefore OECD member states tend not to ignore adverse findings coming out of the “peer review” process.

1.11 Are the targets of the regulation corporations or individuals or both?

As will be clear from the case studies featured in this chapter, the targets of extraterritorial anti-bribery regulation can be corporations, or individuals or both. Many of the FCPA’s provisions, for instance, apply to companies *and* individuals (including executives, finance directors). Individuals (including foreign individuals)

⁷⁴ UN Convention, Article 26.

⁷⁵ See, for instance, UN Convention, Article 63(4).

may also potentially be prosecuted under the FCPA for conspiracy to commit FCPA violations (e.g. “aiding and abetting”), even where they had not actually visited the US at any relevant time (see case study 1 above).

1.12 How do states regulate foreign corporate entities? For instance, is this done directly? Or are regulatory obligations imposed primarily on the parent company?

States generally do not apply their anti-corruption laws to foreign companies directly, even when those companies are subsidiaries of locally incorporated companies, unless they have territorial jurisdiction over the conduct of those foreign companies. The idea of applying US laws directly to foreign subsidiaries of US companies extraterritorially was considered by US Congress when the FCPA was under development, but was rejected because of the “the inherent jurisdictional, enforcement and diplomatic difficulties” raised by the proposal.⁷⁶ However, the US FCPA could potentially be applied directly to foreign (i.e. non-US) companies in three categories of cases that take place abroad. First, where the foreign company falls within the definition of a US issuer, on the basis that it is listed on US stock exchanges (see, for instance, case study 3 above). Second, where the foreign company (usually a foreign subsidiary or agent of a company subject to the FCPA regime) has aided and abetted FCPA violations (see, for instance, case study 4 below) and, third, where a foreign company is party to a course of conduct taking place partly within the US and partly within another state (see discussion at para. 1.1 above).

Apart from these exceptions, extraterritorial regulation of the foreign activities of foreign companies in the anti-corruption field is largely a “parent-based” kind of regulation,⁷⁷ in which parent companies (and potentially their officers and directors too) are held responsible in the event that a foreign subsidiary is engaged in foreign bribery.

There are various ways that parent companies can be held responsible for the activities of their foreign subsidiaries or agents abroad. These can be divided under the following broad headings:

- “primary” liability (e.g. on the basis that the parent was *acting through* a foreign agent – for instance by directing the foreign subsidiary to bribe on its behalf – although obviously this depends much on the way the “primarily liability” offence is framed);
- “negligent supervision” by a parent (where the parent has failed to supervise a foreign subsidiary adequately, and has failed to put in place the proper controls to ensure that bribery offences within its corporate group do not occur);
- “secondary” liability (i.e. on the basis that the parent company aided and abetted or conspired in bribery offences committed by a foreign subsidiary or agent); and
- reporting failures under group accounting requirements.

⁷⁶ See House of Representatives Conference Report No. 94-831 on the FCPA, December 6, 1977, <http://www.usDoJ.gov/criminal/fraud/fcpa/history/1977/corruptrpt-94-831.pdf>.

⁷⁷ See p. 16 above.

Primary liability

Primary liability for parent companies for the acts of their foreign subsidiaries or agents is a possibility under the FCPA, for instance, under which a US national or company may be liable for bribery offences if the parent company makes a payment with the *knowledge* that part of that payment may be used to bribe a foreign public official.⁷⁸ The DoJ interprets “knowing” to include “conscious disregard” or “deliberate ignorance”⁷⁹ as well as actual knowledge that a bribe will be paid. This creates a powerful incentive for US parent companies to carry out (and to ensure that their foreign subsidiaries also carry out) proper due diligence into foreign intermediaries and their staff, e.g. as to whether they are reputable, properly qualified, the extent to which they have links to relevant government officials, and the nature of those links. Although “due diligence” is not a defense as such, it can at least be used by a US parent company to show that any lack of knowledge was not the result of any “wilful blindness,” or a disregard of its legal obligations.

Negligent supervision

The offence of “negligent supervision” is increasingly used in the context of corporate crime, the idea being that although a parent company may not be *directly* responsible for a breach of a legal obligation, it ought nevertheless to be held responsible on the basis that it had failed to take sufficient steps to prevent a third party (over which that parent company exercised some control) from committing offences.⁸⁰ The recent civil fine levied by the UK Financial Services Authority (“FSA”) against Aon Ltd.⁸¹ is an example of a case where a parent company has been held responsible, not for the bribery offences as such, but for allowing a situation to arise where bribery of foreign officials was possible, and failing to take sufficient corrective action.⁸² Specifically, Aon was accused of not using proper due diligence in its payment procedures, and failing to put in place a system of ongoing monitoring of relationships with “overseas third parties.”⁸³

The UK legislature has recently created a new offence of “failure by a commercial organisation to prevent bribery” as part of an overhaul of UK anti-corruption laws. Under section 7 of the UK Bribery Act 2010, a company can be guilty of a criminal offence if an employee or third party intermediary (including a foreign subsidiary) pays a bribe with the intention of obtaining business or advantageous treatment for that company. However, it would be a defense for the company to be able to show that it had put in place “adequate procedures” to prevent bribery from taking place.⁸⁴

⁷⁸ See 15 USC §§ 78dd-1(a), 78dd-2(a) and 78dd-3(a).

⁷⁹ See US Department of Justice, <http://www.justice.gov/criminal/fraud/docs/DoJdocb.html>.

⁸⁰ The idea of “negligent supervision” as a basis for corporate criminal liability has now been endorsed by the OECD Working Group on Bribery and the OECD Council. See the “Good Practice Guideline” annexed to the 2009 OECD Recommendation, n. 48 above. Para B) 2.b.

⁸¹ See n. 61 above.

⁸² Note also, that the fine in that case was not levied pursuant to the UK’s main anti-bribery laws, but because of a breach of the FSA’s own “Principles of Business,” specifically Principle 3 which requires that firms take reasonable care to control their businesses responsibly, and have in place adequate risk management systems.

⁸³ For recent guidance on good practice regarding internal corporate anti-bribery controls and monitoring, which covers relationships with intermediaries and other business partners, see OECD ‘Good Practice Guidance on Internal Controls, Ethics and Compliance’ adopted February 18, 2010. This guidance now appears as Annex II to the 2009 Recommendation, see n. 48 above.

⁸⁴ See UK Bribery Act, n. 10 above, section 7(2).

Following concerns expressed by UK businesses about possible uncertainties surrounding how these provisions might be interpreted in practice,⁸⁵ the Secretary of State is now required, under section 9(1) of the Act, to publish guidance as to what will and will not constitute “adequate procedures” for these purposes.

Secondary liability

“Secondary” liability is also a possibility under many criminal regimes. Under theories of “secondary” liability, an individual or company that directs or authorises, or aids and abets, or (in some cases) ratifies a criminal act, can be criminally liable jointly with the principal offender, for example as an “accessory.” Under anti-corruption laws, a parent company could potentially be criminally liable on the basis that it had aided and abetted, directed or encouraged an act of foreign bribery.

Reporting failures

Finally, book-keeping and accounting requirements are a hugely important way of combating bribery by corporations, and are thought to provide the legal basis for many (if not most) prosecutions under the FCPA. No explicit obligations are placed on foreign subsidiaries directly. Instead, the parent company is made responsible for gathering and disclosing financial information relating to the whole group. A failure to report transactions correctly exposes the parent company, and its officers, to the threat of criminal sanctions, providing powerful incentives for the parent company to put in place proper monitoring systems and to investigate suspicious patterns of activity.

⁸⁵ See the Memorandum submitted by the CBI (BB 07) to the Joint Committee on the Draft Bribery Bill, copy available at <http://www.publications.parliament.uk/pa/jt200809/jtselect/jtbribe/115/115we09.htm>.

Case study 4: Regulating foreign corporate entities: The Siemens Case

Siemens AG, a German company, had been the subject of bribery investigations in a number of countries, including the US, Germany, Switzerland, Italy and Greece. The company was accused of organising the illegal transfer of approximately €420 million over a seven year period in order to win telecoms, transport and other contracts in many different countries.

In October 2007, the Munich District Court imposed a fine of €201 million on the company, in relation to bribery offences alleged to have been committed by a former manager of its telecoms division in Russia, Nigeria and Libya between 2001 and 2004. Seventy-seven separate bribery allegations were cited in the court ruling, totalling around €12 million.

In December 2008, in separate US proceedings, four members of the Siemens group (Siemens AG and three of its foreign, i.e. non-US, subsidiaries) were fined a total of US\$800 million for bribery and book-keeping offences. Siemens AG agreed to pay a US\$448.5 million fine in settlement of criminal prosecutions under the FCPA regarding failure of internal controls and book-keeping offences, while each of the foreign subsidiaries pleaded guilty to charges of conspiracy to violate the books and records provisions of the FCPA (and two of the three also pleaded guilty to conspiracy to violate the anti-bribery provisions of the FCPA as well, having used US bank accounts to move money). These three non-US subsidiaries were fined a further US\$500,000 each. The US charges against Siemens AG related to allegations of bribery offences in Iraq, Argentina and Venezuela. The illicit payments were said to have been falsely described as “commissions” in the books and records of the relevant subsidiaries, which, under consolidated reporting arrangements, were part of the books and records of Siemens AG. Under the terms of the plea agreement, Siemens AG were required to appoint an independent compliance monitor for a four year period, who would be required to report regularly to the company and the DoJ.

In addition to the US\$450 million the Siemens group agreed to pay to the DoJ, the group also agreed to pay a further US\$350 in settlement of separate, but related, civil proceedings brought by the SEC. At the same time, the Siemens group agreed to settle outstanding German proceedings in respect of other (i.e. non-telecoms) divisions within the group. Those charges related to allegations of a corporate “failure to supervise” its officers and employees.

The combined amount paid to the US and German authorities in fines was reported to have exceeded US\$1.6 billion. In its press release announcing settlement of the matter, the DoJ praises the “high level of cooperation, including sharing of information and evidence ... made possible by the use of mutual legal assistance provisions of the [OECD Anti-Bribery Convention].”

Source: US DOJ Press Release ‘Siemens AG and Three Subsidiaries Plead Guilty to Foreign Corrupt Practices Act Violations and Agree to Pay \$45 million in Combined Criminal Fines’ December 15, 2008, copy available at <http://www.justice.gov/opa/pr/2008/December/08-crm-1105.html>.

In summary, outside the US, there is little, if any, state practice of *direct* extraterritorial regulation of foreign companies. In almost all jurisdictions the regulation of foreign companies in relation to foreign activity is done via “parent-based” methods.⁸⁶ But there is still considerable diversity in the approaches to parent-based regulation of foreign companies, in terms of: (a) the extent to which criminal liability can be attributed to the parent company;⁸⁷ (b) the way in which legal liability can be attributed to the parent company (e.g. whether some positive act by an individual is required, or whether evidence of negligence is sufficient);⁸⁸ (c) the relevance of due diligence (or the lack thereof) either to the question of whether a primary offence has been committed⁸⁹ or the availability of a defense; and, (d) the use made of “accessory” type offences (e.g. “incitement” or “authorisation” or “assistance”) as a possible basis for parent company liability.⁹⁰

1.13 What do the anti-corruption treaties say about the regulation of foreign corporate entities?

While all of the treaties either authorise or require the use of nationality jurisdiction in relation to the extraterritorial activities of their corporate nationals, they do not impose specific requirements vis-à-vis the regulation of the foreign activities of foreign companies and no treaties require the regulation of such activities directly. This will be because of the acknowledged legal limitations in relation to the regulation of foreign nationals in foreign territory. However, a number of treaty provisions are potentially relevant to the situation where a foreign subsidiary or agent is primarily responsible for a bribe. For instance, the UN Convention contains provisions relating to “accessory” or “secondary liability”⁹¹, under which a parent company could be held responsible for a foreign bribe on the basis that it was the “instigator” of that bribe.⁹² The OECD Convention mandates liability for complicity in the bribery of a foreign public official, including “incitement, aiding and abetting, or authorization” of such an act.⁹³ The “Good Practice Guideline” annexed to a recent

⁸⁶ See further p. 16 above for an explanation of what is meant by “parent-based” methods of extraterritorial regulation.

⁸⁷ Here, there appears to be a difference in approach between civil law jurisdictions and common law jurisdictions, with civil law jurisdictions historically being less prepared than common law systems to recognise the criminal liability of legal entities. Until fairly recently, many European countries did not recognise the concept of corporate criminal liability, although this is gradually changing, due in part to the influence of the OECD Anti-Bribery regime. See further paras. 4.11 and 4.12 below.

⁸⁸ See further para 4.11 below.

⁸⁹ Australia, for example, has developed a theory of corporate liability that allows for criminal prosecution of companies based on the presence of a “corporate culture” that encourages, tolerates or leads to a situation of non-compliance. This provides a possible basis for parent company liability for acts of foreign bribery carried out by foreign subsidiaries or agents. See further para. 4.11 below.

⁹⁰ Japan, for instance, recognises the possibility of criminal responsibility based on a lack of “due diligence,” but has been called upon by the OECD to reform its law on secondary (or “accessory”) liability to enable it to prosecute “incitement” and “authorisation” of bribery by Japanese parent companies regardless of where the bribery was in fact committed. See OECD, ‘Directorate for Financial and Enterprise Affairs, Japan: Phase 2: Report on the Application of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and the 1997 Recommendation on Combating Bribery in International Business Transactions’, copy available at <http://www.oecd.org/dataoecd/34/7/34554382.pdf>, pp. 43-44.

⁹¹ See further discussion at para. 1.12 above.

⁹² See UN Convention, Article 27.

⁹³ See OECD Convention, Article 1(2).

OECD Recommendation on implementation of the OECD Convention⁹⁴ asks state parties to ensure that “a legal person cannot avoid responsibility by using intermediaries, *including related legal persons*, to offer, promise or give a bribe to a foreign public official on its behalf.”⁹⁵

There is little guidance in the treaty provisions themselves as to the extent to which accounting controls must cover the transactions of foreign subsidiaries. However, to the extent that the treaty covers foreign bribery, it would appear to be the intention that consolidated reporting (covering the transactions of foreign subsidiaries as well as the parent company) is indeed required.

1.14 Conclusions: Lessons for the B&HR sphere

Several arguments have been employed in favour of extraterritorial anti-corruption measures that are potentially relevant to the B&HR sphere. First, the bribery of foreign public officials (the type of corruption offence of most concern at international level) is an offence that normally takes place abroad. Some form and degree of extraterritorial jurisdiction is therefore necessary for the effective enforcement of the offence. Another is the idea of the “level playing field” – that abuses can give unethical companies an unfair commercial advantage and therefore all states should work towards outlawing them. A further argument focuses on the way that morally reprehensible practices can undermine reputations, not just of the company concerned, but also of business in general. Advocates of reform have also pointed out the potential damage that bribery in international business transactions can cause to good governance, democratic institutions, sustainable development and reputations of home states and, more fundamentally, the credibility of capitalism and democracy in an insecure world.

There are clearly parallels between the anti-corruption and the B&HR spheres. But there are also important differences between these two areas which may have a bearing on regulatory solutions. First, anti-corruption regimes are aimed primarily at the prevention of a single activity – bribing foreign officials. In contrast, the B&HR sphere potentially covers a raft of different standards, taking in all internationally recognised human rights. While there seems to be wide acceptance of the principle that companies have a responsibility to “respect” human rights, guidance is still developing about the exact parameters of this responsibility. Second, bribery almost always involves financial transactions (especially in its most serious forms), making book-keeping controls and financial reporting obligations a particularly effective tool in the fight against corruption. B&HR reporting, on the other hand, arguably demands an even more complex and sophisticated set of standards and benchmarks. Third, although human rights abuses can, like bribery, create an “uneven playing field” for companies, the anti-competitive effects are often more subtle and variable, potentially making the *economic* case for coordinated home state action less pronounced.

Nevertheless, sufficient similarities remain between the two areas for us to be able to draw a number of lessons from the way anti-corruption regimes have developed over time and the way they operate now.

⁹⁴ See 2009 OECD Recommendation, n. 48 above.

⁹⁵ *Ibid*, Annex 1, Para. C) (emphasis added).

Lesson 1: Provided there is sufficient international consensus that a certain kind of conduct is “immoral,” “unfair” or anti-competitive (or more often, a combination of all three), states may be prepared to support the development of extraterritorial regimes and, moreover, to tolerate the exercise of extraterritorial jurisdiction over their own subjects or in relation to activities within their own territories. In the case of anti-corruption, international consensus that the bribing of foreign officials should be a criminal offence took some time to build. Although progress was initially slow, momentum has gathered in favour of an international regime as a result of pressure from the US, some external political factors and the opening up of new markets.

In recent years, the US, in particular, has successfully prosecuted a number of cases of very serious and widespread bribery, involving individuals, companies or commercial arrangements outside the US, often in many different jurisdictions. And this has been done with the assistance of regulatory authorities from other states.

Lesson 2: Non-legally binding (or “soft law”) instruments can play a vitally important part in building consensus on the need for, and the best way of structuring, multilateral extraterritorial regimes. This was certainly the case in the development of the OECD Convention, where the non-legally binding 1994 Recommendation became a way of gradually introducing states to the concept of an extraterritorial criminal regime, and also helped build confidence that an international treaty could eventually be achieved.

Lesson 3: While NGOs are important “norm entrepreneurs,” the support of ethical business is a crucial factor in overcoming automatic or perfunctory objections to regulation. Within the OECD, NGOs played a crucial role in galvanising state action, through direct lobbying, mobilising other interest groups, and maintaining media interest. But the support of business was key in neutralizing objections from national governments based on perceived threats to export opportunities and national competitiveness, thus playing a vital role in the consensus building process. Experience in the anti-corruption field suggests the growing awareness of business and government that, while illegal or unethical behavior may give some companies a short-term commercial edge, this can have deeper negative effects in the long term, not just for the companies concerned but for business as a whole. It is simplistic, therefore, to assume that business necessarily benefits from unethical practices, and to regard regulation aimed at improving the ethical standards of companies as “anti-business” – as it may carry the possibility of longer-term economic benefits.

Lesson 4: Multilateral extraterritorial regimes need to offer some flexibility of implementation, to take account of differences in the legal systems of home states, particularly in relation to issues like “corporate criminal responsibility,” and legal traditions regarding the use of jurisdiction. Multilateral anti-corruption regimes have been designed so as to be sympathetic to the legal traditions (including jurisdictional limitations) of the various state parties. The OECD Convention, for example, applies the concept of “functional equivalence.” As a result there is considerable diversity in how these treaty obligations have been implemented.

Lesson 5: But there is a risk that too much flexibility can result in an international enforcement system that is uneven, unpredictable and unfair. In terms of the

harmonisation of standards, these international anti-corruption regimes have only been partially successful. While there is now widespread agreement that bribery of foreign public officials should be subject to criminal sanctions wherever possible, there is considerable variation in how these offences are approached by the regulatory authorities, the resources for enforcing them, and the sanctions that may be imposed. To achieve a level playing field, the results must be “equivalent.”

Lesson 6: Therefore, close cooperation between states is crucial. Clearly, there is a need for proper follow-up regarding how a state has implemented its regulatory obligations, not just in relation to the enactment of laws, but how these laws are enforced in practice. Here, the “peer review” mechanism used by the parties to the OECD Convention is regarded as a particularly good supervisory mechanism, which operates well because states parties have similar and common interests in ensuring compliance by all.

Lesson 7: Extraterritorial regimes can be extremely difficult to enforce in practice, without substantial practical support from other states. In recognition of this, international anti-corruption treaties contain a number of provisions on international cooperation, extradition and mutual legal assistance, which have in some cases been supplemented by more detailed and more specific bilateral arrangements. According to US law enforcement bodies, a number of recent prosecution successes have been due, at least in part, to the greater level of cooperation from other states as a result of these international regimes. However, it is also important for state parties to anti-corruption treaties to engage effectively with non-state parties, especially those facing the most corruption-related challenges. Clearly, the level of international consensus about the need to detect and sanction a proscribed activity, and the political will to bring perpetrators to justice in individual cases, will all be relevant to the level of support a regulating state provides and receives in practice.

Lesson 8: States do not generally seek to regulate the extraterritorial activities of foreign companies directly. Foreign companies are treated as foreign nationals, regardless of the nationality of their ownership and management, and therefore in practice are only prosecuted under a state’s bribery laws where there is some other territorial connection between the company, its activities and the regulating state (e.g. the foreign company committed the offence in the regulating state, or has been party to a conspiracy resulting in an offence being committed in the regulating state).

Lesson 9: Parent-based “preventative” measures (e.g. reporting, due diligence requirements) can be a very effective method of exerting influence over the foreign activities of foreign subsidiaries of parent companies which are based in the regulating state. While the high profile prosecutions may attract the most headlines, many experts believe that it has been the FCPA’s accounting and book-keeping requirements that have had the most overall influence, both in terms of encouraging US parent companies to take an active “policing” role in relation to the behavior of foreign subsidiaries and in terms of making suspicious transactions harder to conceal from the authorities. The new UK offence of “failing to prevent” bribery offences is also likely to be influential. Under these provisions, a bribe by a foreign subsidiary or agent could result in criminal liability for its UK parent company, if the parent company had not put in place adequate supervisory and preventative measures.

Lesson 10. Extraterritorial regimes often use a mix of measures – ranging from direct assertions of extraterritorial criminal jurisdiction in some cases, to administrative enforcement of supporting “parent-based” controls. While direct assertions of criminal jurisdiction over foreign companies and individuals can be controversial, states are beginning to adopt a range of other domestic (including “parent-based”) measures to ensure greater consistency and coherency in their approach to foreign bribery, which are capable, over time, of having considerable extraterritorial impact. These include imposing greater responsibilities on parent companies vis-à-vis the supervision of foreign subsidiaries, reforms to domestic tax systems to remove “tax deductibility” of foreign bribes, and barring companies involved in bribery (or without sufficient internal compliance measures) from access to public procurement opportunities and overseas investor support, such as export credits. However, in some circumstances, these kinds of measures, referred to in this report as “domestic measures with extraterritorial implications” can also be controversial.

Chapter 2: Securities regulation

Introduction: a brief description of the current legal framework

This chapter concerns the regulatory steps that states have taken to ensure that securities markets function effectively and fairly, that companies have access to capital, and that investors are properly protected. Securities regulation therefore covers issues such as corporate governance, transparency, and different forms of market abuse, such as insider trading and misleading investors.

The current international legal framework for securities regulation can be characterised as a highly fragmented system of “generally independent national regulatory systems.”¹ Companies seeking “cross-listing” (i.e. listing on the stock exchanges of more than one country) must deal with the inconvenience and expense of having to comply with different regulatory requirements in different jurisdictions – deriving from primary and secondary legislation as well as stock exchange listing rules – which can sometimes directly conflict with each other. Global financial intermediaries, too, according to the IBA Task Force Report, “cope with a range of contrasting regulations that serve no coherent policy impact, with the consequent problems creating a burden on management time, incoherent efforts to promote similar policies leading to different demands on firms, lack of market clarity, increased difficulty of enforcement cooperation, the creation of compliance traps, the need to multiply systems, and confusion of personnel and danger of inadvertent violations.”²

The need to reform the international framework for securities regulation, to move to a more harmonised and integrated system, has been recognised for some time. The global “credit crunch” and the economic downturn that followed provided a very clear demonstration (if one was needed) of the inter-relatedness of national securities markets and underlying economies, and has added extra impetus to calls for reform. To date, measures to help overcome regulatory conflicts, such as exemptions for foreign companies and “mutual recognition” (e.g. recognition between states of the adequacy of one another’s regulatory arrangements) have been taken largely on an ad hoc basis. Against this background, two organisations – the International Organisation of Securities Commissions (“IOSCO”) and the Committee of European Securities Regulators (“CESR”) – have been working for some time now to improve the quality and coherence of regulatory supervision in the securities field, which has included efforts to build greater cooperation between national securities regulators.

IOSCO was established in 1983, and is the “internationalised” version of its predecessor, the Inter-American Conference of Securities Commissions. In 1998, IOSCO adopted its Objectives and Principles of Securities Regulation (the “IOSCO Principles”) now regarded as the international regulatory benchmark for the regulation of national securities markets. In addition, it has developed an assessment methodology (the “IOSCO Principles Assessment Methodology”) to help assess the level of implementation of the IOSCO Principles in different jurisdictions. In 2002

¹ IBA Task Force Report, p. 276.

² IBA Task Force Report, p. 277.

IOSCO adopted a “multilateral memorandum of understanding”³ (the “IOSCO MOU”), which is designed to facilitate greater cooperation between national regulators on enforcement and information exchange (see Box 2 below). However, these recommendations are “non binding.” Compliance monitoring is done largely by means of self-assessment, although the International Monetary Fund (“IMF”) examines the extent to which different countries comply with the IOSCO Principles as part of its Financial Sector Assessment Programme.

The CESR was established in 2001 under the terms of a European Commission Decision. Its role is to improve coordination between the securities regulators of EU member states, to act as an advisory body to the Commission on securities regulation issues, and to monitor the national implementation of EU securities laws.

2.1 In what ways can securities regulation be regarded as “extraterritorial”? For instance, does the regulation involve direct assertions of extraterritorial jurisdiction over foreign parties or activities? Or does it merely have extraterritorial implications?

Direct assertions of extraterritorial jurisdiction over foreign companies and foreign individuals

It is very common, in the field of securities regulation, for a state (i.e. State X) to impose regulatory requirements on foreign companies. But this is usually justified by the fact that the foreign company in question wishes to access securities markets in State X. In other words, foreign Company A may trade its securities in State X, but must comply with regulatory requirements in State X if it wishes to do so. So, a Japanese company seeking listing on the London Stock Exchange (“LSE”) will be subject to ongoing disclosure obligations under UK securities laws and LSE Listing Rules. Similarly, a UK company seeking listing on the New York Stock Exchange (“NYSE”) will have to be prepared to comply with US securities laws, rules and regulations promulgated by the SEC, as well as NYSE listing rules.

But although the securities laws of State X may apply to foreign companies (alongside State X’s corporate nationals), they do not, of themselves, amount to assertions of extraterritorial jurisdiction. Instead, they are best described as *domestic* measures. Strictly speaking, these requirements are only applicable to markets and related activities within the territory of State X (although, as we shall see from some of the case studies below, they are capable of having significant extraterritorial implications in terms of how foreign companies are run).

However, many of these regimes do have an extraterritorial dimension to the extent that they may impose obligations on foreign individuals, outside State X, who are associated with foreign Company A. For instance, State X’s securities regime may require foreign corporate officers to take personal responsibility for the accuracy of corporate disclosures, and may impose sanctions if those disclosures turn out to be misleading. This potentially involves a direct assertion of jurisdiction in relation to foreign individuals, although only in their capacity as officers of foreign Company A, which (for reasons explained above) is already subject to State X’s jurisdiction.

³ IOSCO, ‘Multilateral Memorandum of Understanding Concerning Consultation and Cooperation and the Exchange of Information’, May 2002, copy available at <http://www.iosco.org/library/pubdocs/pdf/IOSCOPD126.pdf>. See further discussion at para. 2.7 below.

So – to recap – Company A (incorporated outside State X) must be prepared to submit itself to the jurisdiction of State X if it wishes to trade its securities there. But states also occasionally assert jurisdiction over foreign companies and individuals on another basis, namely the *effects* of that foreign party’s activities on investors and markets *within* the regulating state (e.g. as a result of some form of “market abuse”). This differs from the regulation discussed immediately above because the company or individuals may not have directed any activities towards State X, or sought to trade securities there. This kind of extraterritorial regulation is much more controversial because the territorial connections between the foreign party (and its conduct) and the regulating state are that much more remote (see further para. 2.5 and case study 6 below).

The extraterritorial implications of securities regulation

Beyond the *direct* application of laws to foreign parties, securities laws are also capable of having significant extraterritorial implications as a result of disclosure obligations and corporate governance requirements. Listed companies are typically under continuous obligations to report matters that may have a material impact on the price or value of their securities, in addition to periodic reporting obligations. In many, if not most, cases these obligations apply regardless of where in the world the relevant events or circumstances took place. As discussed in other parts of this report,⁴ the presence of disclosure obligations can have a significant effect on how companies approach and manage different kinds of risk, both at home and abroad.

Corporate governance requirements, too, frequently have impacts far beyond the territorial boundaries of the regulating state. Of course, State X’s requirements regarding corporate governance are not intended to apply in State Y as well. Corporate governance in State Y is clearly a matter for State Y. But Company A can only have one system of corporate governance. So the challenge for Company A, if it wishes to trade its securities in both State X and State Y, is to develop systems that are capable of complying with both of those regulatory systems, as well as those of its home state (State Z). In this way, even though State X’s corporate governance requirements would only ever be enforced vis-à-vis Company A’s trading or listing *within* State X, State X’s regulatory requirements clearly have significant implications for Company A, regardless of where it is domiciled and regardless of wherever else it may have a trading presence (see further case study 5 below).

Finally, some domestic regimes (e.g. the UK and the US) are capable of having far-reaching extraterritorial impacts simply by virtue of the sheer international financial clout of the markets they regulate. For instance, companies considering a future cross-listing in State X may consider that it would be less costly to develop voluntary compliance programmes that are consistent with State X’s regulatory regime, than convert to a State X compliant programme at a later stage. And foreign regulatory authorities may decide that it is better to follow State X’s lead with respect to some regulatory matters, than to risk disadvantaging their own companies in seeking access to foreign capital markets.⁵

⁴ See chapter 1 above and chapter 6 below.

⁵ See, for example, the comments in European Commission, DG Internal Market and Services Working Document ‘International Regulatory Dialogues Concerning the Policies of DG Internal Market and Services’, May 20, 2005: “Regulatory developments outside the Internal Market increasingly have an

2.2 Has extraterritorial regulation been adopted unilaterally by states? Or in order to implement an international regime? Or both, and if so, which came first?

Extraterritorial regulation in the securities field has been adopted unilaterally by states. As noted above (see the introduction to this chapter) there is as yet no binding international framework on securities regulation. However there is growing interest among state authorities in achieving greater cooperation and convergence in securities regulation. This is discussed in more detail at para. 2.6.

The US is the state most associated with extraterritorial regulation in this field (although it is by no means the only state to apply its securities laws to foreign companies and conduct). This reputation is due, in large part, to the changes brought about by the Sarbanes Oxley Act.⁶ As discussed at para. 2.4 below, the Sarbanes-Oxley Act generated a good deal of controversy internationally, mainly because of its implications for non-US issuers and non-US accounting firms. However, it was not the fact that the legislation applied to non-US issuers that was most controversial (as non-US issuers were already subject to detailed regulation under US law), but the highly prescriptive and intrusive nature of the new US requirements, especially in relation to corporate reporting and corporate governance. See further case study 5 below.

impact on EU market players and the Internal Market Framework. In cases of high interdependence of markets, widely differing regulatory systems can lead to obstacles in trading with, and investment in, third countries. This can result in significant burdens for EU companies working globally and may partly unravel the work that is being done through the internal market to enhance competitiveness. In some cases it can even lead to significant conflicts of laws. Recent examples are the measures taken by the US following some corporate scandals (US Sarbanes Oxley Act). To avoid this, it is essential that the Internal Market legal framework is adequately attuned to the global economic framework in general *and to key marketplaces in particular*, and vice versa.” (emphasis added), p. 3.

⁶ Public Law 107-204, July 30, 2002, 18 USC Section 1514A.

2.3 Is the jurisdiction claimed primarily prescriptive, adjudicative, or enforcement jurisdiction? And what internationally recognized bases for jurisdiction are claimed (e.g. territory?, nationality?, “effects” doctrine?, “universality”? etc.)

Type of jurisdiction

The extraterritorial jurisdiction claimed by states is primarily prescriptive jurisdiction (in the sense that foreign companies are subject to prescriptive legal requirements with respect to matters such as corporate governance and disclosure obligations) and enforcement jurisdiction (in the sense that violations of prescriptive requirements may be punishable by criminal sanctions).⁷

States that permit civil enforcement of securities laws, such as the US, potentially take extraterritorial “judicial” (or “adjudicative” jurisdiction) as well. For example, Rule 10b-5, promulgated under the US Securities and Exchange Act of 1934, creates a source of civil liability for misleading information conveyed to investors. This rule has historically been given wide extraterritorial reach, and has even provided the basis of claims by non-US residents against non-US companies in relation to share sale transactions taking place outside the US, on the basis either: (a) that there was *some* relevant conduct within the US; or (b) that some harm⁸ to US investors or US interests was the result.⁹

Legal bases for jurisdiction over foreign companies and individuals

As noted above, requiring foreign Company A to observe certain standards if it wishes to have access to investors and securities markets in State X does not, technically speaking, amount to an assertion of extraterritorial jurisdiction by State X over foreign Company A. For these particular regulatory purposes, Company A is treated as if it were operating *within* State X. This kind of regulation is based on the principle of territoriality and is analogous to requiring foreign nationals to abide by the laws of State X when visiting State X. This kind of regulation is not extraterritorial merely because it may apply to foreign nationals as well as to nationals of State X.

However, the regime may also authorise assertions of extraterritorial jurisdiction over foreign corporate officers of Company A. This is based on their position of responsibility in Company A, and Company A’s intended or actual activities in State X.

State X may also justify the assertion of jurisdiction, again based on territorial connections, over a foreign party on the basis that the foreign party was involved in wider business activities *aimed at* a particular state. As the IBA Task Force report explains, “it was thought [by national legislators] that an issuer or financial intermediary that conducted some of its activities in a host country or directed selling

⁷ See, for example, the requirements imposed by the US Sarbanes-Oxley Act on Chief Executive Officers and Chief Financial Officers to certify that periodic reports containing financial information filed with the SEC meet the requirements of the Securities Exchange Act. Criminal penalties for a false statement can be as high as US\$5million, or 20 years imprisonment.

⁸ The standard applied by the US courts is “substantial” harm. *Itoba Ltd. v Lep Group plc* 54 F 3d 118, 122 (2d Cir. 1995).

⁹ See *Psimenos v E.F. Hutton & Co.* 722 F 2d 1041 (2d Cir 1983). But see also case study 6 below.

efforts to investors and customers located in the host country had implicitly consented to being subject to all of the rules and regulations of that country.”¹⁰ US case law confirms that merely sending faxes or mail, or making telephone calls to the US would be sufficient to provide the necessary territorial connection between the conduct and the US.¹¹ This obviously gives some aspects of US securities law extremely wide extraterritorial reach.

Other aspects of securities regulation, especially the provisions aimed at investor protection and preventing market abuse, have been justified by what appears to be a version of the “effects” doctrine, i.e. that State X has a legitimate interest in regulating extraterritorial conduct capable of having an adverse effect on securities markets within State X. The US Third Restatement on Foreign Relations Law¹² contains provisions specifically related to securities regulation, and claims that the US government is entitled to regulate conduct taking place outside the US which relates to securities transactions or securities markets *within* the US if that conduct has, or is intended to have, a substantial effect within the US.¹³ This potentially gives the US authorities jurisdiction over fraudulent statements conveyed to the US by e-mail, or fraudulent material posted on a web-site accessible within the US, provided the “harm within the US” tests are satisfied.¹⁴

2.4 What are the policy drivers (e.g. political and economic) behind extraterritorial regulation in this field?

Fundamentally, securities regulation is concerned with (a) the need to protect local investors (e.g. by ensuring that they have the information they need to be able to make sound investment choices) and (b) the related need to ensure that markets are credible and stable and operate in a manner that is fair to all concerned. Many states, and particularly those for which the financial services industry has special economic importance, are keen to attract foreign companies to their own marketplaces - but not at the cost of damage to their own markets. Therefore, some aspects of the securities laws of State X will apply to foreign companies wishing to trade their securities in State X. From the company’s point of view, having to comply with foreign legal requirements is simply one of the costs of accessing foreign capital.

However, as noted above, assertions of extraterritorial jurisdiction have also been justified by the potential or actual *effects* of foreign conduct on local securities markets. This is much more controversial, as it does not necessarily rely on conduct that could imply submission by the foreign company to the jurisdiction of State X, and any “effects” within State X could be unintentional.¹⁵

¹⁰ IBA Task Force Report, p. 276.

¹¹ *Leasco Data Processing Equipment Corp v Maxwell* 468 F 2d 1326, 1335 (2d Cir 1972); *Continental Grain (Australia) Pty Ltd Pacific Oilseeds Inc.* 592 F 2d 409, 420 (8th Cir 1979).

¹² American Law Institute, ‘Restatement of the Law, Third, Foreign Relations’, 1987, § 213

¹³ *Ibid*, § 416.

¹⁴ H. Friedman, *Securities Regulation in Cyberspace*, 3rd edition, (Kluwer, 2009), pp. 13-49.

¹⁵ See further para. 2.5 and case study 6 below

2.5 What legal and policy objections have been raised in relation to extraterritorial regulation in this field? Are those objections still being raised?

As noted in paras 2.1 and 2.4 above, the nature of the securities industry, and the way that companies are regulated in this area, means that domestic laws inevitably have cross-border impacts. Companies wishing to access foreign capital markets do not expect to be immune from securities regulation in those other states. However, these cross-border impacts do become problematic when it creates regulatory conflicts for companies, intermediaries or institutional investors, or complicated and expensive compliance problems that can sometimes appear not to serve any useful regulatory purpose. For instance, the circumstances that give rise to disclosure obligations can differ from jurisdiction to jurisdiction. Exemptions may be offered, but the eligibility criteria can vary from country to country. All of this contributes to a very complicated regulatory picture.

This section focuses on the two aspects of securities regulation that have been most controversial: first, the extension, under securities laws, of highly prescriptive corporate governance standards and regulatory requirements to foreign companies and service providers listed or operating within the regulating state; and, second, the assertion of direct extraterritorial jurisdiction in private claims for market abuse (sometimes referred to as “corporate fraud litigation”) over parties or conduct overseas.

Securities regulation

One of the most controversial pieces of securities regulation in recent times has been the 2002 US Sarbanes-Oxley Act. Passed in response to a series of corporate scandals, of which Enron is the best known, the Sarbanes-Oxley Act sought to revolutionise US laws on corporate fraud and accounting oversight. However, it also had far-reaching implications for non-US companies. Not only did it introduce a number of crucial changes regarding corporate reporting and governance (a good number of which continue to apply equally to US *and* non-US “issuers”), but it also introduced new rules on accounting and auditor independence with which *all* accounting firms would have to comply, whether they were based in the US or not, if they wished to continue to provide services to US *and* non-US companies trading securities on US markets¹⁶.

Outside the US, governments and business groups expressed their dismay at this new piece of legislation. Critics argued that the new requirements were too intrusive and prescriptive, and showed a lack of respect for the regulatory efforts of other countries.¹⁷ UK companies complained that the Sarbanes-Oxley Act failed to acknowledge that the UK had already taken a number of steps to tighten up corporate governance requirements in the wake of the Enron crisis.¹⁸ The British Bankers Association remarked “we would contend that the UK is as advanced as the US in terms of the development of its corporate governance regime ... We do not believe,

¹⁶ See case study 5 below

¹⁷ C. Falencki ‘Sarbanes-Oxley: Ignoring the Presumption Against Extraterritoriality’, (2004) 36 *George Washington International Law Review* 1211.

¹⁸ A number of changes had been made to the UK’s Combined Code on Corporate Governance in July 2003, following an extensive consultation process. Details on the consultation process and the current version of the Combined Code are available at <http://www.frc.org.uk/CORPORATE/COMBINEDCODE.CFM>.

therefore, that it is necessary or appropriate for the US authorities to define the corporate governance arrangements that should apply to the UK and other overseas companies listed in the US.”¹⁹

Case study 5: The Sarbanes-Oxley Act of 2002

The Sarbanes-Oxley Act was passed by US Congress in July 2002 in response to a series of corporate scandals (including the “Enron scandal”) in an attempt to restore public confidence in US capital markets. The main aims of the legislation were to improve corporate governance, to strengthen internal controls on auditing and financial reporting, and overall to improve the reliability of disclosures made under US securities laws.

Key reforms introduced under the Sarbanes-Oxley Act were:

- The creation of an independent regulatory board to oversee the accounting industry, with disciplinary and rule-making powers;
- New provisions designed to ensure the independence of auditors, which included restrictions on the activities of public accounting firms;
- New criminal offences, including the offence of using a “scheme or artifice” to defraud investors, the maximum penalty for which would be a prison term of 25 years;
- More severe criminal penalties for document destruction and obstruction of justice;
- Mandatory CEO and CFO certification of financial information and of the internal controls used to ensure that material information is brought to their attention (backed up by criminal sanctions for false declarations);
- Greater protection for corporate “whistleblowers”;
- Prohibitions on certain loans to executives or directors;
- New rules requiring more immediate disclosure of changes in financial condition;
- Mandatory refunds of bonuses and profits by the CEO and CFO to the company, in the event that accounts must be restated to rectify false or non-compliant reporting; and
- New rules on corporate governance, including new requirements regarding the establishment, constitution and responsibilities of the audit committee.

Most provisions of the Sarbanes-Oxley Act itself applied equally to US *and* non-US issuers. The application of some provisions to non-US issuers and accounting firms has been criticised, in some cases because it has led to “over-regulation” of companies already subject to comparable regulatory regimes elsewhere, and in some cases because it caused companies to be subject to conflicting legal requirements. However, the SEC has subsequently created a number of exemptions for non-US companies in rules promulgated under US securities laws designed to help reduce the regulatory burdens and problems of non-US issuers. These have included:

- greater flexibility for foreign (i.e. non-US) private issuers with respect to reporting on internal controls (see Sarbanes Oxley Act, section 404), in the

¹⁹ Quoted in Falencki, n. 17 above, p. 1225.

form of extensions to compliance deadlines, annual (as opposed to quarterly) reporting of material changes, and acceptance of the adequacy of systems of evaluating internal controls based on “suitable [foreign] alternatives” to US policy guidance, (e.g. the Turnbull report in the UK).

- exemptions regarding the composition of corporate audit committees - to overcome inconsistencies between the US requirements and the laws of some other countries;
- exemptions for non-GAAP communications made outside the US - so that foreign issuers would not be obliged to reconcile all of their financial reporting to GAAP;
- exemptions to the information requirements imposed on foreign accounting firms as part of the new registration process (to overcome the problem of conflicts with foreign privacy laws); and
- providing a “deregistration” process for non-US issuers whose securities do not undergo significant amounts of trading within the US (which then exempts them from the more onerous reporting obligations under Sarbanes-Oxley).

See further SEC, ‘SEC Rulemaking and Other Initiatives: Accommodations’, http://www.sec.gov/about/offices/oia/oia_rulemaking/accommodations.htm

German companies complained that the Sarbanes-Oxley requirements could not easily be applied to German corporate structures. Some commentators argued that application of Sarbanes-Oxley rules to German companies would lead to an allocation of liability that did not reflect the way in which managerial responsibility in German companies is actually allocated.²⁰ UK companies also complained of regulatory conflicts, having noticed some inconsistencies between the US requirements and UK data protection laws. More generally, the Confederation of British Industries (“CBI”) protested at the “disproportionate” costs involved, and what they described as the “box-ticking mentality” that the Sarbanes-Oxley Act could potentially encourage. The CBI argued this would be less effective in practice than the “principles-based” approach enshrined in the UK Combined Code.²¹

Businesses also pointed out the significant costs of Sarbanes-Oxley compliance. According to a note sent to the SEC by the CBI, one CBI member had, by April 2005, spent \$100 million on Sarbanes-Oxley compliance work. Press reports quoted estimates suggesting that the average cost of compliance for major UK businesses was between £10 million and £20 million for the first year alone. At around the same time, there were a number of press reports that many non-US companies were considering de-listing from US stock exchanges, or postponing or cancelling their US listing plans, citing costs of compliance and difficulties reconciling conflicting regulatory requirements. US exchanges were expressing their concerns about a loss of business to London, where companies were considered subject to a lighter touch, and more flexible, regulatory regime.²²

²⁰ See Falencki, n. 17 above.

²¹ CBI, ‘Comments on the Sarbanes-Oxley Act’ April 2005, copy available from <http://www.sec.gov/news/press/4-497/shaan041105.pdf>.

²² A. Pritchard, *Populist Retribution and International Competition in Financial Services Regulation* 21 (University of Michigan Law School Empirical Legal Studies Center, Paper No. 5, 2010).

In addition to the complaints of “over-regulation,” further concerns were raised that Sarbanes-Oxley would have an anti-competitive effect on businesses servicing the securities industry. Non-US accounting firms complained that the new regulatory requirements imposed on their profession by Sarbanes-Oxley could lead to an “uneven playing field’ that would favour US accounting firms over non US accounting firms because the non-US firms will now be subject to both their national oversight board as well as US oversight.”²³ Foreign (i.e. non-US) regulatory bodies clearly had some sympathy for this view, and threatened to retaliate by imposing “tit for tat” regulatory requirements on US-based audit companies operating in other countries.²⁴

Complaints about the costs to non-US companies of Sarbanes-Oxley compliance are still made, but these have receded with time. Rather than de-listing from US stock markets, many executives decided, as was put by one company Chairman at the time, just to “grit our teeth and get on with it.”²⁵

The difficulties of reconciling two or more sets of (sometimes conflicting) regulatory requirements have been dealt with, in a limited way, by way of exemptions provided to non-US firms under secondary legislation. And there has been some further convergence of regulatory approach. The problems that contributed to the Enron crisis (or at least made it possible) were not unique to the US, and some jurisdictions have since introduced corporate governance and auditing reforms that are comparable with the US approach, at least in terms of overall objectives.²⁶

Securities fraud litigation

Domestic securities law may also allow regulatory action against companies or individuals for securities fraud even where most or all of the conduct complained of occurred outside the territory of the regulating state and no nationals of the regulating state were necessarily involved. For instance, a key provision in the US (known as “Rule 10b-5”) makes it unlawful for any person to make statements that are untrue or misleading in connection with a sale of shares.²⁷ The rule may be privately enforced, and has given rise to many actions for damages, including actions by non-US nationals against foreign companies.

The extraterritorial scope of Rule 10b-5 has been judicially defined. At the time these laws were created, few US investors were investing in foreign companies. So when problems involving foreign companies first began to arise, the courts had to decide whether, as a matter of statutory interpretation, this was a rule that ought to be applied

²³ K. Hsu, R. Cheek and H. Etheridge, ‘The Impact of the Sarbanes-Oxley Act on Non-US Accounting Firms’ (2005) *Journal of International Business Research*, 1, p. 2.

²⁴ Ibid.

²⁵ A. Giles ‘SOX: What does it mean for UK companies?’, quoting the Chairman of UK telecommunications firm BT. A copy of this article is available at <http://www.continuitycentral.com/feature0203.htm>.

²⁶ See, for instance, the UK Companies (Audit, Investigations and Community Enterprise) Act 2004, which is aimed at increasing auditor independence and improving powers of investigation of corporate affairs. See further P. Davies ‘Enron and Corporate Governance in the UK and the European Community’ in J. Armour and J. McCahery (eds), *After Enron: Improving Corporate Law and Modernisation of Securities Regulation in Europe and the US* (Hart Publishing, 2006).

²⁷ 17 C.F.R. 240.10b-5, promulgated under section 10(b) of the Securities Exchange Act of 1934.

to conduct taking place, or harm occurring, outside the US. The courts decided that it should, and that to confine the scope of the legislation only to misrepresentations taking place inside the US would significantly undermine the purpose of the Rule, which was to protect US investors and markets.²⁸ Even in cases of foreign plaintiffs *and* foreign harm, some courts have decided to retain jurisdiction, holding that, as a matter of policy, Congress would not have intended the US to act as a safe haven for wrongdoers.²⁹ Thus, a rule emerged that said that the US courts could retain jurisdiction: (a) if the conduct produced *effects* within the US; or (b) if losses were produced as a result of conduct taking place in whole or in part in the US.

However, the wide scope of extraterritorial adjudicative jurisdiction in market abuse cases has been a concern to business. Some business representatives have argued that this not only risks damaging US markets and undermining US “competitiveness,” but it could also create a significant amount of legal uncertainty for companies both within and outside the US. The issue of the appropriate limits to US assertions of extraterritorial jurisdiction in this regard arose in the recent case of *Morrison v National Australia Bank*³⁰ (see case study 6 below) which involved a non-US plaintiff, suing a non-US issuer, for damages occurring outside the US (a so-called “foreign cubed” case).

Business concerns about the expanding scope of extraterritorial jurisdiction in securities fraud cases were formally set out in an amicus brief filed in the *Morrison v National Australia Bank* case by a group of organisations representing both US and non-US business.³¹ They argued that, contrary to legal trends, the growing internationalisation of securities markets is not a reason for the US authorities to take ever more expansive extraterritorial jurisdiction. On the contrary:

“The dramatically increased globalization and interdependence of financial markets in recent years has greatly heightened the need to impose appropriate limits on the extraterritorial application of domestic securities laws. Application of domestic law to claims with only remote connections to the United States threatens to undermine the competitiveness and effective operation of U.S. markets. This is especially true in cases such as this one – where the investors, the issuer and the transactions all were located outside the United States and where compelling precedent supports the decision to decline subject matter jurisdiction.”³²

²⁸ *Schoenbaum v Firstbrook*, 405 F 2d 200 (2d Cir. 1968). But see the recent decision of the US District Court for the Southern District of New York in *In Re European Aeronautic Defense & Space Company Securities Litigation*, No. 08 Civ. 5389 (SDNY, March 26, 2010) in which the court dismissed a claim by a US pension fund on behalf of US investors that disclosures made by a European company had violated Rule 10b-5. In that case, the relevant share purchases had been made on European exchanges, and the court did not think the territorial connections between the claim and the US were sufficient to justify the application of US securities laws.

²⁹ *SEC v Kasser*, 548 F 2d 109, 116 (3d Cir.), cert. denied, 431 U.S. 938 (1977).

³⁰ 547 F 3d 167 (2d Cir. 2008).

³¹ ‘Brief of the Securities Industry and Financial Markets Association, the Chamber of Commerce of the United States of America, the United States Council for International Business and the Association Francaise Des Enterprises Privees as *Amici Curiae* supporting Defendants Appellees’ filed in the case of *Morrison v National Australia Bank*, n. 30 above, copy available at:

<http://www.uschamber.com/NR/rdonlyres/er25mpgcd4bspsypicjgt3vybjmadrpyosbsyctebv6yvvvt2r4q5nwco5r4clvnxseyipkxzloef5qxwoz36rkgvl7a/Morrisonv.NationalAustraliaBank.pdf>

³² *Ibid*, p. 6.

These business groups then went on to list their further policy concerns about the extraterritorial application of US national securities laws, i.e.:

- “It risks weakening core principles of comity – precluding foreign jurisdictions from establishing liability rules best suited to their markets in an area where U.S. courts and regulators have struggled for decades to strike an appropriate balance between plaintiffs and defendants.
- It risks deterring foreign companies from making acquisitions of U.S. companies – for fear of becoming subject to securities law liability if the target companies have prepared financials that arguably mislead the foreign company and its non-U.S. shareholders.
- It creates a reciprocal risk to U.S. companies – exposing them, should foreign courts adopt similar logic, to securities litigation in virtually any jurisdiction in which they have a subsidiary, even if their shares are traded exclusively by investors in the United States
- It creates the risk of duplicative litigation – with various plaintiffs seeking out the class action regime most favorable to their case and the possibility of multiple “bites at the apple.”
- Lastly, it creates the risk of arbitrariness and inequity – with different companies subject to different liability regimes dependent solely on tenuous factors arising out of the location of business operations or other considerations unrelated to the investor protection objectives of the U.S. securities laws.”³³

The Obama administration, in a separate *amicus* brief filed at the invitation of the Supreme Court, set out some additional concerns relating specifically to *private* extraterritorial claims.³⁴ The authors argue that whereas there is international consensus on the need for public regulation of transnational schemes, *private* enforcement using less well-recognised theories of liability and devices such as class actions, can give rise to conflicts between nations.³⁵ Whereas “[t]he Commission ... routinely works with its overseas counterparts to develop coordinated approaches to transnational securities-fraud enforcement,”³⁶ other countries “might perceive affording a private remedy to foreign [i.e. non-US] plaintiffs as circumventing the causes of action and remedies ... that those nations provide their own defrauded citizens, particularly if the plaintiff’s principal grievance appears directed at another foreign [i.e. non-US] entity.”³⁷ The authors then go on to express their concerns that private claims could divert valuable judicial resources towards claims “having only an

³³ Ibid, pp. 11-12.

³⁴ See ‘Brief for the United States as Amicus Curiae’ filed in the case of *Morrison v National Australia Bank*, n. 30 above, copy available at <http://www.sec.gov/litigation/briefs/2009/morrison1009.pdf>.

³⁵ Ibid, p. 14.

³⁶ Ibid.

³⁷ Ibid, pp. 14-15.

attenuated connection to this country.”³⁸ Related to this is the question of the appropriate “checks and balances” on litigation. Private litigants can generally be expected to act in their own (usually financial) interests. The SEC, on the other hand “can be expected to take account of national interests (including the national interest in ensuring that [the US] does not become a safe haven for wrongdoers) when it determines whether particular enforcement suits represent sound uses of its own resources and those of the federal courts.”³⁹ Therefore, it is argued, the courts ought to be particularly careful to insist on close territorial connections with the US when dealing with *private* (as opposed to *public*) enforcement.

Case study 6: *Morrison v National Australia Bank* 547 F 3d 167 (2d Cir. 2008)

The case concerned a claim by non-US investors against the National Australia Bank (“NAB”), an Australian Bank trading its American Depositary Receipts on the New York Stock Exchange. A US subsidiary of NAB, the mortgage service provider HomeSide Lending Inc. (“Homeside”) was accused of using fraudulent accounting to overstate the value of its business. These figures were then incorporated by NAB into its own public reports. Subsequently, a recalculation of the value of HomeSide’s mortgage servicing rights led to NAB having to announce write-downs totalling US\$2.2 billion in value. NAB was sued under anti-fraud provisions of US securities laws by a number of non-US investors who had purchased stock in NAB at prices inflated by the earlier alleged misstatements (between April 1999 and September 2001), the prices of which subsequently fell following the write-down.

The defendant (and also some other interested parties who had filed *amicus curiae* briefs) argued that the court should not take jurisdiction in so-called “foreign cubed” type cases (i.e. foreign plaintiff, foreign defendant, foreign conduct). The plaintiffs, on the other hand argued (along with the SEC), that jurisdiction *would* be appropriate in a case such as this, where conduct *within* the US was “material to the fraud’s success.”

The District Court dismissed the action, finding that it did not have subject matter jurisdiction as the case had insufficient connections with the US. The plaintiffs appealed. The Second Circuit Court of Appeals declined to make a general ruling about “foreign cubed” cases, but decided that it would not have jurisdiction in this particular case. This was because, of a lack of a sufficient causal relationship between the conduct of HomeSide in the US, and the losses suffered by the plaintiffs. The “significantly more central” causes of these losses, according to the court, were the actions of NAB in Australia. Jurisdiction might have existed had some of the effects of the fraud been felt in the US, but this had not happened in this case.

On November 30, 2009, permission was granted for a further appeal. The case is currently before the Supreme Court and a decision is expected in June 2010. Counsel for the SEC and the US Solicitor General have filed an *amicus* brief on behalf of the Obama administration arguing that the Court should decline jurisdiction in this case. The Obama administration argued that although public enforcement might be

³⁸ Ibid, p. 15.

³⁹ Ibid, p. 15.

Case study 6: *Morrison v National Australia Bank* 547 F 3d 167 (2d Cir. 2008)

appropriate in a case such as this, the links with the US were too slight to support a *private* suit.

Postscript: In October 2009, legislation was introduced into Congress (see Investor Protection Act of 2009, H.R. 3817, 111th Cong., 1st Sess.) that seeks to clarify the scope of US judicial jurisdiction over foreign securities fraud cases. Under that legislation, jurisdiction would exist when there is either (a) “conduct within the United States that constitutes significant steps in furtherance of [a] violation, even if the securities transaction occurs outside the United States and involves only foreign investors or (b) conduct occurring outside the United States that has a foreseeable substantial effect within the United States.”

2.6 Who were/are the main stakeholders driving (or opposing) the development of extraterritorial and/or international cooperative regimes? Are particular stakeholders associated with particular viewpoints or arguments?

The past few decades have seen huge changes in the way securities markets operate, brought about by a combination of technological developments, market liberalisation, the rise of developing country economies and the consequent changes in patterns of supply and demand of capital. All have contributed to the spectacular “internationalisation” of the financial services industry, with all the benefits – and all the international regulatory problems – that this entails. Until recently, states have tended to respond to cross-border regulatory problems unilaterally, without a great deal of consultation and coordination with other interested states. The current challenge for states, according to the IBA Task Force Report, “is how to reshape and modernise their national securities regulatory systems, which were conceived at a time when markets were primarily local, to be helpful to investors (both retail and institutional) and regulated actors already functioning on a global level.”⁴⁰

There is little enthusiasm at present for the idea of harmonising securities laws under an international treaty. Clearly, different states still have quite different ideas as to the appropriate level, style and scope of regulation in this field. Even within the EU, where there is a high degree of economic and social integration, the basics of an EU-wide securities system are only just beginning to be implemented.⁴¹ The IBA comments that the idea of an EU-wide enforcement system remains “politically fraught.”⁴² Businesses would like to see greater harmonisation and convergence, but not towards the kind of “over-regulation” that risks hampering capital flows and economic growth to no great regulatory benefit. Specifically, it seems that harmonisation towards a US style of regulation – with its highly prescriptive provisions on corporate governance and reporting – would not be acceptable to many states (or companies).

⁴⁰ IBA Task Force Report, p. 278.

⁴¹ Ibid.

⁴² Ibid.

Another factor that operates against a harmonised regime is the “regulatory competition” that presently exists between different international financial centres. The governments of countries that are host to important financial centres are generally keen for foreign companies to access their securities markets (provided they can satisfy the requisite investor protection standards) as this is good for both the securities industry and “investor choice.” Within these regulatory systems, the idea of “choice” – for both companies seeking capital and investors – suggests the need for further flexibility. For instance, the UK FSA has recently been consulting on proposals to restructure the UK Listing Regime into two segments – “premium” and “standard.” Under the proposed changes, the corporate governance standards of both UK and non-UK companies would be able to be monitored more closely, with the most onerous disclosure obligations reserved for those companies that wish to have their securities included in the “premium” list.⁴³

For the time being, therefore, international cooperative and “convergence” efforts are likely to be based around looser “soft law” initiatives and transnational “dialogue” rather than an over-arching treaty. Obviously, IOSCO, the international standard setting body for securities regulators, has a key role to play here. Even before the global credit crunch of 2008, and the global financial turmoil that followed, momentum had been gathering in favor of much greater international cooperation in the area of financial services and securities regulation. The events of 2008 added a new sense of urgency, and a G-20 Declaration made in the wake of the financial crisis contained an explicit call for much greater cooperation between national regulators, a strengthening of international standards, and more consistent implementation by states.⁴⁴ The “Action Plan” annexed to the G-20 Declaration also sets out a number of specific tasks and goals for national and international regulatory institutions, including enhanced guidance on valuation of securities, a “single high quality global [accounting] standard,” and country and regional reviews of regulatory systems to ensure they are “compatible with a modern and increasingly globalized financial system.”⁴⁵ IOSCO has responded with a number of new initiatives (including three new “task forces”),⁴⁶ studies and reports.⁴⁷ IOSCO is also recognized as a key international standard-setting body by the new Financial Stability Board.⁴⁸

⁴³ See FSA, ‘Listing Regime Review’, Consultation Paper 09/28, November 2009. The idea is that companies that are able to fulfil the higher regulatory requirements of “premium” listing will attract greater investor confidence and, hence, potential rewards in terms of higher values of securities.

⁴⁴ G20 ‘Declaration of the Summit on Financial Markets and the World Economy’, November 15, 2008, copy available at

http://www.g20.org/Documents/g20_summit_declaration.pdf.

⁴⁵ See G-20 ‘Action Plan’, annexed to the G-20 Declaration, p. 6 .

⁴⁶ On “Short Selling,” “Unregulated Financial Entities” and “Unregulated Financial Products.” See further IOSCO, ‘Annual Report 2008’, copy available at

http://www.iosco.org/annual_reports/annual_report_2008/.

⁴⁷ Ibid.

⁴⁸ The Financial Stability Board was established in April 2009 and is the successor to the G-7 Financial Stability Forum. Its mandate includes “assess[ing] vulnerabilities affecting the financial system and identify[ing] and oversee[ing] action needed to address them”; “promot[ing] co-ordination and information exchange among authorities responsible for financial stability; “monitor[ing] and advis[ing] on market developments and their implications for regulatory policy”; and “advis[ing] on and monitor[ing] best practice in meeting regulatory standards.” For further information see <http://www.financialstabilityboard.org/index.htm>.

In summary, the main focus of international efforts in the securities regulation field at present is on achieving greater convergence of regulatory approaches and standards, and better cooperation and consultation between states to deal more effectively with cross-border regulatory problems. While no internationally binding framework is likely in the near future, international advisory and standard-setting organisations, such as IOSCO, seem to be gaining in international standing and influence. There appears to have been a step-change in the level of international dialogue and cooperation in this field lately, largely due to heightened awareness of regulatory deficiencies following the global financial crisis.

2.7 What are the obstacles to states implementing extraterritorial regimes in this field - for example, the procedural challenges involved in information sharing and joint enforcement activities? What cooperative arrangements are in place (formal and informal) between states? How are jurisdictional conflicts resolved?

Problems of implementation

The difficulties faced by national securities regulators in relation to extraterritorial regulation and enforcement are much the same as in other regulatory areas, namely the difficulties in gaining access to information and witnesses, gaining jurisdiction over individuals in criminal cases, finding and gaining control over proceeds of illegal activities and also in ensuring that foreign assets or property necessary to discharge a judgment or a fine are not dissipated. However, there are additional challenges in investigating and prosecuting corporate crimes like insider dealing, where the relevant trades may have taken place over a long period of time, through many different accounts and involve individuals and companies in a number of different jurisdictions.⁴⁹ The investigation and successful resolution of these types of offences will usually require a high degree of cooperation between national regulators.

Inter-state co-operation and mutual legal assistance

As in other regulatory areas, regulators have entered into “Memoranda of Understanding” (or MOUs) on enforcement cooperation. The US’s SEC, for example, has entered into many bilateral arrangements with other national securities regulators and is also a signatory (along with over 50 other parties) to the IOSCO MOU (see Box 2 below). State regulators can choose whether they wish to follow the IOSCO cooperation model, or whether they wish to enter into special arrangements between themselves. Since becoming a party to the IOSCO MOU, the SEC only plans to enter into further bilateral arrangements where the other party is able to provide assistance over and above that contemplated in the IOSCO MOU (e.g. “the ability to compel testimony, or the gathering of Internet service provider, phone and other records other than bank, broker, and beneficial owner information on behalf of the requesting authority”).⁵⁰ An “enhanced” enforcement cooperation agreement was entered into between the SEC and the Australian Securities and Investments Commission in 2008, which envisages the sharing of telephone and internet provider records, credit card records, travel records and employment information.⁵¹

⁴⁹ FSA ‘Market Abuse Policy and Enforcement in the UK’, speech by Sally Dewar, Director of Markets Division, BBA and ABI Market Abuse Seminar, May 22, 2007, copy available at http://www.fsa.gov.uk/pages/Library/Communication/Speeches/2007/0522_sd.shtml.

⁵⁰ US Securities and Exchange Commission, ‘The SEC’s Cooperative Arrangements with Foreign Regulators’, http://www.sec.gov/about/offices/oia/oia_coopfactsheet.htm.

⁵¹ Ibid.

Box 2: Co-operative arrangements under the IOSCO MOU

The IOSCO MOU dates back to 2002 and was the first multilateral agreement on mutual assistance and enforcement cooperation in the securities field. Under the agreement, the parties agree to “provide each other with the fullest assistance permissible to secure compliance with the respective Laws and Regulations of the [relevant] Authorities” (para. 7(a)). This includes providing information held on regulator’s files, obtaining information and documents (including “contemporaneous records sufficient to reconstruct all securities and derivatives transactions, including records of all funds and assets transferred into and out of bank and brokerage accounts relating to these transactions” and records identifying beneficial owners and controllers for each transaction) and taking evidence under oath (para. 7(b) and (c)).

There is no “double criminality” requirement for assistance. Under para. 7(c), assistance cannot be denied on the basis that the investigated conduct would not be a violation of the laws of the requesting authority.

The MOU goes on to prescribe the form that requests for assistance must take, and the information that must accompany them. Under paragraph 10, the authorities agree to keep requests for assistance confidential, and to not disclose non-public material received from another authority.

<http://www.iosco.org/library/index.cfm?section=pubdocs&year=2002&publicDocID=126>

Cooperation with respect to enforcement matters has taken on exceptional importance as states respond to the fall-out from the global financial crisis. As the then SEC Chairman Christopher Cox told delegates at a conference of the International Enforcement Institute in November 2008:

“The scale of our international enforcement cooperation has been massive. Over the last year, the SEC made 556 requests of foreign regulators for assistance with SEC investigations. That’s more than one a day on average. Many of these investigations are linked to possible wrongdoing in the sub-prime area.

At this moment, the SEC is working on 12 open sub-prime investigations with our foreign regulatory counterparts. Some of these are large scale and complex investigations that require cooperative access to each other's files. In some of these matters there is also an ongoing criminal investigation, both here in the United States and abroad.

At the same time, many of you are making requests of the SEC for assistance with your own investigations. In the past year the SEC

received 454 requests from foreign regulators for this kind of law enforcement help. And we have been eager to provide it.”⁵²

Extradition

Extradition is an important part of international legal assistance in criminal matters. Corporate crimes which impose liability on individuals, such as securities fraud or insider dealing, are no exception. Where a suspected offender is located in another state, his extradition is governed by the terms of any extradition treaty between the relevant states. These will invariably include a requirement that the conduct amount to a crime in both jurisdictions and be punishable, under both states’ laws, by a custodial sentence. In recent years, the US has made fairly aggressive use of its extradition treaty arrangements to prosecute foreign individuals for “white collar crimes” under US laws. The so-called “fast track” extradition arrangements between the US and the UK, under a 2003 treaty,⁵³ have been the basis for a number of high-profile extradition attempts by US authorities, including the request (ultimately successful) for the extradition of the so-called “Natwest Three.”⁵⁴

Resolving jurisdictional conflicts

Domestic regulatory systems may conflict (in the sense that a company may be subject to two or more different sets of requirements and unable to comply with both) or overlap (in the sense that a company is subject to more than one overlapping regime, the requirements of which are not the same, but compliance with both is possible). Despite signs of a gradual convergence of regulatory methods and standards (see para. 2.6 above), overlapping, though inconsistent, regulatory requirements remain a costly problem for companies (see para. 2.5 above) which must design their compliance programmes with more than one regulatory system in mind.

States recognise this problem too, and see the potential for overlapping regulatory requirements to act as a “barrier to entry” for foreign companies. The problem is typically dealt with using two main methods – “exemptions” and “recognition.” “Exemption” involves, obviously enough, exempting foreign companies from local regulatory requirements. This may be done because the regulating state takes the view that the company is adequately regulated elsewhere.⁵⁵ Or the state may consider that

⁵²US Securities and Exchange Commission, ‘Speech of SEC Chairman: The Importance of International Enforcement and Cooperation in Today’s Markets’, Washington, November 7, 2008, copy of speech available at <http://www.sec.gov/news/speech/2008/spch110708cc.htm>. The SEC Chairman then went on to give details of a number of specific cases in which international cooperation efforts “have lead to tangible and impressive results.” These include the cooperation of the UK FSA in gathering evidence that was crucial in obtaining an asset freezing order against a UK citizen who was a defendant in pending SEC action in Boston. He also noted cooperation between SEC enforcement staff and the Swiss Federal Banking Commission to uncover evidence of suspicious insider trading activity, which was used to obtain a temporary restraining order from a US court.

⁵³US-UK Extradition Treaty, March 31, 2003, treaty text available at <http://police.homeoffice.gov.uk/publications/operational-policing/uk-usa-extradition-treaty-20032835.pdf?view=Binary>.

⁵⁴ The “NatWest Three” had been charged under a US “wire fraud” statute of defrauding Natwest in connection with the sale of an Enron-related investment from which they made a personal profit. They were extradited to the US in July 2006, following which they pleaded guilty to a reduced set of charges. Each received a prison sentence, served partially in the US and now to be completed in the UK.

⁵⁵ See IBA Task Force Report, p. 276. The IBA notes that “[w]hile initially conceived as limited exceptions to national law ... safe harbours and exemptions quickly became the norm for global capital offerings.”

the investor protection concerns are not sufficient to justify detailed regulation in that particular case (e.g. the number of investors is small,⁵⁶ or the investors are particularly sophisticated).⁵⁷ Or the state may decide that, as the relevant parties or activities are largely outside the territory of the regulating state, it is appropriate to leave the regulation of the issue to states with a closer regulatory interest.⁵⁸

“Recognition” involves recognising compliance with foreign regulatory requirements as fulfilling the regulatory requirements of the regulating state (i.e. where a company or individual is based in State Y, State X accepts compliance by that company or individual with the laws of State Y as fulfilling the regulatory requirements of State X). This may be done unilaterally (simply to remove “barriers to entry” for foreign companies or intermediaries) or it may be done on a reciprocal basis (i.e. by mutual arrangement between two or more states). An example of “recognition” that operates within the EU is the “EU passport” scheme whereby security markets activities can take place in one EU member state on the basis of regulatory approvals obtained in another.⁵⁹ Another example of “recognition” of foreign standards that has been widely welcomed was the decision by the US SEC in November 2007 to drop the requirement for non-US companies to either comply with US GAAP for the purposes of their US reporting obligations, or to produce an IFRS/US GAAP reconciliation.⁶⁰ Since early 2008, non-US issuers have been allowed to produce their financial standards without reconciliation with US GAAP, provided those statements comply with IFRS.⁶¹

Over the past few years, states have been taking a number of steps – small and large – to reduce the regulatory burden on companies of having to comply with the laws of multiple jurisdictions. This, say regulators, is a direct response to the increasing globalisation of the securities industry. But there is also a criminal enforcement dimension to securities regulation, which raises the question: where two or more

⁵⁶ For instance, in March 2007, for instance, the SEC agreed to allow non-US issuers to de-register (and therefore terminate their US reporting obligations) if their daily US trading volume is equal to or less than 5% of their daily global trading volume over a 12 month period. The aim of the change was to remove a barrier to entry to non-US companies whose main trading markets were outside the US. See further SEC Press Release, ‘SEC Posts Text of Rules Facilitating Foreign Private Issuer Deregistration Under the Exchange Act’, March 27, 2007, copy available at <http://www.sec.gov/news/press/2007/2007-55.htm>.

⁵⁷ E.g. exemptions from registration requirements for foreign broker-dealers in relation to interactions with larger investors. See, in the US, SEC Rule 15a-6.

⁵⁸ Regulatory exemptions offered to foreign intermediaries in relation to foreign investment business would fall into this category. Again, see, in the US, Rule 15a-6.

⁵⁹ IBA Task Force Report, p. 280. However, the IBA Task Force Report also notes that the EU passport system has so far not worked particularly well: “[p]roblems were that large areas of activity were not subject to harmonised rules, leading to host Member State control in those areas. Even in areas that were harmonised, the harmonised rules were often subject to derogations that undermined their usefulness.” p. 282.

⁶⁰ IBA Task Force Report, p. 281. See further US Securities and Exchange Commission ‘Speech by the SEC Chairman: ‘International Financial Reporting Standards: The Promise of Transparency and Comparability for the Benefit of Investors Around the Globe’, address to the IOSCO Annual Conference, May 28, 2008. Copy of speech available from <http://www.sec.gov/news/speech/2008/spch052808cc.htm>

⁶¹ See further SEC Press Release, ‘SEC Takes Action to Improve Consistency of Disclosure to U.S. Investors in Foreign Companies’, November 15, 2007, copy available at <http://www.sec.gov/news/press/2007/2007-235.htm>.

states have an interest (e.g. in a criminal case concerning insider dealing or misleading investors), which state has priority?

The IOSCO MOU suggests a “first past the post” approach to dealing with conflicts of criminal jurisdiction, under which a “requested authority” does not have to provide assistance to a “requesting authority” where “a criminal proceeding has already been initiated in the jurisdiction of the Requested Authorities based upon the same facts and against the same Persons, or the same Persons have already been the subject of final punitive sanctions on the same charges.”⁶² Extradition arrangements also tend to take a “first past the post” approach. Under extradition treaties, like the fast-track arrangements between the US and the UK⁶³ the Requested State will invariably be entitled to refuse to extradite the offender if the person has already been convicted (or acquitted) of a crime on the same set of facts. However, under the UK-US arrangements, the fact that a crime is being investigated by the authorities in the Requested State does not automatically preclude a person’s extradition.⁶⁴

2.8 What considerations are taken into account by regulatory authorities in deciding whether or not to commence enforcement action in relation to foreign companies? For instance, how serious or systematic must the offences be? And how great the connection with the regulating state?

The regulatory structures used to control national securities markets, and the resources provided to them, vary enormously from state to state, as does the “intensity” with which regulatory requirements are enforced.⁶⁵ Some states (e.g. the UK, Norway, Australia, Japan and Singapore) have amalgamated supervision of banks, non-bank financial institutions and securities markets under one regulator.⁶⁶ Others have preferred to leave these different areas to regulation by separate authorities. The use by some states of private enforcement, most notably the US (see para. 2.5 above), complicates the picture further. The different approaches to regulation that may be employed by regulators are illustrated by case studies 7 and 8 below.

Regulatory authorities have limited enforcement resources and therefore will not tend to target the foreign activities of foreign companies unless it is fairly clear – because of information they have received, or because of a compliance problem that has become apparent from wider monitoring activities – that a possible breach has occurred. As noted in chapter 1 in relation to anti-bribery regimes, problems frequently come to light through self-reporting rather than external investigations, and in these cases the company concerned may well be able to take advantage of “leniency” policies, meaning that it might expect more favourable treatment from regulators that it would otherwise have received.

⁶² IOSCO MOU, n. 3 above, para. 6(e)(i).

⁶³ See n. 53 above.

⁶⁴ *Ibid.*, Article 5(3)(c).

⁶⁵ IBA Task Force Report, pp. 288-289.

⁶⁶ M. Cihák & R. Podpiera, ‘Is One Watchdog Better Than Three? International Experience with Integrated Financial Sector Supervision’ (International Monetary Fund, Working Paper No WP/06/57, 2006), available at www.imf.org/external/pubs/ft/wp/2006/wp0657.pdf.

***Case study 7: The US's Securities and Exchange Commission (SEC):
An enforcement-led approach***

The US's SEC describes itself as "first and foremost ... a law enforcement agency." Its Division of Enforcement is responsible for recommending investigations into suspected breaches of US securities laws, recommending civil enforcement by the Commission, and prosecuting those cases in the Federal or Administrative courts. Guidance regarding the SEC's enforcement policy is provided on the SEC web-site. According to the website, common breaches that will lead to SEC investigation and enforcement action include:

- misrepresentation or omission of important information about securities;
- manipulating the market prices of securities;
- stealing customers' funds or securities;
- violating broker-dealers' responsibility to treat customers fairly;
- insider trading (violating a trust relationship by trading on material, non-public information about a security); and
- selling unregistered securities.

Source: US Securities and Exchange Commission, 'The SEC's Cooperative Arrangements with Foreign Regulators', http://www.sec.gov/about/offices/oia/oia_coopfactsheet.htm.

In more adversarial cases, a crucial consideration in whether or not to take enforcement action in relation to the foreign activities of a foreign entity is, obviously enough, the availability of sufficient evidence to mount a credible prosecution. Here, foreign regulators can be an important source of information. But it may be that ultimately a decision is taken to defer to the greater regulatory interests of another jurisdiction, most obviously the foreign entity's home state. The FSA, as a general rule, will contact foreign regulatory authorities with a potential interest before any investigative and enforcement action is taken against a foreign entity, whether or not a formal MOU is in place. Consultation then takes place on the best way to proceed.

Serious and systematic breaches are more likely to attract enforcement action than "one-off breaches" or "slip-ups."⁶⁷ As noted in case study 8 below, the UK FSA is particularly interested in the issue of whether the company had in place sufficient controls to prevent the breach from occurring. Occasionally, though, a breach is sufficiently serious that it becomes necessary, in the interests of consumers and the wider public, to make an example of that individual or company for others in the industry. This is what underlies the FSA's policy of "credible deterrence" (see further case study 8 below).

⁶⁷ See, for example, DOJ, US Attorneys' Manual § 9-43.100 'Prosecution Policy Relating to Mail Fraud and Wire Fraud' "Prosecutions of fraud ordinarily should not be undertaken if the scheme employed consists of some isolated transactions between individuals, involving minor loss to the victims, in which case the parties should be left to settle their differences by civil or criminal litigation in the state courts. Serious consideration, however, should be given to the prosecution of any scheme which in its nature is directed to defrauding a class of persons, or the general public, with a substantial pattern of conduct." Copy available at http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/43mcrm.htm.

Case study 8: The UK's Financial Services Authority: A "risk-based," "preventative" approach

The UK's FSA operates a "risk-based" approach to regulation, which requires an assessment first of potential *impact* (i.e. "regulatory footprint – or "how important the firm (issue) is to the FSA") and, second, the *probability* that risks will arise (or "crystallise"). This assessment then determines the level of "intensity" with which the company will be scrutinised. So for smaller, low impact firms, scrutiny will mainly take the form of review and analysis of returns submitted to the FSA. Larger, high impact firms will be under "close and continuous" scrutiny, including on-site visits and interviews.

The FSA does not see itself as an "enforcement-led" regulator. Instead, it prefers to use "a combination of enforcement tools together with deterrent measures and improving standards through guidance and training." The FSA places emphasis on "partnership" and expects regulated companies to take responsibility for developing their own internal controls. It encourages self-reporting and has made the commitment that "if you [i.e. regulated companies] do this and can demonstrate your firm has good systems and controls and is complying with them, and an individual within the firms commits market abuse, we won't pursue the firm in an enforcement action, just the individual."

Underlying the FSA's approach to enforcement is the principle of "credible deterrence." As FSA Chief Executive Hector Sants puts it:

"We describe our use of enforcement as "strategic" because we do not attempt to enforce against every single violation we find. ... Sometimes the right result can be achieved through a supervisory remediation programme. Our strategy is to focus on enforcement cases where we think we can make a real difference to consumers and markets, using enforcement action strategically as a tool to change behavior in the industry. We need to be visible in the market place, sending tough messages about wrongful behavior and imposing sanctions (which doesn't just mean fines) that are severe enough to have a deterrent effect."

In some cases, such as cases of insider dealing, the FSA has the option of either imposing civil penalties, or launching a criminal prosecution. The FSA's policy is to prosecute through the criminal justice system all cases "where a criminal prosecution is appropriate." These are cases where :

"there is enough evidence to provide a realistic prospect of convicting the defendant; and ... criminal prosecution is in the public interest, considering the seriousness of the offence and the circumstances surrounding it."

Sources: FSA, 'The FSA's Risk-Based Approach', November 2006, <http://www.fsa.gov.uk/pubs/other/arrowguide.pdf>; FSA, 'Market Abuse Policy and Enforcement in the UK', speech by Sally Dewar, Director of Markets Division, BBA and ABI Market Abuse Seminar, May 2, 2007, copy available at:

http://www.fsa.gov.uk/pages/Library/Communication/Speeches/2007/0522_sd.shtml; Hector Sants, Chief Executive of the FSA, 'Principles-Based Regulation – Lessons from the Subprime Crisis', a speech given to the Securities and Investments Institute Annual Conference, May 15, 2008, copy available at http://www.fsa.gov.uk/pages/Library/Communication/Speeches/2008/0515_hs.shtml.

It is important to remember, too, that enforcement priorities can change and develop over time. For example, in 2007, the FSA, signalled its intention to take a much tougher line with respect to market abuse⁶⁸ and announced that it would be strengthening the capacity of its Market Monitoring Department in light of the events leading up to the financial crisis of 2008. In the wake of the subprime mortgage crisis in the US, the SEC announced, in September 2008, “a sweeping expansion of its ongoing investigation into possible market manipulation in the securities of certain financial institutions.”⁶⁹ Further reforms to the SEC enforcement division were made in the wake of the Bernie Madoff scandal⁷⁰ “to better ensure that it focuses on significant cases that will have a meaningful impact.”⁷¹

2.9 Are extraterritorial regulatory initiatives in this field based on: penalties, incentives, criminal sanctions, civil action, or transparency requirements? Or a combination of these?

As is apparent from the discussion above, there is still significant variation in the structure of different national securities regimes, the nature and style of regulation, the “intensity” of enforcement, and the penalties imposed. Securities regulation is a complex, multi-dimensional area of law, covering a range of issues from listing rules and corporate governance to insider dealing and securities fraud. So the answer to this question will vary from country to country, and from regulatory issue to regulatory issue. Box 3 below illustrates the range of regulatory measures potentially available, and how they can work together. Sometimes, the location of the relevant parties and events (e.g. whether they are located within or outside the territory of the regulating state) can have a bearing on the choice of enforcement method, as case study 9 below shows.

⁶⁸ This, according to the FSA, is an area “where the regulatory requirements have been clear for some time and where we need to ensure that regulatory fines are not simply regarded as just another cost of doing business.” See FSA, ‘The FSA’s Risk-Based Approach’, November 2006, <http://www.fsa.gov.uk/pubs/other/arrowguide.pdf>; Market Abuse Policy and Enforcement in the UK,” speech by Sally Dewar, Director of Markets Division, BBA and ABI Market Abuse Seminar, May 2, 2007, copy available at:

http://www.fsa.gov.uk/pages/Library/Communication/Speeches/2007/0522_sd.shtml

⁶⁹ SEC Press Release, ‘SEC Expands Sweeping Investigation of Market Manipulation’, September 19, 2008, <http://www.sec.gov/news/press/2008/2008-214.htm>.

⁷⁰ Bernie Madoff was a US financier and an apparently successful hedge fund manager. However, in 2008, it was revealed that his hedge fund was effectively a fraudulent “Ponzi” scheme in which investors were paid out of money provided by other investors, rather than real profits. He was gaoled in March 2009 after pleading guilty to a series of fraud-related charges relating to the loss of an estimated US\$50 billion of investors’ money.

⁷¹ US Securities and Exchange Commission, ‘The Securities and Exchange Commission: Post-Madoff Reforms’, <http://www.sec.gov/spotlight/secpostmadoffreforms.htm>.

Transparency

Transparency plays an enormously important role in securities regulation. Clear and accurate financial information is obviously essential for the protection of investors, and for the proper functioning of securities markets. Accurate financial reporting is at the heart of securities regimes, supervision of which was taken to a new level in the US under the Sarbanes-Oxley legislation (see case study 5 above). The last few years have also seen several initiatives at EU level designed to improve the quality of financial information available to investors in EU companies and bring about greater harmonisation of standards between member states.⁷² As noted above, these disclosure requirements frequently require (sometimes explicitly, but more often implicitly) reporting on matters outside the territory of the regulating state, as well as inside, if these are material to the financial prospects of the company.

Box 3: US securities regulation: a diverse regulatory package

The US uses a range of different sanctions, incentives and other regulatory devices to secure compliance and punish breaches of US securities law. For instance, SEC investigations can lead to civil action by the SEC enforcement division, which involves the filing of a complaint before the US District Court asking for a remedy. Remedies can include monetary penalties, injunctions, or return of proceeds of illegal activity. In addition, the court may bar any individual concerned from serving as a director or corporate officer for a period. Civil orders are backed up by criminal sanctions, as failure to abide by a civil court order can be treated as contempt of court, which is a criminal offence. Administrative sanctions (which must be confirmed by an independent administrative judge) can include deregistration and suspension of qualifications necessary to act as a broker or an investment adviser, and monetary penalties.

Criminal violations of US securities laws are prosecuted, not by the SEC, but by the DOJ. The DOJ can seek criminal indictments on their own initiative, or following a referral by the SEC. Key criminal offences under US securities laws include “wilful violations” of federal securities laws (e.g. false corporate reporting), false certifications under the Sarbanes-Oxley Act (see case study 5 above), insider trading, securities fraud, “mail fraud,” “wire fraud,” obstruction of justice, document destruction and perjury.

In addition to criminal, civil and administrative enforcement by regulatory authorities, the US securities regime also permits private enforcement by individuals or companies who claim they have suffered loss as a result of securities law breaches. As noted above, Rule 10b-5 permits private claims in the US courts for damages suffered as a result of misleading statements made in connection with securities transactions (see para. 2.6 and case study 6 above).

⁷² See EU Council Directive 2004/109/EC of 15 December 2004 on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market and amending Directive 2001/34/EC, OJ 2004 No. L390/38, 31 December 2004 (the “EU Transparency Directive”); Council Directive 2003/51/EC of 18 June 2003 amending Directives 78/660/EEC, 83/349/EEC, 86/635/EEC and 91/674/EEC on the annual and consolidated accounts of certain types of companies, banks and other financial institutions and insurance undertakings OJ 2003 No. L178/16, 17 July 2003 (the “EU Accounts Modernisation Directive”).

Case study 9: Extraterritorial criminal vs administrative enforcement: a brief comparison of UK and US practice

In the UK, insider dealing can be treated either as a civil (or “administrative”) matter or a criminal offence. Civil penalties may be levied under the Financial Services and Markets Act 2000 (see sections 118 and 123). Where the matter is very serious and there is sufficient evidence to be reasonably sure of securing a criminal conviction, the FSA may prosecute under the Criminal Justice Act 1993. But because of the limits on extraterritorial criminal jurisdiction observed by the UK, breaches of UK insider trading laws taking place *outside* UK territory (whether or not by a UK national) will only be dealt with by authorities under the *administrative* (i.e. not the criminal) regime.

The US, authorities, on the other hand, have asserted criminal jurisdiction over foreign individuals in relation to (largely) extraterritorial conduct on a number of occasions. The wider jurisdictional ambit of US laws (i.e. the wider circumstances in which criminal jurisdiction may be claimed), coupled with what is perceived to be a greater readiness on the part of US authorities to pursue criminal enforcement action, has given rise to accusations that the US-UK extradition treaty arrangements are skewed in favour of the US in relation to “white collar crime,” in the sense that UK executives are much more likely to be extradited to the US than vice versa.*

*See M. O’Kane ‘Tug-o-war: Extradition and the Risks Faced by UK Executives Caught Up in the Fallout from the SubPrime Crisis’, 24 June 2009, <http://www.allbusiness.com/legal/criminal-law-extradition/12569552-1.html>.

2.10 If the regulation is done pursuant to an international regime, does the regime primarily rely on administrative, civil or criminal remedial mechanisms – and at the international, regional or national level? Are non-judicial mechanisms relevant? To what extent are states able to choose enforcement methods? What are the consequences for states of non-compliance?

[omitted]

2.11 Are the targets of the regulation corporations or individuals or both?

The targets of regulation in the securities field can be individuals, companies, or both, depending on the offence. Corporate disclosure regimes, for instance, frequently impose regulatory requirements, and therefore potential legal liabilities, on individual corporate directors and officers, as well as on the company itself.⁷³ Penalties for insider trading or market abuse may also be imposed on corporations, individuals, or both. The EU Directive on Market Abuse, for instance, imposes restrictions on the use of “inside information” by “any person,” which includes “legal” as well as “natural” persons. The directive also provides that, in cases where insider dealing is carried out by a “legal person,” member states must ensure that the same prohibitions also apply

⁷³ See, for instance, Sarbanes Oxley Act, n. 6 above, (see case study 5 above), esp. sections 302 and 404.

to “the natural persons who take part in the decision to carry out the transaction for the account of the legal person concerned.”⁷⁴

2.12 & 2.13 How do states regulate corporate entities abroad?

Direct jurisdiction over foreign companies

As discussed above, domestic legal requirements are often imposed directly on foreign companies by virtue of the fact that their securities are traded within the territory of the regulating state. These requirements include corporate governance and transparency requirements that are designed to ensure that companies are properly managed and that investors have access to reliable and accurate information regarding that company’s financial standing and prospects. While these kinds of measures are often described as “extraterritorial,” they are, in reality, domestic conditions placed on the ability of companies – local and foreign – to access capital markets *within* the jurisdiction. But at a practical level, the regulatory requirements of one jurisdiction (particularly a dominant jurisdiction like the US) can have far-reaching implications for how that foreign company’s entire corporate group is run (see further para. 2.1 above).

The US courts have also taken jurisdiction directly over the foreign activities of foreign parties in cases where their conduct has had a significant *effect* on US markets (e.g. in cases brought under Rule 10b-5 on the use of misleading information to influence share transactions)⁷⁵ or which has been part of a course of conduct prohibited by US law and taking place partly within the US and partly outside it.⁷⁶ This differs in both nature and scope from the regulatory jurisdiction discussed immediately above, because of its different legal basis, and because it potentially covers both foreign parties *and* foreign conduct.⁷⁷ Assertions of extraterritorial jurisdiction of this kind do not rely on the existence of any control relationships between different members of a corporate group, merely on the fact of territorial connections between the activity and State X (e.g. the conduct or activities of a foreign corporate entity produced certain economic effects within the territory of State X).

Consistent with principles under criminal law more generally (see further chapter 4 below), criminal jurisdiction may also be asserted against foreign corporate entities *directly* in response to securities-related crimes committed partly within, and partly outside, the jurisdiction of the regulating state, or alternatively on the basis that the foreign entity had “aided and abetted” crimes committed within the regulating state. This kind of jurisdiction is based on notions of “objective” and “subjective” territoriality,⁷⁸ i.e. that State X ought to have jurisdiction over crimes either commenced or completed within its territory, or which were “aimed at” State X (see para. 2.3 above).

⁷⁴ Council Directive 2003/6/EC of 28 January 2003 on insider dealing and market manipulation (market abuse), OJ 2003 No. L96/16, 12 April 2003 (the “EU Market Abuse Directive”) Article 2(2).

⁷⁵ See *Schoenbaum v Firstbrook*, 405 F 2d 200, 206 (2d Cir. 1968), *cert. denied*, 395 US 906 (1969).

⁷⁶ See discussion at para. 2.3 above.

⁷⁷ But see case study 6 for a discussion of the possible limits of this kind of extraterritorial jurisdiction.

⁷⁸ See pp. 18-19 above.

Domestic measures with extraterritorial implications

Domestic securities regimes also contain some examples of “parent-based” regulatory techniques that will generally impact on the behavior and organisation of subsidiaries abroad, even if no jurisdiction over foreign subsidiaries is directly taken. For instance, under section 302 of the Sarbanes-Oxley Act (see case study 5 above), signing officers must certify that they have designed internal controls that are sufficient to ensure that material information relating to the whole group (including any foreign subsidiaries) is conveyed to them. Section 404 of the Act requires the production of an “internal control report” as part of annual financial reporting obligations. These provisions clearly have implications for how whole multinational groups of companies are run, effectively requiring the risk management systems of all subsidiaries within each group member covered by the regime to be brought in line with Sarbanes-Oxley requirements.

2.14 Conclusions: lessons for the B&HR Sphere

There are some clear differences between the securities field and some other regulatory areas discussed in this report that have to be taken into account when assessing the “extraterritoriality” of securities regulation. In the securities field, the intention of State X is not, by and large, to extend the geographical scope of its laws outward, but to regulate the terms on which all companies (including companies from abroad) may access investors and securities markets *in State X*. In reality, many of the measures that are commonly described as “extraterritorial” in this context are actually *domestic* measures, though, as discussed above, they are capable of having significant extraterritorial implications.

Only occasionally do states seek to regulate foreign conduct directly. Where this happens, the intention is generally to control extraterritorial behavior producing effects *within* the territory of the regulating state. In essence, securities regulation is, like antitrust regulation,⁷⁹ largely an “inward-looking” regulatory system.

However, these general comments need some qualification. First of all, some elements of securities regulation can indeed involve an “export of standards” by the regulating state. The corporate governance provisions of the Sarbanes Oxley Act are probably the stand out example. The US presumably has no interest in enforcing these standards against foreign companies *not* trading securities in the US, and companies are therefore able in principle to avoid the requirements by avoiding US markets and investors. However, the highly-prescriptive nature of the requirements and their implications for the management of whole groups of companies, coupled with the huge importance of US capital markets, means that, in effect, US authorities are capable of having a significant influence on how companies around the world are run.

Secondly, although securities law is overwhelmingly “inward-looking” in that it is concerned with effects *within* the territory of the regulating state, it is possible to find examples of “outward-looking” securities regulation too. For instance, the US courts have interpreted US securities statutes so as to permit them to take jurisdiction over “foreign harm” cases where the foreign losses have come about as a result of misrepresentations or other fraudulent conduct occurring within the US, whether or

⁷⁹ See further chapter 3 below.

not there are significant effects within the US as well.⁸⁰ This appears to have been motivated, at least in part, by a desire not to allow the US to become a “safe haven” for abusive practices.

Therefore, securities regulation is perhaps best described as primarily (though not entirely) “inward-looking” (in terms of its objectives), with some “exporting of standards” in practice. With this in mind, there are a number of lessons that we can draw with potential application to extraterritorial regulation more generally, and the B&HR sphere in particular.

Lesson 1: Domestic measures with extraterritorial implications can sometimes be just as controversial as “direct” assertions of extraterritorial jurisdiction, especially if they are highly prescriptive and intrusive, as opposed to regulation that is “principles-based” or “outcomes-oriented.” This point has been dramatised very clearly in the reactions to the US Sarbanes Oxley Act. Companies do not expect to trade their securities on the stock markets of foreign states without restriction. Clearly, these “host states” have responsibilities to their own nationals (e.g. local investors), which justify the imposition of certain standards on companies – local and foreign. With respect to the Sarbanes Oxley Act, the fact that the regulation applied to non-US issuers was not particularly controversial. It was the content of those regulations – their “highly prescriptive” and “intrusive” nature – that caused so much concern. Very prescriptive regulations are more likely to result in regulatory conflicts, are frequently costlier to implement, are more likely to be opposed by companies and are therefore more likely to give rise to tensions between states.

Lesson 2: The “effects” doctrine provides a possible basis for extraterritorial regulation, but it is not widely used, and still seems restricted to economic (including “market”) effects in practice. US courts have interpreted some US securities statutes as potentially applying to foreign conduct on the basis of the “effects” of that conduct on US securities markets. This has given these US laws very wide extraterritorial scope. But, outside the US, the “effects doctrine” has yet to be utilised to the same degree in the securities law field as it has in relation to anti-competitive behavior (see further chapter 3 below).

Lesson 3: Domestic regimes that create obligations for foreign companies (whether directly or indirectly) but fail to take account of the regulatory structures, traditions and priorities of potentially affected states are likely to be vigorously opposed. This is one of the key lessons from the international reaction to the US Sarbanes Oxley Act. While governments of other states may have had every sympathy with the US’s need to tighten regulation following the Enron scandal, they complained that the US government, in passing the Sarbanes Oxley Act, failed to take account of regulatory developments and successes in other jurisdictions, and as a result the degree of regulation to which non-US companies would be subjected was both unnecessary and unfair. The then UK Secretary for Trade and Industry, Patricia Hewitt, was reported to have complained at the time the law was passed that the US had rushed through legislation without proper consultation with other key jurisdictions.⁸¹

⁸⁰ See pp. 69-73 above..

⁸¹ ‘Hewitt tells US to lay off UK firms’, *Accountancy Age*, October 10, 2002

Lesson 4: “Globalisation” means that states can no longer afford to develop their regulatory regimes in isolation. In recognition of this, the EU now takes part in a series of “international regulatory dialogues” on securities regulation. This is not just because regulatory developments outside the EU increasingly have an impact within the EU, but also because of the risk that regulatory developments within the EU that are not sufficiently attuned with what is happening elsewhere will create unnecessary problems for EU companies, harming their competitiveness, and presenting barriers to entry to other (i.e. non-EU) markets. The need to create a more “level playing field” for companies internationally is proving a powerful driver towards greater convergence of regulatory systems and approaches.

Lesson 5: Extraterritorial regulation can increase legal uncertainty for companies, which may cause them (if they have the choice) to avoid certain jurisdictions and markets altogether. The decision whether or not to seek a cross-listing in another jurisdiction is essentially a cost-benefit decision for a company, over which it ultimately has control. As noted above, the regulatory conditions applied to that cross-listing will be one of the costs to take into account. However, where jurisdiction over a company or individual is based on looser connections with state (e.g. the “effects” of certain conduct on markets in that state), then there is a risk that that companies may shy away from opportunities and transactions that may cause it to engage with that jurisdiction. This was the warning given in amicus curiae briefs in the case of *Morrison v National Australia Bank* (see case study 6 above), in which it was warned that the exorbitant jurisdictional claims of US courts could deter foreign companies from investing in US companies, ultimately to the detriment of the US economy.

Lesson 6: But predictions that changes in regulation will necessarily result in “capital flight” do not always come true. Decisions regarding where to incorporate, where, when, and how to invest, and from where to seek investment, are affected by many factors. These obviously differ from sector to sector and from company to company. The regulatory environment is one of these factors, but by no means the only consideration. This is demonstrated by the reaction to the Sarbanes-Oxley Act by non-US companies. Despite initial expressions of dismay, and predictions that many companies would leave the US and seek listings in the UK instead, most companies decided, in the end, that the US stock markets were simply too important to walk away from.

Lesson 7: Soft law initiatives play a crucial role in developing a useful convergence in regulatory approaches, if not harmonisation. This is apparent from the work of IOSCO, which has become over recent years an influential standard-setter in relation to securities regulation, and a key forum for international dialogue between national regulators.

Lesson 8: Extraterritorial regimes are unlikely to achieve their full potential without international cooperation. As is apparent from the comments of the former SEC Chairman Christopher Cox,⁸² national regulators rely heavily on the assistance of their counterparts in other countries to gather evidence, including the crucial financial and documentary evidence needed to understand and reconstruct securities transactions. Recent years have seen a huge increase in levels of international

⁸² See pp. 76-77.

cooperation in relation to securities law enforcement, no doubt partly as a result of the upsurge of enforcement activity (especially in the US) in the wake of the “subprime crisis.”

Lesson 9: Private enforcement of standards in the securities field may still raise public policy issues, and give rise to tensions between the states concerned, despite (and in some cases because of) the lack of state involvement in the prosecution of that claim. The amicus curiae brief filed by the Obama administration in the case of *Morrison v National Australia Bank* (see case study 6 above) makes the interesting assertion that private claims may be just as likely to give rise to inter-state tensions as public law enforcement in this sphere (if not more so), partly because they may not have been subject to the “interest-balancing” process that would be used prior to public law enforcement. Whether or not this is a fair comment in relation to that specific right of action, it should not necessarily be assumed that extraterritorial private enforcement of public law requirements will be more palatable to foreign states than extraterritorial enforcement by public bodies.

Lesson 10: States can agree on the underlying objectives of a regulatory regime, but still disagree profoundly on the best regulatory response. This is clear from the international debate that emerged out of the US response to the Enron crisis. Most states could agree on the causes of the crisis, and the regulatory deficiencies that had made them possible. But while the US opted for a “rules-based” response, the UK argued that its “principles-based” approach was far preferable. At the international level, IOSCO appears to favour a “principles-based” approach, noting that “[t]here is often no single correct approach to a regulatory issue. Legislation and regulatory structures vary between jurisdictions and reflect local market conditions and historical development. The particular manner in which a jurisdiction implements the [IOSCO] objectives and principles ... must have regard to the entire domestic context, including the relevant legal and commercial framework.”⁸³

Lesson 11: Transparency initiatives can play a key role in bringing about improvements in corporate standards across transnational corporate groups provided they are backed up with sufficient sanctions and regulatory guidance on required information. Such initiatives improve the quality of information available to investors, often about corporate activities throughout the group, including human rights impacts, which the SRSG’s corporate law tools project has highlighted.⁸⁴ They can also help put pressure on management to improve their oversight and treatment of the issues the company is required to report on. This makes it increasingly likely that knowing and doing less is not a benefit but rather an added risk. However, these measures must be accompanied by appropriate implementation and enforcement mechanisms, and regulatory guidance to increase clarity for companies on exactly what is expected of them. This guidance may also assist shareholders and other stakeholders to hold companies to account.

Lesson 12: Revelations of serious corporate recklessness and abuse with cross-border impacts can provide the catalyst for a step-change in levels of international

⁸³ IOSCO, ‘Objectives and Principles of Securities Regulation’, copy available at <http://www.iosco.org/library/pubdocs/pdf/IOSCOPD154.pdf>.

⁸⁴ For information about the project generally, see: <http://www.business-humanrights.org/SpecialRepPortal/Home/Materialsbytopic/Corporatelaw/CorporateLawTools>.

enforcement activity, international cooperation, and political commitment to developing new international solutions, as well as domestic regulatory reforms. This is demonstrated very clearly by the regulatory responses to the Enron scandal in 2001 and, subsequently, the global financial crisis that developed out of the “subprime crisis” in 2007. But whereas the Enron scandal sparked off a series of largely unilateral domestic reforms, the global financial crisis seems to have given rise to political demands for much greater and closer international cooperation with respect to enforcement, exchange of information, and the development and implementation of international regulatory standards.

Chapter 3: Antitrust

Introduction: a brief description of the current legal and institutional framework

“Antitrust” (or “competition”) regulation refers to the measures taken by states to ensure that markets remain open and competitive and that no company or group of companies is able to dominate a market, restrict supply or otherwise limit the terms on which products are bought and sold. Antitrust regulation can be divided into three broad areas: (a) supervision of mergers and acquisitions (b) control of abusive practices by market participants and (c) control of arrangements that restrict free trading and competition between participants (often referred to as “cartels”).

The current international legal framework for antitrust regulation can be described as a network of overlapping domestic law rules with varying degrees of extraterritorial scope, overlaid with inter-governmental cooperative agreements¹ and a number of “soft law instruments” setting out standards of “best practice” as regards regulation, enforcement and cooperation. With the exception of the EC Treaty (see below), there is currently no international treaty either harmonising domestic law rules or governing the use of extraterritorial jurisdiction by states in the antitrust field. Instead, the relevant inter-governmental arrangements are mainly bilateral (and often “non-binding” or “soft law” arrangements) under which states have agreed to curb their use of extraterritorial jurisdiction in certain circumstances and to abide by a prearranged set of procedures where jurisdictional conflicts could occur.

Key international institutions in this field are the OECD, which has promulgated a series of non-binding recommendations to states on antitrust regulation, and the International Competition Network (“ICN”), an informal body that brings together the competition authorities from a diverse group of states to discuss areas of common interest such as practical enforcement issues and areas of possible policy convergence.² At the European level there is also a “European Competition Network” (“ECN”) comprising the European Commission and the competition authorities of EU member states. The ECN offers an important forum for coordination of enforcement activity between member states. It aims to facilitate communication between EU member states on cross-border competition problems, encourage the consistent application of laws and also helps to allocate jurisdiction in cross-border cases.³

The European Commission deserves special mention as the agency principally responsible for the administration of the only set of supranational rules on antitrust. Article 101 of the EC Treaty prohibits cartels and restrictive practices “which may affect trade between Member States and which have as their object or effect the prevention, restriction and distortion of competition within the common market.” Article 102 prohibits “[a]ny abuse by one or more undertakings of a dominant position in the common market or a substantial part of it ... in so far as it may affect trade between member states.” These two provisions are the primary source of the European Commission’s authority as principal regulator and enforcer of EU antitrust standards. Further regulations amplifying the Commission’s role and powers have been adopted by the EU Council under the terms of the EC Treaty.

¹ IBA Task Force Report, p. 47.

² See <http://www.internationalcompetitionnetwork.org/>.

³ See http://europa.eu/legislation_summaries/competition/firms/126109_en.htm.

3.1 In what ways can the regulation in the antitrust field be regarded as “extraterritorial”? Does the regulation involve direct assertions of jurisdiction, or does it merely have extraterritorial implications?

Antitrust regulation primarily involves direct assertions of extraterritorial jurisdiction over foreign actors and conduct. While there are some examples of domestic measures with extraterritorial implications, they do not play the same role in antitrust regulation that they play in some of the other regulatory areas considered in this report.

The antitrust laws of many states – such as the US, UK, Australia, France, Germany, China, Japan and Brazil,⁴ as well as the EU – create the possibility of *direct* assertions of extraterritorial jurisdiction over foreign parties and activities. However, states differ in their willingness to enforce their laws against foreign parties in respect of overseas conduct. Whereas the US has frequently sought to apply its “long-arm” jurisdiction to activities taking place outside the US but which nonetheless have an effect on markets within the US, other countries seem less inclined to do so. As the IBA Task Force Report puts it, “[s]tates around the world do still continue to adopt different approaches to the concept of extraterritoriality. In practice, smaller states tend to be far less proactive than the United States and European Union in actually attempting to assert extraterritorial jurisdiction for numerous reasons, for example, historical deference to the older more established US and European legal systems, lack of power and resources, and difficulties in collecting evidence located abroad.”⁵

But while direct assertions of jurisdiction may get the most attention, the way different states apply their antitrust laws can have significant extraterritorial impacts. For instance, a decision by one state authority to clear or block a proposed merger within their territory has enormous implications for the (often transnational) corporate groups concerned, and may also have significant consequences for other states’ economies too.

3.2 Has antitrust regulation been adopted unilaterally by states? Or in order to implement an international regime? Or both, and if so, which came first?

As yet, there is no international treaty on competition law, apart from the EC Treaty.⁶ Domestic antitrust regimes involve unilateral assertions of jurisdiction by states, except for those operated by EU member states, which exist within a harmonised EU regime, under the framework of an EU-wide competition law policy.

But there are a number of international bodies that have an interest in domestic competition law and policy. One such body is the WTO. Obviously, the approach taken by individual states to competition and anti-competitive practices by companies has a profound influence on international trade. Provisions relating to competition policy have appeared in the GATT, the GATS and the TRIPs agreement. In 1996, the

⁴ See IBA Task Force Report, Annex, setting out summaries of key provisions and features of regulatory regimes from a number of jurisdictions, available at <http://www.int-bar.org/images/downloads/etjtfantitrustannex1.pdf>.

⁵ IBA Task Force Report, p. 48.

⁶ See the introduction to this chapter above.

WTO Ministerial Conference established two working groups “to look more generally at how trade relates to investment and competition policies.”⁷ At the Doha conference in 2001, the Ministers laid out a work programme that included looking at provisions on cartels, arrangements for voluntary cooperation and capacity building. However, the work programme was suspended following the Cancun Ministerial Conference in 2003, at which many states (particularly developing states) expressed their unhappiness about the inclusion of investment and competition issues in the WTO’s agenda.⁸

Other international “soft law” standards on competition policy and enforcement include a series of OECD Recommendations on Restrictive Business Practices,⁹ the 1998 OECD Recommendation on Hard Core Cartels¹⁰ and the UNCTAD ‘Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices’.¹¹

3.3 What type of extraterritorial jurisdiction is claimed (e.g. prescriptive, adjudicative or enforcement jurisdiction)? And what jurisdictional rules do states rely on?

Type of jurisdiction

The direct extraterritorial jurisdiction claimed in the field of antitrust regulation can involve extraterritorial prescriptive (i.e. “legislative”), adjudicative (i.e. “judicial”) and enforcement jurisdiction. Examples of extraterritorial prescriptive jurisdiction can be found in the merger control laws of jurisdictions such as the US, EU and Canada, which require that proposed mergers which meet certain financial thresholds must first be notified to and cleared by the relevant authorities, regardless of where in the world the proposed merger is to take place. This jurisdiction is justified by the potential effects of the merger on markets within the jurisdiction of the regulating state. Financial thresholds, such as turnover/revenue or asset values, are used as a way of identifying mergers that may produce adverse market effects. These tests may take account of worldwide turnover or assets, or domestic turnover or assets, or both.¹²

An example of extraterritorial adjudicative jurisdiction would be the jurisdiction granted to the US courts under the US federal antitrust statutes to entertain private enforcement actions of US antitrust provisions, which includes jurisdiction over foreign parties and activities carried on entirely outside the US. Extraterritorial “enforcement” jurisdiction is created by statutes providing for the recovery of civil

⁷ See http://www.wto.org/english/thewto_e/whatis_e/tif_e/bey3_e.htm#investment.

⁸ See further para. 3.6 below.

⁹ This work dates back to the late 1960s. A revised and amalgamated set of recommendations was published in 1995, under the OECD 1995 Recommendation of the Council Concerning Cooperation Between Member Countries on Anti-Competitive Practices Affecting International Trade, copy available at <http://www.oecd.org/dataoecd/60/42/21570317.pdf>. See further Box 5 at p. 102 below.

¹⁰ OECD Recommendation of the Council Concerning Effective Action Against Hard Core Cartels 25 March 1998 - C(98)35/FINAL, copy available at [http://webdomino1.oecd.org/horizontal/oecdacts.nsf/linkto/C\(98\)35](http://webdomino1.oecd.org/horizontal/oecdacts.nsf/linkto/C(98)35).

¹¹ Adopted by the UN General Assembly on December 5, 1980, Res. 35/63, copy available at <http://www.unctad.org/en/docs/tdrbpconf10r2.en.pdf>.

¹² See for instance, the European Community Merger Regulation, Council Regulation (EC) No 139/2004 of January 20, 2004 on the control of concentrations between undertakings, OJ 2004 No. L24/29, 1 January 2004, pp. 1–22.

and criminal penalties from actors operating abroad. However, as discussed in para. 3.7 below, there are practical limits to the use of extraterritorial “enforcement” jurisdiction when defendants (and their assets) are located outside the regulating country.

Basis for jurisdiction (e.g. “nationality,” “territory,” “effects doctrine” etc.)

Extraterritorial jurisdiction in relation to foreign anti-competitive conduct may be claimed under the nationality principle, over conduct of nationals or residents abroad (including corporate nationals and residents).¹³ Where the party is foreign, and the nationality principle does not apply, jurisdiction may still be claimed in some circumstances, based on the effects doctrine. As discussed in the Introduction to this study,¹⁴ the effects doctrine is an extended version of the principle of objective territoriality and asserts that a state may regulate, not only conduct taking place within its territory, but also extraterritorial conduct having a territorial effect. This doctrine, controversial in the past though now perhaps becoming less so,¹⁵ has been used to justify assertions of jurisdiction by US courts over foreign parties, even when all (or virtually all) of the behavior complained of has taken place outside US borders.¹⁶ Cases like this have received a certain amount of critical academic comment.¹⁷ However, it is important not to overstate the extent to which the effects doctrine has actually been used by US regulatory authorities in practice. According to one observer, assertions of extraterritorial jurisdiction under the Sherman Act based solely on the “effects doctrine” have actually been “quite rare.”¹⁸

In the antitrust context, the “effects” referred to are, of course, the economic effects on domestic markets and consumers, or perhaps (though even more controversially) on the domestic economy more generally (e.g. because of the inability of domestic companies to compete in international markets).¹⁹

Comparing the antitrust laws of a number of different states, the IBA Task Force Report notes “a fair degree of consensus on the application of an ‘effects based’ jurisdictional framework to determine the extraterritorial application of competition laws.”²⁰ However, the IBA Task Force also notes that “the working definition of

¹³ See further p. 19 above.

¹⁴ See pp. 18-19 above.

¹⁵ See further pp. 97 below.

¹⁶ See, for instance, *Hartford Fire Insurance v California* 113 S Ct 2891 (1993), in which the US Supreme Court held that the US courts *would* have jurisdiction under the US Sherman Act over the conduct of London-based reinsurers affecting the terms on which commercial general liability cover would be available in the US. See also case study 11 below.

¹⁷ See A. Lowe, ‘Blocking Extraterritorial Jurisdiction: The British Protection of Trading Interests Act, 1980’ (1981) 75 *American Journal of International Law* 257; A. Lowe, ‘The Problems of Extraterritorial Jurisdiction: Economic Sovereignty and the Search for a Solution’ (1985) 34 *International and Comparative Law Quarterly* 724; P. Roth ‘Reasonable Extraterritoriality: Correcting the Balance of Interests’ (1992) 41 *International and Comparative Law Quarterly* 245.

¹⁸ See P. Muchlinski, *Multinational Enterprises & the Law*, 2nd ed. (Oxford University Press, 2007), p. 134.

¹⁹ Although note that most statements of the “effects” doctrine make it clear that extraterritorial jurisdiction is not permitted in relation to small or minor effects. Under US antitrust law, the “effects” on the US must have been “direct, substantial and reasonably foreseeable” before the authorities can act. See 1982 Foreign Trade Antitrust Improvements Act.

²⁰ IBA Task Force Report, p. 48.

‘effects’ varies considerably – or it may be that many jurisdictions merely espouse the ‘effects’ test, without any, let alone a consistent, statutory or judicial delimitation.”²¹

3.4 What legal objections have been raised at the international, regional and national levels to unilateral antitrust regimes? Are those objections still being raised?

Assertions of extraterritorial jurisdiction in the antitrust field have been very controversial in the past, and continue to give rise to comments, objections and interventions by affected states today, especially where strategic interests and industries, or the futures of key companies (i.e. “national champions”), are at stake.

Most commentators trace this controversy back to the 1945 *Alcoa* case, in which a US appeals court held that the Sherman Act²² would apply to a Canadian corporation involved in an international aluminium cartel.²³ In a classic judgment, Judge Learned Hand held that it was “settled law” that “any state may impose liabilities, even upon persons not within its allegiance, for conduct outside its borders that has consequences within its borders which the state reprehends.”²⁴ That case, and the attempts by US courts in subsequent cases to place some limits on the use of the “effects doctrine” through “reasonableness” and “interests balancing” tests²⁵ have attracted a considerable amount of academic interest and legal comment.²⁶ Much of this legal writing reflects concerns about (a) the status (and limits) of the effects doctrine under international law and (b) whether national courts were adequately equipped and sufficiently independent to properly weigh up the interests of different states in the manner envisaged in the US antitrust case-law.²⁷

The controversy surrounding the use of extraterritorial jurisdiction by the US in the antitrust field appears to have escalated during the 1960s and 1970s. Litigation based on the ideas expressed in the *Alcoa* case was consistently opposed by affected states, and also drew a number of diplomatic protests. For instance, the *Swiss Watchmakers Case*²⁸ in which the US court condemned a series of agreements by the watch-making

²¹ Ibid.

²² The Sherman Act was passed in 1890 and is still, today, the basis of much of the antitrust enforcement action by the US government.

²³ *United States v Alcoa* 148 F 2d 416 (2d Cir 1945)

²⁴ Ibid, at p. 443.

²⁵ See *Timberlane v Bank of America* 549 F 2d 597 (9th Cir. 1976); *Mannington Mills v Congoleum Corp.* 595 F 2d 1287 (3d Cir 1979). For a more detailed discussion of “interest balancing” approaches to jurisdictional conflicts, see pp. 105-106 below. For a more general discussion of the “reasonableness” requirement in relation to the use of extraterritorial jurisdiction, see pp. 20-21 above.

²⁶ See, for example, H. Maier, ‘Extraterritorial Jurisdiction at a Crossroads: An Intersection between Public and Private International Law (1982) 76 *American Journal of International Law* 280; H. Maier ‘Interest Balancing and Extraterritorial Jurisdiction’ (1983) 31 *American Journal of Comparative Law* 579; G. Born, *International Civil Litigation in the United States Courts*, 3rd edition (Kluwer, 1996); K. Meessen (ed.) ‘Extraterritorial Jurisdiction in Theory and Practice’ (Kluwer, 1996), esp. chapters I and VIII; Lowe, ‘The Problems of Extraterritorial Jurisdiction’, n. 17 above; Roth, n. 17 above.

²⁷ One commentator continues, “it is unlikely that any such [interest balancing] rules would be satisfactory even if they were to emerge. Courts tend to decide on the basis of the immediate short-term interests involved in any case, and give scant attention to the need for developing “systemic” criteria designed to facilitate the workings of the international system as a whole, rather than to dispose of particular cases as they arise,” Lowe, ‘The Problems of Extraterritorial Jurisdiction’, n. 17 above, p. 731.

²⁸ *US v Watchmakers of Switzerland Information Center, Inc.* 1963 Trade Cases CCH, para 70,600 (SDNY 1962).

industry in Switzerland, provoked a diplomatic protest from Switzerland and a threat to bring a case against the US before the International Court of Justice.²⁹ And the case of *Zenith Radio Corp. v Hazeltine Research Inc.*,³⁰ which concerned a private treble damages action in relation to an alleged “patent pool” aimed at boosting Canadian production of consumer goods for Canadian markets, provoked a diplomatic protest from the Canadian government.³¹

Quite a few states, including Canada, the UK, Australia, Germany, France and South Africa, went on to introduce “blocking legislation” to limit the impacts of the laws of other states on actors and commercial activities within their own jurisdictions.³²

Governments have also intervened in individual antitrust cases by way of *amicus curiae* briefs. In the case of *In Re Uranium Antitrust Litigation*³³ in the US during the 1970s, *amicus curiae* briefs objecting to the taking of jurisdiction were filed by Australia, Canada and the UK, all home states to corporate defendants.³⁴ The Government of Japan filed similar objections in support of the Japanese defendants in the 1997 *Nippon Paper* case,³⁵ arguing that the application of the Sherman Act to conduct occurring entirely within Japan was not permissible under principles of international law and comity.³⁶ And in the recent “Vitamin Cartel Case,”³⁷ an *amicus curiae* brief was filed by the Chinese government (the first time the Chinese government has intervened in US antitrust proceedings in this way) arguing that the Chinese “trade association” accused of facilitating a cartel was in fact a regulatory body charged with regulating the prices of vitamin C products destined for export.³⁸

Governments have also intervened less formally through “letters” or “statements,” and also by way of press briefings. In 2001, news that the European Commission was planning to block a proposed merger between GE and Honeywell (which had already been cleared by US authorities) provoked an angry response from the US authorities and a letter from US Senator Rockefeller, to the European Commission, warning that the Commission’s stance may have a “chilling effect on transatlantic aerospace and aviation cooperation.”³⁹ And the US DOJ quickly responded to a 2007 decision by the

²⁹ See Roth, n. 17 above, p. 247.

³⁰ 395 US 100 (1969).

³¹ See Muchlinski, n. 18 above, p. 135.

³² For a case study of the UK legislation see Lowe, ‘Blocking Extraterritorial Jurisdiction’, n. 17 above. For a discussion of how the Australian blocking legislation came about, see case study 11 below. For a more general discussion on “blocking legislation” and how it works see pp. 103-104 below.

³³ 473 F. Supp 382 (N.D. Ill. 1979).

³⁴ See further case study 11 below

³⁵ *United States v Nippon Paper Industries Co.* 109 F 3d 1 (1st Cir. 1997). This case concerned allegations of price fixing in Japan that would raise the price of paper products when sold in Canada and the US.

³⁶ Brief of *amicus curiae* of the Government of Japan, *United States v Nippon Paper Industries Co.*, No. 96-2001 (1st Cir., filed Nov. 18, 1996). Note, however, that these arguments were not accepted by the appeals court and the proceedings (previously dismissed by an inferior court) were reinstated.

³⁷ *In Re Vitamin C Antitrust Litigation* 584 F Supp. 2d 546 (2006).

³⁸ In essence, the Chinese government was aiming to show that the defendants were subject to conflicting legal requirements under Chinese and US law, in support of a motion by the defendants to strike out the proceedings on the basis of “international comity,” “act of state” and a “foreign compulsion” defense.

³⁹ ‘Competition Panel Backs Brussels on GE-Honeywell Veto’, *The Independent*, June 26, 2001, copy available at <http://www.independent.co.uk/news/business/news/competition-panel-backs-brussels-on-gehoneywell-veto-675534.html>.

European Court of First Instance to force Microsoft to license certain pieces of technology to competitors with a “statement of comments,” expressing fears that the decision could hamper innovation and ultimately harm consumers.⁴⁰

In summary, legal, political and economic objections are still being raised about the use of extraterritorial jurisdiction in antitrust matters, especially where the only territorial connections between the activity and the regulating state are the economic “effects” within that state and where the litigation poses a direct challenge to the economic policies of other states. But it is no longer just a case of the rest of the world objecting to extraterritorial US jurisdiction. Now that the effects doctrine appears to be gaining acceptance beyond the US⁴¹ the picture is becoming much more mixed. As the examples above make clear, tensions have arisen between Europe and the US, not just because of the way US competition authorities have treated European companies, but also because of the impacts European competition decisions have had on US companies and interests. Differing national approaches to competition will always have the potential to lead to complaints, as will decisions that threaten key national interests, and decisions which appear to have been motivated by extraneous (e.g. protectionist or political) reasons.

3.5 What were the key policy drivers (political, economic etc) underlying the development of current antitrust regimes and what were the policy obstacles? Are there still challenges to the regime along policy lines? If so, from where?

The key policy drivers underlying the extension of antitrust laws beyond national boundaries are: (a) the need to ensure that domestic companies can compete successfully in international markets; and (b) the need to protect citizens and domestic businesses from the consequences of anti-competitive conduct abroad. Obviously, the “globalisation” of international trade and commerce means that, if these objectives are to be achieved, something more than a strictly territorial approach is necessary.

However, the US, historically the most aggressive user of extraterritorial jurisdiction in this context, has encountered a number of policy challenges. The first, mentioned above, is the challenge of reconciling two things: first, respect for the sovereignty of other states and, in particular, each state’s right to determine its own economic policies and priorities free from interference and, second, the US’s own interests in protecting its own internal markets from disruptions and interferences from abroad. As discussed in more detail at para. 3.7 below, the US courts and the US legislature have devised several different formulae for “balancing interests.” However, these tests - which often rely on heavily on judicial discretion and which may be difficult for national courts to apply satisfactorily without the benefit of detailed submissions as to the overseas interests affected⁴² - remain controversial.

In addition to the general concerns of states about the impact of extraterritorial antitrust regulation on their own sovereignty, there are further policy challenges related to the way different states define anti-competition practices. As the IBA Task Force Report puts it, “the legal and economic framework applied by different

⁴⁰ Copy available at http://www.justice.gov/atr/public/press_releases/2007/226070.htm.

⁴¹ See IBA Task Force Report, p. 48. In relation to the EU, see further pp. 110-111 below.

⁴² See further Maier, ‘Interest Balancing’ n. 26 above, at pp. 589-590; and Lowe, ‘The Problems of Extraterritorial Jurisdiction’, n. 17 above at p. 730.

competition authorities to assess whether a company is dominant or has substantial market power may lead to divergent outcomes. For example, the same type of business conduct by the same global company may be regarded as an abuse in one jurisdiction and as legitimate competition on the merits in another.”⁴³ The IBA Task Force notes that unlike cartels and price fixing agreements - which are viewed as pernicious by most states and criminalized by many - there is, in relation to “unilateral conduct,” such as abuse of a dominant position, “marked divergence [between states] as to what the appropriate rules should be and fundamental disagreement over the benefits of enforcement.”⁴⁴

In addition, there are, of course, a number of practical challenges around investigating and enforcing anti-competitive practices taking place outside the regulating state, which are discussed in more detail at para. 3.7 below.

3.6 Who were/are the main stakeholders driving (or opposing) the development of an international antitrust regime? Are particular stakeholders associated with particular viewpoints or arguments?

Problems caused by extraterritoriality in the antitrust field

As noted above, differences in regulatory requirements and policies between states create many difficulties and uncertainties for companies. Merger notification thresholds may differ amongst jurisdictions, creating compliance difficulties. Causes of action and damages awards may vary wildly from country to country, creating a situation that encourages “forum shopping” by plaintiffs. Definitions of what constitutes “anti-competitive conduct” may differ from state to state, meaning that a company may be compliant with its home state’s laws, but possibly violating the laws of another. Companies must then find ways to deal with difficulties arising from conflicting requirements in different jurisdictions, a situation which can come about because of different industrial or regulatory policies or, in some cases because of action taken under “blocking statutes.”⁴⁵

It is not surprising, therefore, that businesses have been vocal in their criticism of the impacts of extraterritorial regulation in the antitrust realm in practice. A 2006 Policy Statement by the International Chamber of Commerce (“ICC”) singles out inconsistent and overlapping merger regulation as a particular area of concern.⁴⁶

An international antitrust regime?

Despite the difficulties created by overlapping and inconsistent national regimes, there does not seem to be any great appetite at present for an international treaty on antitrust law. As noted briefly at para. 3.2 above, some effort had been made to develop an agreement under the WTO framework,⁴⁷ but this work has been abandoned for the time being, largely because of opposition from developing states.

⁴³ IBA Task Force Report, p. 56.

⁴⁴ Ibid.

⁴⁵ See further pp. 103-104 below.

⁴⁶ ICC, Policy Statement ‘Extraterritoriality and Business’ The ICC Task Force on Extraterritoriality, July 13, 2006. Copy available at <http://www.iccwbo.org/uploadedFiles/ICC/policy/trade/Statements/103-33%205%20Final.pdf>.

⁴⁷ See European Commission, ‘Competition Policy in the New Trade Order: Strengthening International Cooperation and Rules: Report of the Group of Experts,’ Brussels 12.07.1995, COM(95) 359 final.

Reasons for this opposition varied, but a number of developing countries expressed concern about the resources that would be needed to implement the proposals. Some could only see benefits to richer, capital-exporting countries; according to some poorer states, the benefits of an international competition law regime to them were less than clear. Some states were concerned about the possible impact on sovereignty, and their freedom to determine their own development priorities. Other states felt that there were more urgent priorities within the world trading system to address.⁴⁸

Even among the more developed states, a harmonised regime is an unlikely prospect at present, given the divergence in national standards and enforcement capabilities. The more sophisticated regimes, such as the US and EU, would be unlikely to support a “lowest common denominator” regime that might curtail their existing powers, and it is unlikely that many other states would have the capabilities, or indeed the inclination, to adopt a more aggressive approach.

There is, however, considerable interest in developing greater “convergence” of standards and enforcement strategies through soft law initiatives. This should be helpful to businesses, especially those whose home states have more sophisticated antitrust regimes, which have complained about the lack of a level playing field in international business transactions.⁴⁹ This should also help address the problem of the vast expense involved in multi-jurisdictional merger reviews, a direct consequence of the many different notification requirements.⁵⁰ This is a key concern of global business, as it can be a huge obstacle to cross-border acquisitions.

Other business concerns, which could potentially be ameliorated by greater convergence and cooperation between states, include: (a) the problem of “double penalties” under parallel proceedings (i.e. where the courts of one state fail to take account of the penalties imposed by another);⁵¹ (b) the ability of some authorities to impose “structural” solutions on corporate groups, which then have far-reaching implications for the whole group, including parts with no connection whatsoever to either the infringement or the regulating state; and, finally, (c) the possible misuse of antitrust law within some jurisdictions for protectionist purposes.

At present, a considerable amount of work is being done within the framework of the ICN to address many of these issues. Although these are “soft law” initiatives, they are becoming increasingly influential. So far, guidance has been produced on merger review practices,⁵² merger analysis,⁵³ and analysis of possible cases of market abuse.⁵⁴

⁴⁸ See further Chee Yoke Heong ‘Rocky Road for WTO at Cancun’ *Asia Times*, August 6, 2003

⁴⁹ A. Lowenfeld, *International Economic Law*, (Oxford University Press, 2008), p. 348.

⁵⁰ J. Rowley and A. Campbell, ‘A Comment on the Estimated Cost of Multi-Jurisdictional Merger Reviews’ (2003) *The Antitrust Source* 1.

⁵¹ See the decision of the European Court of First Instance in the *Graphite Electrodes Cartel Case*, Decision 2002/271/EC, *Graphite Electrodes* OJ 2002 No. L100, 1.

⁵² See <http://www.internationalcompetitionnetwork.org/index.php/en/publication/294>.

⁵³ See http://www.internationalcompetitionnetwork.org/media/library/Cartels/Merger_WG_1.pdf

⁵⁴ See http://www.internationalcompetitionnetwork.org/media/library/unilateral_conduct/Unilateral_WG_1.pdf

3.7 What are the obstacles to states implementing extraterritorial antitrust regimes - for example, the procedural challenges involved in information sharing and joint enforcement activities? What cooperative arrangements are in place (formal and informal) between states? And how are jurisdictional conflicts resolved?

Obstacles to implementation

The primary obstacles for states in implementing extraterritorial antitrust regimes are the difficulties involved, first, in investigating and, second, in enforcing domestic law standards against foreign individuals and companies, including wholly-owned subsidiaries of domestic companies operating abroad. For instance, regulatory authorities cannot use their normal compulsory powers of investigation, such as searching properties and seizing documents, in relation to premises located out of the jurisdiction.⁵⁵ Furthermore, information held by foreign regulatory authorities may be subject to obligations of confidentiality under their own domestic law. There may also be differences between the regulating state and foreign state in terms of when, how, and how much evidence may be obtained. For example, in the context of “pre-trial discovery,” US law offers the parties considerably more latitude than in many other states. This may create further tensions between the states concerned.⁵⁶

On the enforcement side, foreign courts may be called upon to enforce civil judgments imposing damages. However, foreign courts may be reluctant to assist, particularly where the penalty does not exist under their own legal system.⁵⁷ More generally, foreign regulatory authorities may not be inclined to respond to a request for assistance because they disapprove of the requesting state’s approach, such as criminalization of conduct that the foreign state treats as an “administrative” matter.⁵⁸ In addition, requests for extradition from another state for the purposes of a criminal trial may occasionally be refused on the grounds that the normal requirements of “double criminality” are not satisfied.⁵⁹

Cooperative arrangements

International cooperation can play a significant role in helping to resolve these problems. Accordingly, the main users of extraterritorial jurisdiction in the antitrust space, the US and the EU, have entered into a series of bilateral arrangements with

⁵⁵ This problem can sometimes overcome to some extent by addressing extensive document requests to a local subsidiary, which may include requests for information relating to the activities of foreign parents and affiliates, although in practice some companies take steps to limit the documentation held within particular jurisdictions so as to limit disclosure risk. In the EU, these requests are seldom contested, but see *Seamless Steel Tubes Case* (Commission Decision of 8 December 1999, OJ 2003 No. L140/1, 6 June 2003).

⁵⁶ See for instance the litigation against Australian companies in *In Re Uranium Antitrust Litigation* n. 33 above, which led directly to “blocking legislation” by the Australian government. See further D. Senz and H. Charlesworth, ‘Building Blocks: Australia’s Response to Foreign Extraterritorial Litigation’, (2001) 2(1) *Melbourne Journal of International Law* 69. See further case study 11 below.

⁵⁷ See also the response of the Australian government to the threat of “treble damages” claims against Australian companies in *In Re Uranium Antitrust Litigation*, case study 11 below.

⁵⁸ According to the IBA Task Force Report, “the dichotomy between the countries that do and do not provide for criminal enforcement of cartel activities remains. It has led to issues, if not tension, mostly in the sharing of information and, in the case of individuals, issues involving travel restrictions, extradition and possible double jeopardy, and disproportionate punishment.” p. 53.

⁵⁹ *Ibid.*

each other and with other states regarding issues such as notification, consultation, jurisdiction, information-sharing and enforcement. The US began entering into bilateral arrangements on antitrust cooperation in 1976, with an agreement with Germany. Since then, it has signed agreements with Australia (1982), Canada (1984 and 1985) and the European Union (1991),⁶⁰ supplemented by the EU/US “positive comity” agreement in 1998) (see Box 4 below). In 1999, further bilateral agreements were signed with Israel, Japan and Brazil. In addition, the OECD, in a series of recommendations, has laid down what it considers to be “best practice” in this area⁶¹ (see further Box 5 below).

The inability of investigators to obtain access to confidential information from foreign authorities has remained a problem for regulators, although the US has enacted some legislation to help facilitate the exchange of confidential material between national authorities, with some safeguards to ensure that the information remains privileged.⁶² In relation to criminal matters, states may also have the benefit of more general Mutual Legal Assistance Treaties (provided, of course, that antitrust enforcement is not excluded).⁶³

It is also important not to underestimate the level of *informal* assistance and information-sharing given over and above, or outside, the terms of any formal bilateral arrangements.⁶⁴ The IBA Task Force Report notes that recently there has been an “unprecedented increase in multinational cooperation and collaboration with respect to investigations, information-sharing and, most recently, in providing suitable punishments for individuals in the appropriate locale”⁶⁵ as exemplified by the *Marine Hose Case* (see case study 10 below).

⁶⁰ 1991 ‘Agreement Between the Government of the United States and the Commission of the European Communities Regarding the Application of Their Competition Laws’, copy available at http://ec.europa.eu/competition/international/bilateral/us_agreement_1995_en.pdf

⁶¹ See the OECD 1995 Recommendation Concerning Cooperation Between Member Countries on Anticompetitive Practices Affecting International Trade, n. 9 above.

⁶² See the 1994 US International Antitrust Enforcement Assistance Act 48 Pub. L. No. 103-438, 108 Stat. 4597 (1994).

⁶³ On mutual legal assistance treaties generally, see further pp. 130-131 below.

⁶⁴ IBA Task Force Report, p. 54.

⁶⁵ *Ibid.*

Some examples of cooperative arrangements and “best practice”

Box 4: The 1991 EU/US Agreement on Competition Law

Under the 1991 EU/US Agreement, each party must “notify the other whenever its competition authorities become aware that their enforcement activities may affect important interests of the other Party.” Under Article III, officials from the relevant authorities agree to meet at least twice a year to keep each other informed, specifically, to “(a) exchange information on their current enforcement activities and priorities, (b) exchange information on economic sectors of common interest, (c) discuss policy changes which they are considering, and (d) discuss other matters of mutual interest relating to the application of competition law.” And importantly, “[e]ach Party will provide the other Party with any significant information that comes to the attention of its competition authorities about anticompetitive activities that its competition authorities believe is relevant to, or may warrant, enforcement activity by the other Party’s competition authorities.” Where enforcement becomes necessary, the competition authorities agree to give each other assistance “to the extent compatible with the assisting Party’s laws and important interests, and within its reasonably available resources.” And the agreement also provides for the possibility of coordination of enforcement activities “where both Parties have an interest in pursuing enforcement activities with regard to related situations.”

Box 5: The 1995 OECD Recommendation Concerning Cooperation Between Member Countries on Anticompetitive Practices Affecting International Trade

The 1995 OECD Council Recommendation is the culmination of a series of recommendations on competition law cooperation going back some 40 years. Not only does it set out what the OECD considers “best practice,” it has provided the basic framework for many more detailed bilateral arrangements. The OECD Council recommends:

- Early notification to other states of proposed investigations that may affect the important interests of those other states;
- Coordination of proceedings as far as possible (where two or more states are proposing to take action);
- Exchange of information, subject to appropriate safeguards (including confidentiality);
- Proper consultation between Member States on competition cases, taking account of each other’s views;
- That Member States have the ability to request remedial action from other states with regard to anti-competitive practices affecting the Requesting State’s interests (with the possibility of conciliation through the OECD if no agreement can be reached).

Case study 10: The Marine Hose Case

The *Marine Hose Case* concerned allegations of participation in a worldwide cartel that was responsible for fixing prices and allocating markets for the sale of marine hoses used in the oil transportation industry. The investigation was a collaborative effort, involving the US, EU, UK and Japanese authorities. In May 2007, eight executives of the various alleged cartel members were arrested while attending trade fairs in Houston and San Francisco. Three of these were British nationals – the Marine Hose Three. While the UK Office of Fair Trading (OFT) gathered evidence and put together their case, the British defendants negotiated a plea bargain with the US authorities which included the right to be transferred back to the UK to cooperate with the UK regulatory authorities and to serve what remained of their jail sentences under a “split-jurisdiction” deal. Information collected by the US DoJ was made available to the UK authorities.

In June 2008 the three were found guilty of offences under the UK Enterprise Act and given sentences ranging from two and a half to three years imprisonment. Under a novel term in their plea bargaining arrangement, if the Marine Hose Three received prison terms at least as long as their US prison terms, they would not have to return to the US. They were also disqualified in UK proceedings from acting as company directors for periods ranging from three to five years.

In addition, the EU imposed fines under EU law of €31,510,000 on the multinational companies themselves – Bridgestone, Dunlop Oil and Marine/Continental, Trelleborg, Parker ITR and Manuli – for “very serious infringement[s] of EC Treaty Antitrust Rules.” There remains, according to press reports, the possibility of further civil actions for damages under EU law. Prior to the handing down of the European Commission fines, the Japanese authorities had already taken enforcement action against several companies and individuals associated with the same cartel, securing remedies which included board resolutions regarding action taken in relation to the cartel activity, and in the case of one Japanese company, a fine.

Dealing with jurisdictional conflicts

As the above discussion highlights, jurisdictional overlaps are commonplace in the antitrust field. An international cartel, for instance, may involve parties from several different jurisdictions, and create effects in many more. Several jurisdictions may have an interest in breaking up the cartel and punishing those behind it and, where nationality jurisdiction does not exist, they may invoke the effects doctrine in an attempt to do so.

In addition to the cooperative arrangements discussed above, two methods of dealing with jurisdictional conflicts have been developed specifically in response to problems in the antitrust field – one quite confrontational, and one more conciliatory.

(a) “Blocking legislation

During the 1970s and 1980s a number of states introduced “blocking legislation” in an attempt to counter the effects of extraterritorial regulation from other states

(including in the antitrust field) in their own jurisdictions. The main aim of “blocking legislation” is to make it more difficult for foreign regulatory authorities to investigate and enforce their own laws against nationals of the “blocking” state. For instance, the UK Protection of Trading Interests Act, which was enacted in 1980, authorised the Secretary of State for Trade and Industry to direct UK nationals to refuse to comply with extraterritorial laws of other countries that could damage British trading interests. It also restricted the ability of foreign authorities to investigate and enforce foreign judgements, and provided a mechanism by which UK parties could “claw back” punitive elements of foreign damages awards. Australia’s use of “blocking legislation” dates back to 1976 and was enacted in direct response to a huge antitrust claim against 29 uranium producers, including four Australian companies, launched by Westinghouse in 1976 (see further case study 11 below).

Case study 11: Westinghouse and the Australian uranium producers: In Re Uranium Antitrust Litigation (1976-1981)

In 1976, Westinghouse Electric Corporation (“Westinghouse”) filed an antitrust lawsuit in the US against 29 US and foreign uranium producers claiming that they were participants in an illegal cartel. It argued that the cartel’s activities caused the uranium price to sharply rise, so that Westinghouse was unable to fulfil its fixed price supply contracts to US nuclear power plants. The lawsuit claimed “treble damages” under US law, amounting to over US\$7 billion. The US DOJ also began a criminal investigation into the cartel, and served discovery orders on both US and foreign corporations. Letters of request (“letters rogatory”) were also sent to foreign courts, requesting their assistance with the collection of evidence.

Twelve of the foreign defendant companies refused to appear in court. Many of the companies banned their individual corporate officers from travelling to the US for fear of invoking US “personal” jurisdiction. In a diplomatic note to the US State Department, the Australian government asserted that the litigation conflicted directly with Australia’s own policies for marketing and sale of uranium, and that not only had the Australian government approved of some of the targeted arrangements, it had encouraged them. The Australian government also objected to the size of the damages claim, which it argued could seriously affect the local economy, and of the US’s broad exercise of jurisdiction. The Australian government filed amicus curiae briefs in the US proceedings objecting to the litigation. It also enacted two pieces of legislation – the Foreign Proceedings (Prevention of Certain Evidence) Act 1976 and, in response to default judgments and injunctions awarded against Australian companies, the Foreign Antitrust Judgment (Restriction of Enforcement) Act 1979, which empowered the Attorney General to declare that certain foreign antitrust judgments would not be enforceable in Australia. Soon after, the Australian Attorney General declared that the US Westinghouse default judgments and injunctions would not be recognised in Australia.

Eventually settlement negotiations commenced, involving both the commercial parties concerned and Australian government officials. A settlement with the Australian companies was reached in 1981. One condition was that it would need to be approved by the Australian government. This approval was given in March 1981. In 1982, Australia and the US entered into a new inter-governmental agreement, the “Antitrust Cooperation Agreement.” Following this agreement, the two pieces of

Australian “blocking” legislation were repealed and replaced with the Foreign Proceedings (Excess of Jurisdiction) Act 1984. This Act empowers the Australian Federal Attorney General to make orders prohibiting compliance with foreign judgements, or giving evidence, or producing documents for use in foreign proceedings if such an order would be “desirable for the protection of the national interest” or if the Attorney General takes the view that the assumption of jurisdiction, or the manner of exercise of the extraterritorial jurisdiction is contrary to international law “or is inconsistent with international comity or international practice.”

(b) Judicial “interests balancing” tests

A more conciliatory way of resolving jurisdictional conflicts in the antitrust field is through the exercise of judicial restraint where it appears that the interests of other states may be affected by the exercise of extraterritorial jurisdiction. In the *Timberlane*⁶⁶ and *Mannington Mills*⁶⁷ cases the US courts put forward their own versions of “interests balancing” tests to help them decide when an exercise of jurisdiction would and would not be appropriate. In *Timberlane*, the court held that there must be some effect on US economic interests, and the injury to, or links with, the US must be sufficiently strong *vis-à-vis the interests of foreign states* to justify an assertion of jurisdiction in those circumstances. In *Mannington Mills*, the court held that, in addition to the size of the injury to the US, the US courts ought also to take account of factors such as the effect on foreign relations, and the possibility of conflicts in legal requirements, and how the US would view the assertion of jurisdiction were the positions reversed.⁶⁸ However, there are many problems with the “interests balancing” approach in practice. In theory, where the US interests were outweighed by the interests of other states, the US court would defer to the interests of the foreign state. However in reality, US appellate courts almost never decline jurisdiction on this basis and according to some experts foreign state interests typically receive only the most “perfunctory consideration.”⁶⁹

Moreover, different US courts have had varying ideas as to what a “jurisdictional conflict” actually is. In the case of *Hartford Insurance*⁷⁰ for example, the US Supreme Court thought that the application of the Sherman Act to the behavior of London reinsurers in London would not be “unreasonable” because it would be possible for the UK parties to comply with both US and UK law – in other words, because the behavior was only *permitted* in the UK, yet *prohibited* in the US, a true conflict would not exist.

Although there are doubts about its use in practice, “interests balancing” still appears in the terms of cooperative agreements between states, both inside and outside the courts. Article IV of the 1991 EU/US agreement (see Box 4 above), sets out the “interest balancing” regime which will apply between the EU and the US to help overcome problems of “conflicts over enforcement activities.” First of all, the parties make an overarching commitment “[w]ithin the framework of its own laws and to the

⁶⁶ See n. 25 above.

⁶⁷ See n. 25 above,

⁶⁸ For a similar, though more detailed, version of an “interests balancing” test see American Law Institute, ‘Restatement of the Law, Third, Foreign Relations’, 1987, § 403.

⁶⁹ See Senz and Charlesworth, n. 56 above. See also Lowe, ‘The Problems of Extraterritorial Jurisdiction’, n. 17 above.

⁷⁰ See n. 16 above.).

extent compatible with its important interests ... [to]... seek, at all stages in its enforcement activities, to take into account the important interests of the other Party.”⁷¹ These interests must be taken account in deciding whether to initiate an investigation, the scope of the investigation and the kinds of penalties sought.⁷² Article VI(3) goes on to provide that where there is potential for the interests of the other party to be affected, the party seeking to enforce its antitrust laws must take the following into account in seeking “an appropriate accommodation of the competing interests:

- (a) the relative significance to the anticompetitive activities involved of conduct within the enforcing Party’s territory as compared with conduct within the other Party’s territory;
- (b) the presence or absence of a purpose on the part of those engaged in the anticompetitive activities to affect consumers, suppliers or competitors within the enforcing Party’s territory;
- (c) the relative significance of the effects of the anticompetitive activities on the enforcing Party’s interests as compared with the effects on the other Party’s interests;
- (d) the existence or absence of reasonable expectations that would be furthered or defeated by the enforcement activities;
- (e) the degree of conflict or consistency between the enforcement activities and the other Party’s laws or articulated economic policies; and
- (f) the extent to which enforcement activities of the other Party with respect to the same persons, including judgments or undertakings resulting from such activities, may be affected.”⁷³

3.8 What considerations are taken into account by regulatory authorities in deciding whether or not to commence enforcement action in relation to extraterritorial activities? For instance, how serious or systemic must the offences be? And how great the connection with the regulating state?

It is to be expected that, as a general rule, competition authorities will tend to target the practices that they view as having the potential to do the most damage to local markets. The UK’s OFT targets “behavior that poses the greatest threat to consumer welfare, such as mass-marketed scams and cartel activity.” However, it continues: “[i]n all our enforcement work, we are committed to acting proportionately to achieve effective outcomes. For example, we can accept undertakings in lieu of legal action, and may offer leniency to companies that cooperate with cartel investigations.”⁷⁴

Cartel activity is taken extremely seriously, and is punishable in some countries with criminal sanctions, including the possibility of imprisonment and substantial fines.⁷⁵ But the statutory prohibitions relating to cartels tend to be drawn very widely, which raises the question of the legal treatment to be given to arrangements that only have a very trivial effect on markets. The European Commission’s ‘Notice on Agreements of

⁷¹ Article VI (preamble)

⁷² Ibid.

⁷³ See n. 60 above, Article VI(3).

⁷⁴ See http://www.offt.gov.uk/oft_at_work/enforcement_regulation.

⁷⁵ See further para. 3.10 below.

Minor Importance’⁷⁶ sets out the tests that the Commission will apply to determine which agreements will not appreciably affect competition and will not therefore be pursued under Article 101. The tests are framed by reference to the market shares of the parties involved, individually (in relation to non-competing undertakings) and in aggregate (in relation to competing undertakings).⁷⁷

In addition, many countries operate “leniency” programmes for whistleblowers and those prepared to cooperate with the relevant authorities. For instance, in the *Marine Hose Case* (see case study 10 above) a sixth company, Yokohama, escaped the fine imposed on others by the European Commission, because it had “revealed the existence of the cartel to the Commission.”⁷⁸ In the UK, too “[i]f you are part of a cartel and want to end your involvement, your business may benefit from the OFT’s leniency programme and you may benefit from a no-action letter.”⁷⁹ The OFT offers total immunity to the first person or company to come forward with information, and reductions in penalty for others, provided certain criteria are satisfied. In international cases, though, there is obviously a need for cooperation in relation to leniency programmes too or “a corporation could receive immunity in one jurisdiction but find itself ‘third-in’ in another, subject to minimal protections and maximum carve-outs, or discover that seeking leniency in one jurisdiction has subjected it to joint and several liability in another jurisdiction that does not offer a leniency programme.”⁸⁰

In relation to cases involving activities taking place outside territorial boundaries, there are two additional and significant issues for regulatory authorities. First, whether there is sufficient evidence available to proceed, and specifically what kind of assistance will be required from other states, for example under Mutual Legal Assistance Treaties and bilateral antitrust cooperation agreements, or other informal avenues. Second, as highlighted above, the authorities should exercise their powers in a manner that is consistent with principles of “comity” and the “reasonableness.” As discussed at the outset of this report, all states are subject to international law obligations not to assert extraterritorial jurisdiction “unreasonably” (i.e. in such a way that constitutes an unreasonable encroachment on the sovereignty of other states). “Reasonableness” may also be a requirement under domestic law,⁸¹ as well as under any applicable bilateral cooperative arrangements. Under the EU/US cooperation arrangements, this includes consideration of the relative strength of the connections between the illegal conduct and the US on the one hand and the EU on the other.⁸² Relevant to this consideration will be the basis of jurisdiction chosen in the first place,

⁷⁶ OJ No. 2001 C368/13, 22 December 2001.

⁷⁷ The term “undertaking” derives from Article 101 of the EC Treaty, which prohibits agreements between undertakings that have as their object or effect the prevention, restriction or distortion of competition within the common market. “Undertakings” are defined very widely for the purposes of EU law. The term is taken to refer to any entity carrying on economic activities, or any “business concern” however constituted.

⁷⁸ See European Commission Press Release, ‘Antitrust: Commission fines marine hose producers €131 million for market-sharing and price fixing cartel’, January 28, 2009, copy available at <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/09/137&guiLanguage=en>.

⁷⁹ See the Office of Fair Trading web-site ‘Confess your Cartel to the OFT’ http://www.offt.gov.uk/advice_and_resources/resource_base/cartels/confess.

⁸⁰ IBA Task Force Report, p. 55.

⁸¹ For example, in the form of a statutory constraints on authority, or as part of “interest balancing” approaches developed by courts. See pp. 105-106 above.

⁸² See discussion at para. 3.7 above.

which in many cases will provide a snapshot of the different ties that exist between the conduct and the various interested states.

3.9 Are domestic antitrust regimes based on: penalties, incentives, civil action, or transparency requirements? Or a combination of these?

Domestic antitrust regimes make use of a range of penalties and enforcement methods, including criminalisation, civil remedies under private enforcement action, and also transparency requirements.

A few states have criminalized cartel activity.⁸³ The US DoJ has vigorously prosecuted international cartels under the Sherman Act and has, over the years, recovered vast amounts in fines. Criminal liability under the Sherman Act carries the possibility of imprisonment for individuals and heavy fines for individuals and companies.

On the other hand, the liability of companies under competition law in the UK⁸⁴ is “administrative” rather than criminal, although members of a cartel can still be fined up to 10 per cent of their annual turnover, so the financial penalties can still be very high. However, individuals who are dishonestly involved in cartel activities may be subject to criminal prosecution, with the possibility of prison terms of up to five years, an unlimited fine, and disqualification from being able to act as a company director.⁸⁵

Whatever the provision for criminal liability, in most states the lion’s share of enforcement is done by way of administrative enforcement (i.e. non-criminal fines and enforcement orders). In the merger control area, structural and behavioral remedies play a vital regulatory role, with merger clearance only rarely taking the form of a binary “block/clear” decision.

In addition, it is possible in many jurisdictions to bring a private law claim for losses incurred as a result of anti-competitive practices. Under English law, for instance, competition law infringements are also treated as “torts” (i.e. breach of a statutory duty) for the purposes of a civil claim. Private law actions are also a possibility under the laws of each of the EU member states, some based directly on the EC Treaty provisions - in jurisdictions where rights under treaties are directly applicable - and some as a result of domestic implementation. However, the procedural and evidential requirements vary considerably, giving rise to a certain amount of “forum shopping”⁸⁶. Civil actions to enforce antitrust laws are also, and famously, permitted under US antitrust statutes, with the possibility of jury trials and “treble damages.”

Other regulatory methods include “transparency” requirements” for example under merger control law requiring advance notification to the authorities of a proposed

⁸³ E.g. US, UK, Canada, Australia and Japan. See IBA Task Force report, pp. 52-3.

⁸⁴ See Chapter 1 of the UK Competition Act 1998, which implements Article 101 (formerly Article 81) of the EC Treaty.

⁸⁵ See UK Enterprise Act 2002, sections 188-190. See also Company Directors Disqualification Act 1986, as amended by the Enterprise Act 2002, section 2004. The maximum period of disqualification is fifteen years. See the *Marine Hose* case, case study 10 above.

⁸⁶ See IBA Task Force Report, p. 69.

transaction with competition law implications. Incentives also play a vital part in antitrust enforcement, in the form of leniency programmes.⁸⁷

3.10 If the regulation is done pursuant to an international regime, does the regime primarily rely on administrative, civil or criminal remedial mechanisms – and at the international, regional or national level? Are non-judicial mechanisms relevant? To what extent are states able to choose enforcement methods? What are the consequences for states of non-compliance?

[omitted]

3.11 Are the targets of the regulation corporations, individuals or both?

Domestic antitrust law targets both companies and individuals. Under the UK Competition Act 1998, for instance, companies found in breach of the statutory prohibition on cartels may be subject to a substantial “administrative” fine. However, section 188 of the Enterprise 2002 adds considerably to the overall deterrence package by creating a new criminal offence (aimed at employees and directors of companies) of “dishonestly agree[ing] with one or more other persons to make or implement, or to cause to be made or implemented [certain] arrangements ... relating to at least two undertakings.” The arrangements referred to in this section include price fixing, limiting supply, limiting production, bid rigging, and dividing up markets.

Section 1 of the US Sherman Act, declares any “contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations” to be illegal. The provision goes on to say that “[e]very person who shall make any contract or engage in any [illegal] combination or conspiracy” is guilty of a felony. This applies to both individuals and corporations.

3.12 & 3.13 Where a regime (unilateral or multinational) applies to corporations, how do states regulate corporate entities abroad?

Direct assertions of jurisdiction

As discussed above, the US has, on a number of occasions, asserted antitrust jurisdiction over foreign companies *directly* on the basis of the “effects” doctrine, provided the foreign activity has a “direct, substantial and reasonably foreseeable effect” on trade or commerce within the US.⁸⁸ However, “personal jurisdiction” must still exist over the foreign party which, as discussed in other sections of this report⁸⁹ is subject to the “due process” limitations that there be “minimum contacts” between the foreign party and the relevant US jurisdiction and that the taking of jurisdiction is consistent with notions of “fair play” and “substantial justice.” A wide interpretation has been given to what will constitute “minimum contacts” in the antitrust field. “Minimum contacts” can be found to exist where a foreign party has been transacting

⁸⁷ See p. 107 above.

⁸⁸ But see the decision of the Supreme Court in *F. Hoffman-LaRoche, Ltd. v Empagran S.A.* (03-724) 542 US 155 (2004) in which the court held that, as a result of the Foreign Trade Antitrust Improvements Act of 1982, the Sherman Act would not apply to foreign (i.e. non-US) effects of foreign price fixing that was independent of any US effects.

⁸⁹ See chapters 4 and 5 below.

business in the US, including through an agent or “alter ego.” But the US courts have also held that “minimum contacts” may also exist in relation to conduct that is deliberately aimed at the US and which might be expected to have a direct impact on competition, even where the company has not actually been transacting in the US.⁹⁰

It is interesting to compare this to the approach of the European Commission in a series of cases involving the application of the competition provisions of the EC Treaty to foreign companies. The *Dyestuffs* case arose out of the discovery of a cartel among producers of aniline dyes. The Commission found that ICI (based in the UK, which was not a member of the EEC at that time) had engaged in conduct contrary to Article 101 (then Article 85) of the EC Treaty by virtue of instructions it had given to its Belgian subsidiary, and imposed a fine of 50,000 units on ICI. ICI appealed, arguing, among other things, that the Commission did not have the power to impose EC competition rules on companies outside the EEC. The ECJ held that the Commission *did* have jurisdiction, though not on the basis of the “effects doctrine.” Instead, the ECJ applied a “single entity theory” to explain the liability of ICI, finding that ICI had been acting within the EEC *through* its Belgian subsidiary.⁹¹ On this basis, it was held, the Commission would have jurisdiction over the foreign company.

The issue of jurisdiction over foreign companies came up again in the *Woodpulp* case.⁹² In this case, which concerned allegations of price fixing in the wood pulp industry, the Commission held that forty-three entities (forty-one companies and two trade associations, all of which were based outside the EC) had engaged in concerned practices contrary to the EC Treaty and imposed fines on thirty-six of them. Many appealed, including on jurisdictional grounds. Again, the ECJ again held that the Commission *did* have the power to investigate and levy fines on the foreign parties, but this time on the basis that the agreements (made outside the EU) were implemented *within* the EU. As the court put it:

“the infringement of Article [101] ... consists of conduct made up of two elements, the formation of the decision, agreement or concerted practice and the implementation thereof. If the applicability of the provisions ... were made to depend on the place where the decision, agreement or concerted practice was formed, the result would obviously be to give undertakings an easy means of evading these provisions. The decisive factor is therefore the place where it is implemented. ... the producers in this case implemented their pricing agreement within the Common Market.”⁹³

⁹⁰ See *Consolidated Goldfields plc v Anglo American Corp of South Africa* 698 F Supp. 487, 496 (SDNY 1988).

⁹¹ Case 48/69 *ICI v Commission (Dyestuffs)* [1972] ECR 619; [1972] CMLR 557.

⁹² Case 89, 104, 114, 116, 117, and 125-9/85, *Ahlstrom Oy v Commission* [1988] ECR 5193, [1988] CMLR 901.

⁹³ *Ibid*, at paras 16 and 17.

The court then went on to add that:

“[i]t is immaterial in that respect whether or not they had recourse to subsidiaries, agents, sub-agents, or branches within the Community in order to make their contacts with purchasers within the Community.”⁹⁴

Up until the late 1990s, although the Commission felt justified in asserting jurisdiction over foreign companies on the basis of the “effects doctrine,” the ECJ preferred to base jurisdiction on the idea that these foreign companies might “act through” entities within the EU with whom they had ties (*Dyestuffs*) or “implement” their anti-competitive agreements within the EU in other ways (*Woodpulp*). More recent EU case-law, however suggests a more straightforward acceptance of the effects doctrine as a basis for extraterritorial jurisdiction.⁹⁵ This obviously shifts the focus away from any parental control that might have existed between foreign and EU-based entities, as well as where anti-competitive conduct was designed and formally implemented, and focuses instead on the “effects” within the EU of mergers and anti-competitive practices, wherever they take place.

Use of corporate “control” links to obtain information from foreign entities in antitrust cases

The decisions in *Dyestuffs*, and to a lesser extent *Woodpulp*, are notable because they tend to de-emphasise the legal separation that exists between different members of corporate groups and treat parents as “acting through” or “implementing their policies through” their foreign subsidiaries and contractors. Another area antitrust regulation in which this occurs is in relation to discovery orders against corporate groups. The practice, developed within the EU, of obtaining information about the activities of non-EU parents through information requests served on EU subsidiaries has already been noted above.⁹⁶ Similarly, foreign subsidiaries of US companies have been required to produce materials through discovery orders imposed by US courts on their US parent companies. This was the situation in *In Re Uranium Antitrust Litigation*,⁹⁷ where the courts appeared to treat information held by a foreign subsidiary to be sufficiently within the local parent company’s “control” for it to be covered by civil procedure “discovery” rules. Under US case-law the requirement for “control” has been satisfied where a corporation has the power “either directly or indirectly, through another corporation or series of corporations to elect the majority of the directors of another corporation.”⁹⁸ There have also been cases where information in relation to a non-US parent company has been demanded from a US subsidiary on the basis of an “upstream” control relationship.⁹⁹

⁹⁴ Ibid, at para. 17.

⁹⁵ See the decision of the European Court of First Instance in the *Gencor/Lonrho* case. See *Gencor Ltd v Commission*, Case T-102/96 [1999] ECR-11-753.

⁹⁶ See n. 55 above.

⁹⁷ *In Re Uranium Antitrust Litigation* 480 F. Supp 1138, 1144-45 (N.D. Ill. 1979). See case study 11 above.

⁹⁸ See *In Re Investigation of World Arrangements* 13 FRD 260, 285 (DDC1952).

⁹⁹ See *In Re Electric & Music Industries* 155 F. Supp 892, 895 (SDNY 1957), *appeal dismissed*, 249 F 2d 308 (2d Cir. 1957). In that case, although the subsidiary did not “control” the parent as such, the court upheld the discovery order on the basis that the UK parent and the US subsidiary were “reciprocating partners,” involved in a common enterprise. See further G. Born, *International Civil Litigation in the United States Courts*, 3rd edition (The Hague: Kluwer, 1996), p. 859

3.14 Conclusions: lessons for the B&HR Sphere

There are clear differences between extraterritorial regulation in the antitrust field and some of the other regulatory areas discussed in this report. For instance, whereas extraterritorial anti-bribery regimes are aimed at stamping out undesirable and unfair practices wherever they occur,¹⁰⁰ antitrust regimes are interested in extraterritorial behavior to the extent that it produces anti-competitive effects *within* the territorial boundaries of the regulating state. In other words, whereas extraterritorial anti-bribery regulation tends to be outward-looking in terms of its aims and objectives, domestic antitrust regimes are predominantly inward-looking.

The doctrine on which extraterritorial antitrust cases are sometimes based – the “effects doctrine” – seems to be growing in acceptance. There now seems a fair amount of consensus that it does indeed justify claims of jurisdiction over foreign companies and individuals in certain circumstances, though there is great variation in the extent to which states are actually prepared to use it, and states continue, from time to time, to object to its use. It is important to note, however, that so far it has only been invoked in relation to “economic effects” produced in a country from abroad, not other (e.g. human rights) effects.

Nevertheless, this study of antitrust does yield some useful lessons in relation to extraterritorial regulation more generally.

Lesson 1: States are more likely to cooperate (and less like to object to direct assertions of extraterritorial jurisdiction) in relation to conduct that they can agree is pernicious or immoral. Recent years have seen a significant increase in international cooperation in relation to the prosecution of illegal cartels in particular (see, for example, the *Marine Hose Case*, case study 10 above). However, states continue to diverge in their approaches to merger control and “unilateral conduct” (i.e. restrictive business practices by a single enterprise) which can cause tension when conflicting standards are enforced.¹⁰¹

Lesson 2: But assertions of extraterritorial jurisdiction by another state that have the potential to impact a state’s key industries, or undermine its industrial, economic or national security policies have been vigorously opposed. The tensions that can arise in relation to the exercise of direct extraterritorial jurisdiction in the antitrust field, and particularly enforcement jurisdiction, are dramatised very well by the international responses to the US litigation in historical cases such as *In Re Uranium Antitrust Litigation*,¹⁰² and more recently, the reaction by the UK government to the litigation against London reinsurers in *Hartford Insurance*¹⁰³ and by the Japanese government in *Nippon Paper*.¹⁰⁴ As noted above, international tensions over extraterritorial jurisdiction in this field appear to be receding, as a result of a gradually building consensus over antitrust policy and enforcement. However, as cases such as GE/Honeywell and Microsoft show,¹⁰⁵ states still take a keen interest in

¹⁰⁰ See chapter 1 above.

¹⁰¹ See discussion in relation to *GE/Honeywell* and *Microsoft* at pp. 96-97 above.

¹⁰² See case study 11 above.

¹⁰³ See n. 16 above.

¹⁰⁴ See p. 96 above.

¹⁰⁵ See pp. 96-97 above.

foreign rulings that may threaten or disadvantage their key industries or “national champions.”

Lesson 3: International rules on extraterritorial jurisdiction are not static. There now seems to be broad consensus that states may, in some circumstances, assert direct extraterritorial jurisdiction in relation to foreign private transactions and activities with the potential to cause serious economic effects within the regulating states’ territory. However, the effects doctrine is not unlimited. Some account must be taken of the interests of other states in deciding when and how it is applied. This now seems to be acknowledged by most, if not all, states - including, of course, the US, which historically has been the main proponent and user of the doctrine. Under US legislation, the effects on the US must have been “direct, substantial and reasonably foreseeable” for the US authorities to be able to act in relation to foreign companies and individuals. US courts have also developed “interest balancing” tests to help them determine when an exercise of extraterritorial jurisdiction in this area is “reasonable.” Bilateral and multilateral agreements too highlight the importance of interest balancing and working towards, rather than against, comity.

Lesson 4: In order to avoid disputes, it would be beneficial if states could ensure that mechanisms and resources are in place to ensure that decision-makers do indeed take proper account of the legitimate interests of other states when deciding whether or not an exercise of jurisdiction is “reasonable.” Past experience with “interest balancing” tests raises legitimate questions as to whether national courts and law enforcement authorities are adequately equipped or sufficiently independent to take proper account of the interests of other states. Other problems with judicial “interest balancing” are that it lacks legal certainty and tends to take place after the event. For the purposes of future extraterritorial regimes, it would be worth bearing the problem of “parochialism” of national courts and law enforcement authorities in mind, and considering whether some more independent and objective mechanism for reconciling competing state interests might be found.

Lesson 5: Extraterritorial regulation that creates inconsistencies in standards and enforcement approaches can not only make it difficult for individuals and companies to comply and increase compliance costs, but can lead to significant tensions amongst states. States should consider whether extraterritorial regimes will expose companies (and groups of companies) to standards that conflict or overlap unnecessarily with those of other states, or bilateral/multilateral regimes. This can create tensions between states, and compliance difficulties for companies that can be enormously costly to address. This is a particular problem in relation to highly prescriptive requirements, such as notification thresholds under merger review laws. Clearly, some level of prescription is necessary for regimes to work effectively, but there can also be great benefit in working towards harmonization wherever possible.

Lesson 6: Treaty proposals (e.g. to harmonise policies and standards, or to create joint enforcement mechanisms) may not be widely supported if they do not take account of resource constraints of some countries, particularly developing countries, and if states are unclear as to the potential benefits to them. This is demonstrated by the decision to abandon the WTO work programme on trade and

competition law at Cancun.¹⁰⁶ Proposals that are viewed by developing states as merely an attempt by richer nations to access new markets, and which threaten to undermine their own development policies and plans are likely to be resisted.

Lesson 7: Whereas treaties can be difficult to negotiate, soft law initiatives can play a crucial role in developing a convergence of approach, if not harmonisation.

Where the practice and approaches of states vary greatly, an international treaty (e.g. to harmonise standards, or build a common enforcement approach) may be unrealistic. However, as an interim step, “soft law” initiatives can be an important way of building understanding and cooperation. This is evident from the increasing influence of organisations like the ICN, which has lately been very active in developing soft law standards on issues such as merger review practices and merger analysis. The OECD, too, has played a key role in developing understanding of “best practice” through non-binding “recommendations.”

Lesson 8: Regional initiatives can also play a crucial role in developing standards, building convergence of approach and bringing about greater international acceptance of the need for extraterritorial regulation.

The work of the European Commission has been significant in developing greater international understanding and appreciation of the role of competition law in economic development and the need for strong enforcement, which includes the exercise of direct extraterritorial jurisdiction in some instances.

Lesson 9: Extraterritorial regimes are unlikely to achieve their full potential without international cooperation.

Without international cooperation there are serious limits to what a state can achieve in relation to extraterritorial corporate activity. While a state may enact extraterritorial laws, it is unlikely to be able to investigate breaches, bring a prosecution or enforce a judgement without assistance from authorities in other states. In the antitrust field, observers have noticed increasing levels of cooperation in relation to the investigation and prosecution of illegal cartels in particular. This cooperation has taken the form of joint investigations, sharing of information and sharing of penalties.

¹⁰⁶ See p. 93 above.

Chapter 4: Extraterritorial jurisdiction in criminal matters generally

4.1 What kinds of crimes do states try to regulate extraterritorially? In what way can the regulation be regarded as “extraterritorial.” For instance, does the regulation involve direct assertions of extraterritorial jurisdiction over foreign parties or activities? Or does it merely have extraterritorial impact?

Direct extraterritorial jurisdiction

Criminal jurisdiction is primarily “territorial,” meaning that it usually applies only to conduct occurring within the territorial boundaries of the regulating state. Nevertheless, many, if not most, states apply their criminal law to overseas activities or behavior to some extent. Traditionally, the extent to which states have been prepared to do so has depended on their own legal traditions, as well as requirements and restrictions under international law. For instance, the enforcement of foreign crimes based on the nationality of the offender has historically been more prevalent in civil law states than common law ones. But even the UK, traditionally very cautious about enforcing its own laws extraterritorially, has long exercised jurisdiction over a limited number of offences committed in other countries, such as murder, treason and bigamy. More recently, this list has expanded greatly to include many new offences, including conspiring to commit criminal acts abroad,¹ sexual offences against children,² and foreign acts of terrorism.³ In addition, many states have extended their criminal laws to cover very serious human rights violations in other countries, such as war crimes, genocide and crimes against humanity.⁴

States approach extraterritorial regulation in the criminal law sphere in a variety of different ways. In cases of serious criminal offences against other people (such as murder, war crimes, terrorism and sexual offences against children) it is not unusual for states to assert extraterritorial jurisdiction directly. This is usually based on the nationality of the offender, but may also be based, in cases of serious human rights violations, on the universality principle as well.⁵ However, assertions of jurisdiction based on universality alone (i.e. where there are no other connections between the crime and the regulating state), are extremely controversial (see further discussion at para. 4.3 below).

Domestic measures aimed at foreign or cross-border harms

States have also introduced criminal offences in relation to acts committed within the territory that have the potential to cause harm in other states. Examples of this include laws criminalizing the use of the internet to incite terrorist acts abroad.⁶ Another

¹ See the UK Criminal Justice (Terrorism and Conspiracy) Act 1998, section 5.

² See the UK Sexual Offences Act 2003, s. 72. See further Box 6 below.

³ See the UK Terrorism Act 2000, s. 62 and 63; Terrorism Act 2006, s. 17; Crime (International Co-operation) Act 2003.

⁴ IBA Task Force Report, pp. 157-161. See also A. Ramasastry and R. Thompson, ‘Commerce, Crime and Conflict: Legal Remedies for Private Sector Liability for Grave Breaches of International Law: A Survey of Sixteen Countries’, FAFO, 2006. Copy available from <http://www.fafo.no/pub/rapp/536/index.htm>.

⁵ See p. 20 above.

⁶ See EU Council Framework Decision 2008/919/JHA of 28 November 2008 amending Framework Decision 2002/475/JHA on combating terrorism, OJ 2008 No. L330/21, 9 December 2008, copy available at

example is the offence under UK law of “conspiracy to commit a criminal act abroad.”⁷ Under this UK law, a person can be prosecuted for being party to a conspiracy hatched in the UK, to commit a crime in another country.⁸ In the field of bribery and corruption, the OECD Convention (discussed in more detail in chapter 1 above) requires states to make greater use of “conspiracy-type” offences to control foreign acts of bribery. Article 1(2) of this Convention provides that “[e]ach Party shall take any measures necessary to establish that complicity in, including incitement, aiding and abetting, or authorisation of an act of bribery of a foreign public official shall be a criminal offence.”

It is not uncommon, too, for legislatures to strengthen regimes that rely on direct assertions of extraterritorial criminal jurisdiction, such as laws relating to “sex tourism,” with additional domestic measures with extraterritorial implications. The US 2003 “PROTECT” Act, for example, created a new offence under US law of “travelling with intent to engage in illicit sexual conduct.” But it also created a new offence, aimed at tour operators, of “arranging, inducing or facilitating” the travel of a person, while knowing that the person was intending to commit criminal acts once they got to their destination.⁹

Other domestic measures aimed at combating foreign crime

Obviously state authorities cannot prevent criminal activity in other jurisdictions altogether. But they can help make extraterritorial criminal activity more difficult by introducing measures to help detect, and control the use of, proceeds of crime. Money laundering legislation, while it may not involve direct assertions of extraterritorial jurisdiction as such, can still have extraterritorial impact where the legislation does not distinguish between local and foreign predicate offences. Under EU law, money-laundering offences may be committed regardless of where the underlying, or “predicate,” criminal conduct took place, and regardless of whether the conduct was criminal in the country where it occurred.¹⁰

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:330:0021:0023:EN:PDF>. See also UK Terrorism Act 2002, section 59. For a comparison of UK and US laws see further E. Renieris, ‘Combating Incitement to Terrorism on the Internet: Comparative Approaches in the United States and the United Kingdom and the Need for an International Solution’ (2009) 11 *Vanderbilt Journal of Entertainment and Technology Law* 673.

⁷ See UK Criminal Justice (Terrorism and Conspiracy) Act 1998, section 5.

⁸ Note that the crime itself must be treated as a crime in both countries (i.e. “double criminality”), but the UK does not need to have criminal jurisdiction over the *foreign crime itself* to be able to punish the *conspiracy*.

⁹ See the US Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act 2003 PUBLIC LAW 108–21—APR. 30, 2003

¹⁰ EU Council Directive 91/308/EEC of 10 June 1991 on prevention of the use of the financial system for the purpose of money laundering, OJ 1991 No. L166/77, 28 June 1991, Article 1.

“Parent-based” measures

Finally, legislatures can seek to control extraterritorial criminal behavior indirectly. This can be done by placing statutory obligations on local companies, and theoretically individuals too, to use the influence they have to ensure that foreign private actors operating in other jurisdictions adhere to certain prescribed standards of behavior. In the field of money laundering, the “customer due diligence” requirements mentioned below, which must be extended to foreign subsidiaries and branches of EU financial institutions, is a good example of this kind of “parent-based” regulation in action.¹¹

4.2 Has the regulation been adopted unilaterally by states? Or in order to implement an international regime? Or both, and if so, which came first? To what extent do international regimes require the use of extraterritorial jurisdiction by states?

Unilateral use of extraterritorial criminal jurisdiction

Historically, assertions of extraterritorial criminal jurisdiction have been largely unilateral. As discussed at para. 4.3 below, these assertions of jurisdiction have been subject to rules of customary international law, designed to ensure that assertions of extraterritorial jurisdiction by states do not encroach too greatly on the sovereignty of other states. Sometimes unilateral assertions of extraterritorial criminal jurisdiction become replicated by other states to the extent that the use of extraterritorial jurisdiction in that area becomes normalized. This process appears already to be underway in relation to foreign sex tourism offences, for example (see Box 6, at p. 124 below). This regulation began as a series of unilateral extensions of extraterritorial jurisdiction, based on the nationality of the offender, although regulation in this area is now covered by several international and regional regimes.

However, some unilateral extensions of criminal jurisdiction can be extremely controversial. While “nationality-based” jurisdiction is well established in international law, some unilateral extensions of jurisdiction based on the universal principle (see further para. 4.3 below) have been opposed by other states. The main complaint levelled at unilateral assertions of jurisdiction on the basis of “universality” is that they are open to abuse for political purposes. Both Belgium and Spain have sought, unilaterally, to develop regimes that would enable national authorities to prosecute very serious human rights violations in foreign countries, predominantly those amounting to international crimes. However, the extreme extraterritorial scope of these regimes has been scaled back following pressure from other states (see case study 12 below).

Regional initiatives drawing on extraterritorial criminal jurisdiction

In some cases, states have been required to assert their criminal jurisdiction over extraterritorial activities as a result of regional initiatives. For example most EU member states have now put in place measures establishing criminal jurisdiction over certain terrorist offences committed outside their respective territories, as part of their implementation of the 2002 EU Framework Decision on combating terrorism.¹² In the

¹¹ See further discussion at Box 8 and para. 4.12 below.

¹² EU Council Framework Decision of 13 June 2002 on combating terrorism (2002/475/JHA), OJ 2002 No. L164/3 22 June 2002, Article 9. Copy available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2002:164:0003:0007:EN:PDF> (“EU Framework

area of money laundering, the Third EU Money Laundering Directive¹³ requires all EU Member States to introduce laws requiring financial institutions covered by the regime to ensure that the “customer due diligence” procedures required under the regime are applied by subsidiaries and branches in third countries, as well as within the European Union.¹⁴

International regimes authorising or requiring use of extraterritorial criminal jurisdiction by state parties

Finally, there are cases where jurisdiction has been taken over extraterritorial activities in response to the requirements of international regimes. The efforts of OECD states to regulate foreign bribery offences under the framework of the OECD Anti-Bribery Convention (see chapter 1 above) are good examples. The taking of extraterritorial jurisdiction over criminal offences committed by nationals, and sometimes residents, is also a specific obligation under a number of international and regional anti-terrorist regimes¹⁵ and also under international treaties on the protection of children.¹⁶ In other cases, extraterritorial jurisdiction has been taken, not because of an international law *obligation*, but in order to complement and facilitate the operation of an international regime. For instance, many states have taken extraterritorial criminal jurisdiction over war crimes, genocide and crimes against humanity to assist the effective operation of the International Criminal Court regime.¹⁷

4.3 Is the jurisdiction claimed primarily prescriptive, adjudicative or enforcement jurisdiction? And what internationally recognised bases for jurisdiction are claimed (e.g. territory?, nationality?, “effects” doctrine, “universality”? etc).

Types of extraterritorial jurisdiction

In the criminal law sphere, direct assertions of extraterritorial jurisdiction involves the use of both prescriptive jurisdiction, to the extent that laws are applied directly to foreign activities, and enforcement jurisdiction, in the sense that the suspect can be brought before national courts of that state and, if found guilty, punished in

Decision on Combating Terrorism”). On the compliance of EU member states with the 2002 EU Framework Decision on Combating Terrorism see ‘Report from the Commission based on Article 11 of the Council Framework Decision of 13 June 2002 on combating terrorism Brussels, 08.06.2004 COM(2004)409 final, copy available at

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2004:0409:FIN:EN:PDF>. See further Box 7, pp. 126-127 below.

¹³ See Council Directive 2005/60/EC of 26 October 2005 on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing OJ 2005 No. L309/15, 25 November 2005.

¹⁴ See further discussion at Box 8, pp. 127-128 below.

¹⁵ See further Box 7, 126-127 below. See, for example, the 1979 International Convention Against the Taking of Hostages, Article 5; and the 2005 International Convention for the Suppression of Acts of Nuclear Terrorism, Article 9.

¹⁶ See further Box 6, p. 124 below. See Council of Europe Convention on the Protection of Children Against Sexual Exploitation and Sexual Abuse (due to enter into force in July 2010), Article 25, copy available at <http://conventions.coe.int/Treaty/EN/treaties/Html/201.htm>.

¹⁷ Under the 1998 Rome Statute of the International Criminal Court, the International Criminal Court does not investigate and prosecute cases that have properly been dealt with by state parties. By taking jurisdiction over these offences, whether they occur within or outside a state’s territory, a state ensures that it is at least in a position to be able to investigate and prosecute a suspected offence at domestic level if need be. See, for instance, the UK International Criminal Court Act 2001, section 51.

accordance with that state's laws. Adjudicative jurisdiction, in the sense used in this report,¹⁸ does not play a significant role in the criminal law sphere.¹⁹

Legal bases for extraterritorial jurisdiction

(a) Nationality principle

Direct assertions of extraterritorial criminal jurisdiction are overwhelmingly based on the nationality principle, that is, the jurisdiction that every state enjoys over its own nationals. Definitions of nationality differ from context to context. Nationality jurisdiction invariably covers citizens of the regulating state, however, and frequently extends to residents as well, depending on the context and the particular regulatory objectives involved.

(b) Universality principle

Where very serious violations of human rights are concerned, extraterritorial assertions of extraterritorial criminal jurisdiction may also be based on the universality principle. As discussed in the Introduction to this study,²⁰ the universality principle allows any state to take jurisdiction over a criminal matter which is so serious, and which has such grave implications for international peace and security, that all states potentially have an interest in preventing or ending it. Therefore, if a suspected offender enters the territory of a state, that state may, in theory at least, prosecute very serious human rights abuses in the absence of a nationality connection with the offender (or the victim, see further (c) below) and regardless of where in the world the abuses occurred.

As noted in the Introduction, customary international law arguably authorises the use of universal jurisdiction in relation to the most serious international crimes, such as war crimes, crimes against humanity and genocide.²¹ The ideas underlying universal jurisdiction have also been influential in the development of international "prosecute or extradite" treaty regimes relating to crimes such as hijacking, torture, drug trafficking,²² and terrorist offences.²³ However, as noted above, some unilateral extensions of jurisdiction based on the universality principle have been extremely controversial (see case study 12 below).

¹⁸ See pp. 13-14 above.

¹⁹ Some national legal systems allow for the possibility of civil enforcement of public laws. See p. 14 above. However, this kind of enforcement tends not to result in criminal liability.

²⁰ See p. 20 above.

²¹ Ibid. See further discussion in *Arrest Warrant Case (Congo v Belgium)*, International Court of Justice, Case No. 121, February 14, 2002.

²² See further IBA Task Force Report, pp. 150-161.

²³ See for instance the 2005 Council of Europe Convention on the Prevention of Terrorism. Article 14 of this Convention provides that "[e]ach Party shall take such measures as may be necessary to establish its jurisdiction over the offences set forth in this Convention in the case where the alleged offender is present in its territory and it does not extradite him or her to ... [another state] ..." In other words, under the terms of the Convention, a state party does not need to be able to show a territory or nationality connection to a terrorism offence to be able to exercise jurisdiction over it. All that is needed is for the suspect to be present in a state party's territory.

Case study 12: Assertions of universal jurisdiction by Belgium and Spain

(a) Belgium's 1993 Act Concerning Punishment for Grave Breaches of International Humanitarian Law

In 1999, this Act was amended to provide for universal jurisdiction over crimes against humanity, genocide and war crimes. The amended legislation gave victims the right to initiate complaints. Between 1999 and 2003, numerous private complaints were filed against foreign (i.e. non-Belgian) politicians and government officials regarding their complicity in serious human rights abuses in countries including the Democratic Republic of Congo ("DRC"), Iran, Iraq, Israel, the Ivory Coast, the Palestinian Authority and the United States.

Attempts by Belgian authorities to prosecute extraterritorial cases under this law have been extremely controversial. One warrant issued by a Belgian magistrate for the then foreign minister of the DRC was challenged before the International Court of Justice which ruled that the case was barred on grounds of sovereign immunity. The US and Israel have both objected to attempts to prosecute members of their respective governments, arguing that Belgian prosecutors were using the legislation for political purposes. A 2003 decision by a Belgian appeals court rejecting a jurisdictional challenge in a case involving Ariel Sharon was described by Binyamin Netanyahu, in his capacity as Israeli Foreign Minister, as "a scandal," and resulted in diplomatic protests.

In 2003, the Act was substantially amended and then subsequently repealed in favour of new laws generally requiring there to be a greater connection (e.g. nationality of the offender or the victim) between the alleged crimes and Belgium. Cases where neither the victims nor the perpetrators were Belgian nationals would only be allowed to proceed where the alternative jurisdiction did not have the institutions adequate to allow for a fair trial.

(b) Spain's "universal jurisdiction" law

In 1985 the Spanish government passed a law giving Spanish courts extraterritorial criminal jurisdiction over certain crimes against international law, including genocide, terrorism and piracy. In 1998, this law was the basis for the issues of an arrest warrant against General Auguste Pinochet and an extradition request to the UK. Pinochet was in the UK at the time for medical treatment. The Spanish extradition request resulted in many months of legal wrangling before Pinochet was eventually released by the UK government on medical grounds, and allowed to return to Chile.

Since then, several investigations have been launched into allegations of serious human rights violations in other states, including claims of human rights abuses by Chinese authorities in Tibet, claims relating to an alleged 2002 attack by Israeli forces on a Hamas leader, and allegations of torture at Guantanamo Bay. However, following international pressure, the Spanish government decided in mid-2009 to limit the scope of the legislation in future. On November 4, 2009 it enacted amending legislation that expressly includes "crimes against humanity" as a criminal offence under Spanish law, but limits jurisdiction to cases where (i) the alleged perpetrators are present in Spain, (ii) the victims are of Spanish nationality, or (iii) there is some relevant link to Spanish interests. Finally, jurisdiction will not exist if another competent domestic court or international tribunal has commenced proceedings that amount to an "effective investigation and prosecution" of the case.

(c) “Passive personality”

Some states also rely on the “passive personality” doctrine as a basis for assertions of extraterritorial criminal jurisdiction where the victim of a criminal offence is a national of that state.²⁴ The IBA Task Force Report notes that this is an available basis for extraterritorial criminal jurisdiction in a number of states, including Finland, Sweden and China, and gives examples of criminal prosecutions in France and US based on this principle.²⁵ It is worth noting, too, that while Belgium and Spain have decided to restrict the ability of interest groups to bring cases based solely on “universal jurisdiction,” prosecutions may still be brought based on the principle of “passive personality” (see case study 12 above). In addition, a number of international criminal law treaties, particularly treaties relating to terrorist offences, authorise, though do not require, the taking of extraterritorial criminal jurisdiction based on the “passive personality” principle.²⁶

(d) The “protective” principle

The “protective” principle is another potential basis of extraterritorial criminal jurisdiction. The IBA Task Force Report lists extraterritorial arms control and anti-counterfeiting measures as potentially covered by the “protective principle.”²⁷

(e) Other territorial connections, including “effects”

States may assert criminal jurisdiction over a course of conduct or events taking place *partly* in their own territory and *partly* in the territory of another state. This is because, legally speaking, the place of “commission” of an offence can either be: (a) the place where the relevant acts were commenced (“subjective territoriality”); or (b) the place where the acts constituting the offence were completed (“objective territoriality”).²⁸

The territorial connections between the conduct or events constituting the offence and the territory of the regulating state do not necessarily have to be very great. In some areas of criminal law, states have based jurisdiction over foreign parties on seemingly slight connections, such as the use of a bank account within its territory to transfer money, or making a phone call or sending an e-mail to or from the territory of the regulating state (see, in the context of anti-bribery laws, case study 1, at pp. 38-39 above). However, as a general rule, the more remote the connections between (a) the conduct or events and (b) the regulating state, the more controversial the assertion of extraterritorial jurisdiction is likely to be.²⁹

One particularly controversial application of the “objective territoriality” principle is the idea that extraterritorial jurisdiction can be based merely on the *economic* effects felt in the territory of the regulating state. While this idea appears to be gaining acceptance in some areas of regulation (see, in particular, the discussion at para. 3.2

²⁴ See also Box 7, pp. 126-127 below in relation to jurisdiction over terror offences.

²⁵ IBA Task Force Report, pp. 146-149.

²⁶ See for instance, Council of Europe Convention on the Prevention of Terrorism, Article 14(2); UN Convention Against Transnational Organized Crime, Article 15(2).

²⁷ Ibid, pp. 149-150.

²⁸ See pp. 18-19 above. See Council of Europe, ‘Extraterritorial Criminal Jurisdiction’, European Committee on Crime Problems, Strasbourg 1990. Copy available at

http://www.tm.gov.lv/lv/jaunumi/Notikumi/excrimju_03_1a.pdf, pp. 8-9.

²⁹ See further the Conclusion to this study, at para. 7.4 below.

above), it is not a widely accepted basis for criminal jurisdiction.³⁰ It arguably provides the basis for extraterritorial enforcement of market abuse offences under US securities law,³¹ the effects in these types of cases being the impacts of the extraterritorial behavior on local investors and markets.³² However, other states are more cautious. In the securities law field, the UK, for instance, reserves criminal enforcement for market abuse practices taking place within the UK, and deals with extraterritorial conduct through administrative, rather than criminal, measures.³³

4.4 & 4.5 What were the key policy drivers underlying the development of the various criminal law regimes and what were the policy obstacles? Are there still challenges to the regime along policy lines? If so, from where? Have any legal objections been raised?

In view of the number and range of different extraterritorial criminal initiatives currently in place, it is not possible to give any general answers to these questions, as the policy drivers and challenges will depend on the particular context. Extraterritorial criminal regimes have come about, and have undergone further development, as a result of a diverse range of factors which often inter-link. This is illustrated by the three sample areas of criminal law discussed in more detail below – sex tourism, counterterrorism and money laundering. As will be seen, the development of extraterritorial regimes in these areas have been influenced by a wide range of concerns, including political distaste and embarrassment over the behavior of a country’s nationals abroad and a wish to help protect vulnerable individuals in other countries (e.g. sex tourism), a need to respond to globalized threats (e.g. counterterrorism and money laundering), and a desire to close loopholes and enforcement gaps (e.g. sex tourism, counterterrorism and money laundering). Some regimes have particular relevance for companies (e.g. money laundering) and some are aimed primarily at individuals (although may include provisions relating to corporate “facilitators,” e.g. sex tourism) and some have aspects that apply to either companies or individuals, depending on the context (e.g. counterterrorism). In each case, the historical and political background to the regimes is revealing.

Sex tourism: national embarrassment, and a sense of responsibility for extraterritorial harm to vulnerable individuals

NGOs played a crucial role in galvanising a legislative response from states in relation to sex tourism. (See Box 6, p. 124 below for a potted history of the development of this legislative response). In Australia, NGOs (including ECPAT,³⁴ World Vision and members of the Australian Council for Overseas Aid) used the ratification by Australia of the UN Convention on the Rights of the Child as a way of applying pressure on the Australian government to do more about the problem of sex tourism. This campaign also received support during a visit from the UN Special Rapporteur on Sale of Children, Child Prostitution and Child Pornography at the time,

³⁰ But see *U.S. v Noriega*, 746 F Supp. 1506 (SD Fla. 1990), *aff’d*, 117 F 3d 1206 (11th Cir. 1997), in which it was held that “RICO,” the Racketeer Influenced and Corrupt Organizations Act, could be extended to acts taking place outside the US where those acts have had a substantial effect within the US.

³¹ See para. 2.3 above.

³² Note that most judicial tests require there to have been a “significant” or “substantial” effect.

³³ See case study 9, p. 84 above.

³⁴ The campaigning group known as ‘End Child Prostitution, Child Pornography and the Trafficking of Children’.

Professor Muntabhorn, who suggested that the Australian government extend its criminal laws to include Australian nationals taking part in “transnational sexual exploitation.”³⁵ The Australian government was aware that, as participants in the Asian child sex industry, Australians and Australian businesses were highly visible.³⁶

Once the Australians had passed their legislation, the NGOs then had the benefit of a legislative precedent with which to begin the persuasion process in other countries. There now appears to be broad international consensus that tackling sex tourism is a moral imperative, for which richer “tourist-sending” states bear particular responsibility. In the words of the Final Declaration of Justice and Interior Ministers meeting at the 2007 G8 summit, “[u]nfortunately, many of the destination countries lack adequate legislation or resources to vigorously address this problem within their own borders. Therefore, action by the home countries, including the G8 States, is essential to effectively protecting children around the world. ... We agree that, regardless of the abuser’s nationality, that person must be held accountable, whether in the home or destination country.”³⁷

The Australian sex tourism legislation received bi-partisan support in the Australian parliament, although some policy concerns were raised at the time, by NGOs and by law enforcement bodies about the potential costs and practical difficulties involved in enforcing the new law, and whether, given these problems, the law would have the requisite deterrent effect. Although there have now been a number of successful prosecutions in several different states, concerns are still expressed about the poor enforcement record of many states, the continuing lack of international cooperation in this area and particularly the general lack of communication between some states on suspected offenders (see further para 4.6 below). More specific criticisms are also made of the procedural and substantive requirements under some state’s laws which hamper their effectiveness,³⁸ including requirements that victims file a complaint before a prosecution can be launched.³⁹

³⁵ C. Ryan and C. Hall, *Sex Tourism: Marginal People and Liminalities* (London: Routledge, 2001), p. 130.

³⁶ “In 1995, it was estimated that Australians owned or managed up to 80% of the bars and hotels involved in the sex industry in Angeles City, The Philippines,” S. Lauber, ‘Confronting Sexual Exploitation: An Australia-Philippine Dialogue’ (1995) 67 *ALRC Reform Bulletin* (Winter 1995) 1.

³⁷ Concluding Declaration, G8 Justice and Interior Ministers Meeting, Munich, May 25, 2007, copy available at <http://g8.gc.ca/about/past-summits/ministerial-meetings-2007/concluding-declaration/>.

³⁸ Such as requirements for double criminality, prohibitions on “double jeopardy,” especially where punishments in the destination country seem particularly lenient.

³⁹ See further ECPAT, ‘Extraterritorial Laws: Why They Are Not Really Working and What Can Be Done to Strengthen Them’, September 2008, copy available at http://www.ecpat.net/WorldCongressIII/PDF/Journals/EXTRATERRITORIAL_LAWS.pdf.

Box 6: From unilateral to multilateral action: the international response to “sex tourism”

From the early 1990s onwards, the Australian government came under pressure from NGOs regarding the involvement of Australians in the sex trade in Asia, as sex tourists, tour operators and bar owners. The government was eventually moved to legislate, and the Commonwealth Crimes (Child Sex Tourism) Act was passed in 1994. The Act made it a criminal offence for Australian nationals to commit offences against children outside Australia, or to encourage, or to do anything with the intention of benefiting from, the commission of offences under the Act.

A number of other countries soon followed suit. The UK created a similar extraterritorial criminal offence in 1997, under the Sex Offenders Act. Similar legislation was also put in place by other “tourist sending” countries, including Germany and Sweden.

In May 2000, an Optional Protocol was added to the UN Convention on the Rights of the Child (on “the sale of children, child prostitution and child pornography”). Expressing the parties’ “[deep concern] at the widespread and continuing practice of sex tourism,” this Protocol, which entered into force in May 2002, requires each state party to “ensure that, as a minimum, [certain offences against children] are fully covered under its criminal or penal law, *whether such offences are committed domestically or transnationally or on an individual or organized basis.*” (emphasis added). The Protocol went on to authorise, though not require, the use of nationality jurisdiction over nationals and residents to prosecute and punish extraterritorial offences.

At European level, a succession of EU initiatives culminated in a 2004 Council Framework Decision, which explicitly requires the use of extraterritorial jurisdiction, on the basis of nationality. The Council of Europe Convention on the Protection of Children Against Sexual Exploitation and Sexual Abuse was opened for signature in 2007 (and is due to enter into force in July 2010). By mid-2008, according to a UK-based child protection NGO, around 40 countries had enacted laws on child prostitution with some extraterritorial reach.* The issue of better cooperation over investigation and prosecution of sex offences has also been included in the remit of the Roma/Lyons group, the G8 export group on organised crime.

* Source: ECPAT ‘Extraterritorial Laws: Why They are Not Really Working and What Can Be Done to Strengthen Them’, September 2008. Copy available from http://www.ecpat.net/WorldCongressIII/PDF/Journals/EXTRATERRITORIAL_LAW_S.pdf.

Counter-terrorist measures and anti-money laundering regimes: a response to globalized threats

As will be clear from the brief history of counter-terrorist measures below (see Box 7, pp. 126-127 below), there was a significant increase in legislative activity on the problem of terrorism following 9/11, at both national and international levels. Doubtless this was due, in part, to the desire of many states to show solidarity with the US, but it was also a reflection of a growing appreciation of the fact that many, if not

most, countries of the world were now at risk, and that close international cooperation would be needed to deal with the threat. The link between money laundering and terrorist financing was well understood, and so the post 9/11 period also saw an intensification of international and national efforts to deal with the problem of money laundering. In the US, the desire to close down sources of terrorist funding post 9/11 provided the impetus to get a number of money laundering reforms, some which had been under discussion for some time, onto the statute books under the umbrella of the US PATRIOT Act.⁴⁰

In these areas there has been a high level of international cooperation, most likely motivated by the mutual interests at stake. However, there have been problems where unilateral action has given rise to conflicts and compliance difficulties for companies in particular. For example, some commentators have expressed concerns about the possibility that European banks, for instance, are subject to competing demands under European law on the one hand and under US anti-money laundering legislation on the other.⁴¹

4.6 Who were/are the main stakeholders driving (or opposing) the development of the various criminal law regimes? Are particular stakeholders associated with particular viewpoints or arguments?

In the case of sex tourism (see Box 6, p. 124 above), the main drivers behind the regime were, first and foremost, campaigning NGOs and human rights bodies, although the need for regulation soon came to be acknowledged by a succession of governments, and then several international institutions. As discussed above, there was no significant opposition to the principles underlying the regulation itself, only questions regarding the extent to which it would prove effective on the ground.

NGOs and human rights organisations have also been vigorous supporters of universal jurisdiction regimes of the kind exemplified by the, now much restricted, Belgian war crimes and genocide law.⁴² Amnesty International, for instance, took a keen interest in the Belgian law, making regular comments on individual cases, criticising attempts to limit the courts' jurisdiction and calling on other European states to follow Belgium's lead in making greater use of universal jurisdiction. Support for greater use of universal jurisdiction is often expressed in terms of the principle that there should be "no safe haven" for perpetrators of international crimes. On the other hand, countries affected by prosecutions and extradition requests under

⁴⁰ This legislation was introduced into the US Congress as the "Provide Appropriate Tools Required to Intercept and Obstruct Terrorism (PATRIOT) Act of 2001," and later passed as the Uniting and Strengthening America (USA) Act in October 2001, H.R 2975. A copy of the legislation can be viewed at

<http://thomas.loc.gov/cgi-bin/query/F?c107:4:./temp/~c107YCYJ7DE:e671>:

⁴¹ The SWIFT case illustrates the point. SWIFT is a Belgian-based company, with offices in the US, which operates a secure messaging system for the transmission of bank transaction information. In 2006 it was reported in the press that the US authorities were monitoring the information passing through SWIFT, under subpoenas obtained by the US Office of Foreign Assets Control. In September 2006, a commission appointed by the Belgian Data Protection Authority stated its opinion that, in complying with the US surveillance operation, the company had violated Belgian data protection law, which implemented the EU Data Protection Directive. See further R. Graves and I. Ganguli, 'Extraterritorial Application of the USA Patriot Act and Related Regimes: Issues for European Banks Operating in the United States' [2007] *Privacy and Data Security Law Journal* 967, pp. 970-971

⁴² See case study 12 above.

the Belgian law – the US, Israel and China in particular – have been extremely critical (see case study 12 above).

Other extraterritorial regimes, motivated by security rather than human rights concerns, have been driven largely by states themselves. International regimes on counterterrorism (see Box 7 below) and money laundering (see Box 8 below) are good examples of this. However, concerns have been expressed about money laundering controls in particular: by lawyers, on the grounds that some of the reporting requirements would undermine traditional rules on legal professional privilege; and by banks, in relation to some of the practical difficulties in fulfilling their legal requirements (e.g. in gaining access to information needed to identify the “beneficial owner” of funds) and because of the overall burden on industry. Despite these concerns, though, the banking industry appears to recognise the need for a coordinated regulatory regime, and seems to be broadly supportive of at least the EU’s overall approach, including its general flexibility, its endorsement of “risk-based” regulation and compliance, and, perhaps most importantly, the fact that it draws from internationally agreed standards (see further Box 8 below).

Box 7: A brief history of extraterritoriality and counterterrorism

States have long recognised the utility and legitimacy of extraterritorial jurisdiction in relation to terror offences. For instance, the 1977 European Convention on the Suppression of Terrorism calls on all state parties to exercise their jurisdiction over terror suspects found in their territory (regardless of where the terror act was committed) if that state, for whatever reason, does not extradite the suspect. Within the EU, the fight against terror has been an explicit area for intergovernmental policy since the 1992 Maastricht Treaty, a position confirmed in the 1997 Amsterdam Treaty.

The US, too, has for some time exercised jurisdiction over foreign (i.e. non-US) nationals in relation to acts of terror outside the US. In 1986, US Congress passed the Omnibus Diplomatic Security Act, which provides for US jurisdiction over foreign nationals who murder US nationals abroad, where the offender’s acts were “intended to coerce, intimidate, or retaliate against a government or a civilian population.”

Anti-terrorism initiatives were stepped up significantly at both national and international levels following the 2001 (“9/11”) attacks in the US. The days and months following the attacks saw a significant increase in legislative activity at all levels - national, regional and international. The day after the terrorist attacks, the UN Security Council passed Resolution 1368 calling on all states “to work together urgently to bring to justice the perpetrators, organizers and sponsors of these terrorist attacks ... [and also] “to redouble their efforts to prevent and suppress terrorist acts including by increased co-operation and full implementation of the relevant international anti-terrorist conventions and Security Council Resolutions.” On the same day, the Council of the European Union issued a special declaration expressing its sympathy and solidarity with the government of the United States, and its commitment to “work closely with the United States and all partners to combat international terrorism.”

The US hastily passed new legislation in the form of the “PATRIOT” Act, which is primarily concerned with improving the access of US law enforcement authorities to information regarding terrorism and related activities. Among its many new provisions, it imposed new due diligence requirements on US banks which maintain correspondent accounts for foreign banks, and conferred new extraterritorial powers on US authorities, including the right to subpoena information held by foreign banks, and the right to seize funds of foreign banks held in US inter-bank accounts.

Meanwhile, the EU had been working on its own “action plan” on terrorism. This “Action Plan,” originally adopted September 21, 2001, was updated and “realigned” following the Madrid train bombings in 2004 and now is addressed to seven main objectives, including “reduc[ing] terrorists’ access to financial and economic resources” and “increas[ing] the capacity of the European institution and Member States to investigate and prosecute.” Elements of the action plan have been encapsulated in various pieces of EU legislation, including the EU Framework Decision of 13 June 2002 on combating terrorism. This Framework Decision requires Member States to take extraterritorial jurisdiction (based on “extended territoriality,” (i.e. the principles of objective and subjective territoriality) “passive personality” or “nationality”) over a whole range of terrorist and terrorist-related offences regardless of where in the world they occur. Supporting this is the European Arrest Warrant, which creates a mechanism for swift arrest and transfer of terror suspects between EU member states. In 2003, two new agreements were signed between the US and the EU, covering extradition and mutual legal assistance. (These are due to enter into force in 2010. See further para. 4.7 below).

In 2005, the Council of Europe Convention on the Prevention of Terrorism was concluded. The Convention requires the criminalisation of the activities of “public provoking” of terrorism, and recruitment and training for terrorist purposes. State parties are required to take extraterritorial jurisdiction over offences when committed by “nationals” abroad.

Box 8: US and EU extraterritorial initiatives to combat international money-laundering

Money laundering refers to the transfer of funds or property derived from serious crime, with the intention of hiding its illicit origins. It allows criminals to keep control of property and funds and provides a legitimate “cover” for illegal sources of income.

Globalisation, the ease with which money can now be moved across national borders (including electronically), and recognition of the connection between money laundering and terrorist financing (see Box 7 above), have all added urgency to efforts to develop a coordinated international response. Several international treaties on international criminal activity (such as the 1988 UN Convention on Drug Trafficking and the 2000 UN Convention on Transnational Organised Crime) have called upon state parties to criminalise, not just the targeted activity, but also the laundering of its proceeds.

However, the most influential initiative has been, not a treaty, but a “non-binding” (or “soft law”) initiative. The Financial Action Task Force on Money Laundering

("FATF") is an inter-governmental body that traces its existence back to the G7 Paris Summit of 1989. It now has a membership comprising 32 countries and 2 regional organisations (the EU and the Gulf Cooperation Council). In 1990, the FATF issued its blueprint for international cooperation to tackle international money laundering, in the form of a set of 40 "Recommendations." These non-binding recommendations, which have been amended and added to over time, have formed the basis of much domestic legislation on money laundering, including the regime laid down by successive EU Directives on Money Laundering.

EU

The EU regime on money laundering targets criminal practices outside the EU in several different ways. First, it is made clear that the predicate offences do not have to have been committed within the EU, thereby extending the regulatory implications of the regime beyond EU borders. This basic regime (dating back to 1991) was extended and further refined by two subsequent EU Directives. The Second EU Directive, adopted in 2001, extended the regime beyond drug trafficking to other serious offences (this had been recommended by the FATF in 1996) and also to cover other non-financial sector businesses. The Third Directive, adopted in October 2005, contained more detailed provisions on customer due diligence and extends the extraterritorial reach of the regime by requiring EU companies to subject their subsidiaries in third countries to the "customer due diligence" requirements of the Directive – a "parent-based" form of extraterritorial regulation.

US

The US was the first state to make money laundering a criminal offence in its own right. This was done under the 1986 Money Laundering Control Act ("MLCA"). The MLCA also criminalised the transportation of illicit funds in and out of the US. The US's anti-money laundering regime has been developed and supplemented over time by a number of additional pieces of legislation including, notably, the 2001 US PATRIOT Act (see Box 7 above). The PATRIOT Act considerably increased the extraterritorial scope and implications of US anti-money laundering regulations, by virtue of increased due diligence and reporting requirements, especially in relation to customers and funds from higher risk jurisdictions and in its prohibition on the maintenance of US accounts for foreign "shell" banks. In addition, by expanding the definition of "financial institution" under the MCLA to include foreign banks, the scope of US criminal law was expanded to cover money laundering *exclusively* through a foreign bank. Controversially, the PATRIOT Act also asserts jurisdiction over foreign banks that maintain accounts at US financial institutions for the purposes of enforcing penalties under the MLCA, including in relation to transactions taking place outside US territory.

4.7 What are the obstacles to states in implementing these various criminal law regimes – for example, the procedural challenges involved in information sharing and joint enforcement activities? What co-operative arrangements are in place (formal and informal) between states? How are jurisdictional conflicts resolved?

The problems vary from context to context and from case to case, but generally speaking states have difficulties investigating and prosecuting extraterritorial crimes

(see Box 9 below). Lack of direct access to foreign witnesses, premises, documents; and lack of surveillance powers mean that home state authorities are highly reliant on the assistance of foreign authorities under mutual legal assistance arrangements. For instance, the difficulties in gathering evidence abroad and then presenting it in an Australian court have been a problem for the Australian anti-sex tourism regime. The victims of these crimes rarely, if ever, report these crimes themselves, and can face considerable disadvantages and pressures in a foreign courtroom setting when giving evidence.⁴³ In practice, many successful prosecutions have come about, not because of the evidence of the victims themselves (who in some cases have not been able to be found) but because of incriminating material brought back to Australia, and the admissions of the offender.⁴⁴

Informal cooperative arrangements

Cooperative arrangements, often informal, are increasing between states in relation to extraterritorial criminal jurisdiction. For instance, a number of cooperative arrangements have been put in place to help overcome the difficulties enforcing extraterritorial sex tourism regimes: some under formal mutual assistance agreements (see further below), and some more informal, ad hoc and ongoing. This includes regular exchanges of information using pre-designated points of liaison, between law enforcement agencies and Interpol, on travel movements of convicted and suspected child sex offenders. In addition, national law enforcement bodies regularly share intelligence to help identify possible suspects, and have developed close working relationships with law enforcement partners in destination countries. Specialist teams have been established to deal with the problem of online child abuse, and coordination of activities takes place through the Virtual Global Taskforce.⁴⁵ Law enforcement bodies have also developed relationships with NGOs working in the area, recognising that these too can be a vital source of intelligence.

⁴³ See discussion of the Australian case of *R v Holloway* in F. David, 'Child Sex Tourism', *Australian Institute of Criminology Bulletin*, No. 156 June 2000, p. 3, copy available at <http://www.aic.gov.au/documents/2/7/9/%7B2790DD52-6337-4A1E-991C-C48F48A02BD3%7Dt156.pdf>.

⁴⁴ *Ibid.*

⁴⁵ See <http://www.virtualglobaltaskforce.com/index.asp>.

Box 9: Difficulties faced by investigators in relation to foreign crimes

According to the IBA Task Force Report, there are many difficulties in investigating foreign crimes, even where formal cooperation arrangements exist between the states concerned. These include:

- “(a) a lack of cooperation in, or diplomatic opposition to, the attempted exercise of jurisdiction, for example for regulatory crimes and political crimes;
- (b) lack of statutory authority for police or prosecutors to share investigative information with one another;
- (c) lack or inadequacy of extraditions and other procedures to bring the defendant before the court;
- (d) cumbersome procedures governing international judicial assistance and mutual legal assistance, meaning both judicial assistance and direct police or prosecutorial contacts. The exercise of extraterritorial criminal jurisdiction may be hampered by the lack of any criminal counterpart to the Hague Convention on the Taking of Evidence Abroad in Civil and Commercial Matters. Mutual Legal Assistance Treaties may fill this gap, but these exist on a case-by-case basis, and there are often lengthy delays in responses to requests for information and assistance under these treaties. There is a limited number of multilateral and bilateral treaties regarding evidence for criminal matters, and many states require a treaty to permit cooperation. Even where cooperation treaties do exist, they usually provide many grounds for refusing cooperation in any given case;
- (e) the overall difficulty of obtaining evidence from abroad, including the particular problem of producing evidence located abroad in a form usable by the prosecuting country and the risk that evidence outside the control of the courts in the prosecuting country will be destroyed;
- (f) the requirements in some jurisdictions to maintain secrecy during the preliminary investigative stages;
- (g) the risk that the accused might flee a country sympathetic to the interests of a prosecuting country to another that is not;
- (h) potential conflict between criminalisation and other methods of dealing with unlawful actions particularly for cases involving the exercise of universal jurisdiction.”

Source: *IBA Report of the Task Force on Extraterritorial Jurisdiction* (IBA, 2008), pp. 181-183 (footnotes omitted).

International agreements on extradition and mutual legal assistance

It is common for treaties regulating, or requiring, the use of extraterritorial criminal jurisdiction to include provisions governing cooperative arrangements between states. These provisions are often very general and flexible, and are designed to be supplemented by further bilateral and multilateral agreements and state practice. More detailed guidance is provided, however, in the UN Convention Against Transnational Organised Crime, which sets out requirements in relation to issues such as confiscation and seizure of assets, extradition, conduct or cross border investigations and enforcement. On the issue of mutual legal assistance, the Convention requires state parties to give each other “the widest measure of mutual legal assistance in

investigations, prosecutions and judicial proceedings in relation to the offences covered by this Convention.”⁴⁶ Help can be requested from another state party regarding:

- (a) Taking evidence or statements from persons;
- (b) Effecting service of judicial documents;
- (c) Executing searches and seizures, and freezing;
- (d) Examining objects and sites;
- (e) Providing information, evidentiary items and expert evaluations;
- (f) Providing originals or certified copies of relevant documents and records, including government, bank, financial, corporate or business records;
- (g) Identifying or tracing proceeds of crime, property, instrumentalities or other things for evidentiary purposes;
- (h) Facilitating the voluntary appearance of persons in the requesting State Party;
- (i) Any other type of assistance that is not contrary to the domestic law of the requested State Party.⁴⁷

In addition to their treaty obligations, States (and regional groupings like the EU) have entered into bilateral arrangements to amplify their responsibilities and provide the basis for a more coordinated response to cross-border crime. Two good examples are the US-EU Agreements on Extradition and Mutual Legal Assistance,⁴⁸ which were negotiated and signed as part of an intensification of efforts by EU and US authorities to develop a more coordinated response to international terrorism in the wake of the terrorist attacks of 9/11 (see Box 7, pp. 126-127 above). The agreement on mutual legal assistance provides for greater sharing of financial information between US and EU authorities, and envisages greater powers for financial regulators (as well as general law enforcement bodies) to request information. It also provides for the possibility of joint investigative teams, including the use of video conferencing technology to take evidence. The agreement on extradition clarifies, as between the US and EU, the kinds of offences that will be extraditable, as well as exchange of information and transit rules. The provisions also include stronger protections against use of the death penalty in the US, meaning that EU authorities will no longer have to rely on case by case guarantees. The agreements are expected formally to take effect in 2010.

Resolving jurisdictional conflicts

Given the variety of possible bases for the exercise of extraterritorial criminal jurisdiction, jurisdictional conflicts are inevitable. As noted in the Introduction to this study, the exercise of extraterritorial criminal jurisdiction, like other forms of direct extraterritorial jurisdiction, is limited by a requirement of “reasonableness.”⁴⁹

⁴⁶ Article 18.

⁴⁷ Article 18(3).

⁴⁸ ‘Agreement on Extradition Between the European Union and the United States of America’, OJ 2003 No. L181/27, 19 July 2003, copy available at

<http://ec.europa.eu/world/agreements/downloadFile.do?fullText=yes&treatyTransId=10121>;

‘Agreement on Mutual Legal Assistance Between the European Union and the United States of America’ OJ 2003 No. L181/34, 19 July 2003, copy available at

<http://ec.europa.eu/world/agreements/downloadFile.do?fullText=yes&treatyTransId=10101>.

⁴⁹ See further pp. 20-21 above.

Different states have laid down their own guidance as to what will and will not constitute a “reasonable” exercise of extraterritorial criminal jurisdiction. According to guidance provided by the UK Home Office, for instance, the presence of any of the following factors will help make the case that the “reasonableness” test is satisfied:

“...where there is international consensus that certain conduct is reprehensible and that concerted action is needed involving the taking of international jurisdiction ... where the vulnerability of the victim makes it particularly important to be able to tackle instances of the offence ... [and] ... where there is a danger that such offences would not otherwise be justiciable.”⁵⁰

In practice, states often defer to each other’s interests in the way they exercise extraterritorial criminal jurisdiction. A number of methods have been developed by which this can be done. Some states have adopted a more formal “subsidiarity” approach where a state seeking to rely on a more controversial jurisdictional doctrine, such as the protective principle or universal jurisdiction, will only do so where the state (or states) with the more traditional jurisdictional claim (e.g. territoriality or nationality) has failed or refused to act.⁵¹ In some cases, the matter of jurisdiction will be settled by the issue of custody of the offender. The state having custody (the “custody state”) may be under an obligation to prosecute or extradite. This means that if, for some reason, the custody state is unable to extradite – because, for instance, the offender is one of its own nationals, or the offence is not covered by the relevant extradition regime, or dual criminality requirements are not satisfied - the custody state must prosecute the offence itself.⁵² At the moment, though, there are few international law instruments that provide for an objective prioritisation of interests between states in criminal matters.

Nevertheless, in relation to each of the specific areas of criminal law discussed above – sex tourism, counterterrorism and money laundering – some attempt has been made to regulate and allocate jurisdictional competence between interested states, and to resolve potential jurisdictional conflicts. In relation to sex tourism, the Council of Europe Convention contains a simple “consultation” clause that provides that, where more than one state claims jurisdiction over an alleged offence, “the Parties involved shall, where appropriate, consult with a view to determining the most appropriate jurisdiction for prosecution.”⁵³ This means that whether or not to exercise jurisdiction is not necessarily a unilateral decision for one of the interested parties. In practice, law enforcement agencies of some “tourist sending” states tend not to prosecute offences that have taken place in another state without the permission of that other state. Regardless of where the offence is to be prosecuted, the authorities of both “tourist-sending” and “tourist-destination” countries appear to recognise the value of cooperation.

The 2002 EU Framework Decision on Terrorism also contains provisions on consultation (“with the aim, if possible, of centralising proceedings in a single

⁵⁰ Home Office, ‘Review of Extraterritorial Jurisdiction; Steering Committee Report’, July 1996, para. 2.21.

⁵¹ See further IBA Task Force Report, p. 171-173.

⁵² See further IBA Task Force Report, pp. 161-167

⁵³ Council of Europe Convention on the Protection of Children Against Sexual Exploitation and Sexual Abuse 2007 (due to enter into force in July 2010), Article 25(8).

Member State”), but then goes on to add that in deciding which state is the most appropriate to exercise jurisdiction, “[s]equential account shall be taken of the following factors:

- the Member State shall be that in the territory of which the acts were committed,
- the Member State shall be that of which the perpetrator is a national or resident,
- the Member State shall be the Member State of origin of the victims,
- the Member State shall be that in the territory of which the perpetrator was found.”⁵⁴

This creates a useful starting point for negotiations on jurisdictional claims. But while settling jurisdictional claims at an early stage may be the ideal, this may not always be possible or practical. In some cases it may be desirable, once proceedings have commenced, to transfer them to another country. The possibility is provided for in the UN Convention Against Transnational Organized Crime under which states parties “shall consider the possibility of transferring to one another proceedings for the prosecution of an offence covered by this Convention in cases where such transfer is considered to be in the interests of the proper administration of justice, in particular in cases where several jurisdictions are involved, with a view to concentrating the prosecution.”⁵⁵

International criminal law treaties also contain techniques for reducing the potential for conflicts arising from different regulatory standards between states. For instance, under the UN Convention Against Transnational Organized Crime, predicate offences for the purposes of establishing liability under the money laundering provisions may have taken place either inside *or* outside the jurisdiction of the regulating state. In the latter case it may only be treated as a predicate offence for the purpose of money laundering laws if the behavior constitutes a criminal offence in *both* states.⁵⁶

In addition to the treaty positions, some states have collaborated on the development of new policies on the management of “concurrent jurisdiction” in criminal matters. Arrangements have been put in place between the UK and US law enforcement authorities for example, which call for early consultation between UK and US prosecuting authorities where it appears that they may both have an interest in prosecuting the same “serious, sensitive or complex” crime.⁵⁷ Procedures are laid down to facilitate this, and the interested prosecuting authorities are expected to discuss and develop a “case strategy,” that is, a joint position on issues such as where and how investigations would best be pursued, and whether and where certain proceedings should be initiated or discontinued. Where an agreement is unable to be reached between the two sides, the offices of the two respective Attorneys General are expected to take the lead.

⁵⁴ EU Council Framework Decision on Combating Terrorism, n. 6 above, Article 9(2).

⁵⁵ Article 21.

⁵⁶ See Article 6(2)(c).

⁵⁷ See UK, ‘Attorney General’s Domestic Guidance for Handling Criminal Cases Affecting Both England, Wales or Northern Ireland and the United States of America’, January 18, 2007, <http://www.publications.parliament.uk/pa/ld200607/ldlwa/70125ws1.pdf>.

4.8 What considerations are taken into account by regulatory authorities in deciding whether or not to commence enforcement action in relation to extraterritorial activities? For instance, how serious or systematic must the offences be? And how great the connection with the regulating state?

As with any criminal case, one of the most important considerations for the prosecuting authorities in deciding whether or not to take enforcement action is whether there is a realistic chance of securing a conviction. This has particular significance in the context of extraterritorial crimes, given the difficulties in gathering and presenting evidence from overseas sources, discussed above. In relation to lesser “regulatory” or “administrative” offences, such as failures to put in place adequate money laundering controls, prosecutions are likely to be most vigorously pursued in relation to offences that are repeated or systematic, rather than a “one-off.”⁵⁸

Some of the crimes discussed in this part, for example crimes involving universal jurisdiction, may give rise to political sensitivities that may well affect the decision whether or not to go ahead with a prosecution. As discussed above, the application by Belgium of the principle of “universal jurisdiction” under its now repealed “genocide law” has given rise to tensions between Belgium and other states (see case study 12 above). Similarly, proceedings commenced under Spanish law by Baltasar Garzon against the “Bush Six,” comprising members of the Bush administration and their advisers in relation to alleged human rights abuses at Guantanamo Bay, seem to have created considerable foreign relations problems for the Spanish government. These problems were arguably a major factor in the decision by the Spanish parliament to restrict these kinds of prosecutions in future (again, see case study 12 above).

As discussed above (see para. 4.7), to help avoid such problems a state may defer to the interests of another state in relation to an extraterritorial crime, and decline to assert jurisdiction over an offender so that another state may prosecute. As noted above, this is largely a matter for the discretion of the states’ concerned, although some limited guidance is provided in some treaty regimes as to the resolution of competing claims. Here, the strength and number of connecting factors between the crime and the states may well be a relevant consideration.⁵⁹

4.9 Where attempts are made to regulate foreign parties or activities unilaterally, are these criminal law regimes based on penalties, incentives, civil action, or transparency requirements? Or a combination of these?

Criminal law regimes are based overwhelmingly on criminal penalties, although they may be supported, for instance in the case of money laundering offences, by reporting and transparency requirements which can act as a deterrent, and make suspicious activity harder for offenders to conceal. In the vast majority of cases, criminal prosecutions are handled by state authorities, although some jurisdictions allow for the possibility of civil or “private” prosecutions of criminal offences as well. It is possible in many jurisdictions to bring a civil claim for damages for the consequences

⁵⁸ See, in relation to securities regulation, para. 2.8 above.

⁵⁹ See, for instance, the “prioritisation of interests” of EU member states under the 2002 EU Framework Decision on Terrorism. See n. 54 above, and accompanying text.

of criminal acts. Some jurisdictions, notably civil law jurisdictions, also allow for parallel civil claims to be made in the course of criminal proceedings.⁶⁰

4.10 If the regulation is done pursuant to an international regime, does the regime primarily rely on administrative, civil, or criminal remedial mechanisms – and at the international, regional or national level? Are non-judicial mechanisms relevant? To what extent are states able to choose enforcement methods? What are the consequences for states of non-compliance?

Choice regarding enforcement methods

International criminal law regimes rely overwhelmingly on criminal remedial mechanisms. State parties are required, as part of their treaty obligations, to criminalize the conduct covered by the treaty, and then to enforce those domestic criminal laws. States are also often required to ensure that their legal systems recognise the possibility of “accessory” or “secondary” criminal liability in relation to those offences.

However, not all states recognise the concept of corporate *criminal* liability, and therefore it is usual for states to be given some flexibility as to how their treaty obligations are to be implemented in relation to corporate entities. Under the Council of Europe Convention on the Prevention of Terrorism, for instance, “the liability of legal entities [i.e. companies] may be criminal, civil or administrative.”⁶¹ But lack of corporate criminal liability concepts at the domestic level should not mean lesser penalties. It is common for international instruments to contain wording expressly requiring that the punishment fit the crime, regardless of the kind of liability involved. EU legislation usually requires that the sanctions should be “effective, proportionate and dissuasive.”

Although the offences envisaged in the three case studies will largely attract criminal sanctions, some international instruments offer suggestions as to other possible punishments *for companies*, e.g.

- (a) exclusion from entitlement to public benefits or aid;
- (b) temporary or permanent disqualification from the practice of commercial activities;
- (c) placing under judicial supervision;
- (d) a judicial winding-up order;
- (e) temporary or permanent closure of establishments which have been used for committing the offence.⁶²

Consequences of non-compliance by states

As with all treaty regimes, the effectiveness of these international instruments in practice depends on the quality of monitoring and follow-up by the relevant sponsoring or supervisory institutions. The main consequence for a state of non-

⁶⁰ See chapter 5 below, para. 5.1, Table 3.

⁶¹ See Article 10(2). See also UN Convention Against Transnational Organised Crime 2000, Article 10(2).

⁶² EU Council Framework Decision on Combating Terrorism, n. 6 above, Article 8. See also Council of Europe Convention on the Protection of Children Against Sexual Exploitation and Sexual Abuse, n. 16 above, Article 27(2).

compliance with the treaty regimes mentioned in this chapter, as with most treaties, is the risk of criticism both within and outside the state, including the potential loss of that state's credibility within the particular international treaty regime. But there may be other consequences too. Compliance with the FATF Recommendations on money laundering is monitored, even though these Recommendations are technically "non-binding," by a "mutual assessment" programme. Under these procedures, non-compliant states risk not just expulsion but also wider consequences. Because the Recommendations themselves demand special safeguards in relation to people and companies from non-compliant states, non-compliant states risk creating a situation that leads to disadvantageous treatment for their own nationals, including their corporate nationals, in international financial transactions. FATF Recommendation 2, for instance, states that "[f]inancial institutions should give special attention to business relationships and transactions with persons, including companies and financial institutions, from countries which do not or insufficiently apply the FATF Recommendations." Moreover, under the US PATRIOT Act,⁶³ foreign banks operating out of "non-cooperative" jurisdictions, or jurisdictions considered by the FATF to raise particular money laundering concerns, are subject to "enhanced due diligence" requirements.

4.11 Are the targets of the regulation individuals, corporations, or both?

Each of the initiatives discussed in the three case studies above is aimed at companies *and* individuals to some extent. For instance, although domestic legislation on sex tourism is aimed primarily at the *individual* offender, it also potentially targets companies that aid, abet, or facilitate foreign exploitation of children, for example by arranging tours.⁶⁴ Companies can be prosecuted under Australian sex tourism legislation, for instance, which creates an offence of "encouraging conduct" of a kind that would constitute an offence under the legislation and also of carrying out acts with the intention of "benefiting" (including financially) from child sex tourism overseas.⁶⁵ The Council of Europe Convention also makes it clear that corporate liability of some description is envisaged,⁶⁶ as does the second optional protocol to the UN Convention on the Rights of the Child.⁶⁷

Terrorism and money laundering regimes are also aimed at both individuals and companies. As discussed at para. 4.10 above, state parties to international criminal law regimes are usually placed under express requirements to criminalize conduct where carried out by individuals, but they have greater flexibility as regards the legal liability of legal entities, including corporations. The treaties often go on to provide

⁶³ See Box 7, pp. 126-127 above.

⁶⁴ In 2003 a civil suit was filed against "Big Apple Oriental Tours" under state law prohibiting the "promotion of prostitution." The suit alleged that the company was involved in the promotion of prostitution in Thailand, the Philippines and Cambodia. A restraining order was obtained against the company, disabling its web-site and effectively preventing it from advertising. Criminal indictments were also issued against the company's two owners, but these were eventually dismissed.

⁶⁵ Australian Crimes (Child Sex Tourism) Amendment Act 1994, inserting new sections 50DA and 50DB into the Australian (Cth) Crimes Act.

⁶⁶ See n. 16 above, Article 26. See further n. 73 below and accompanying text.

⁶⁷ Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography, adopted and opened for signature, ratification and accession by General Assembly resolution A/RES/54/263 of May 25, 2000, in force January 18, 2002, copy available at <http://www2.ohchr.org/english/law/crc-sale.htm>. See Article 3(4).

that any *corporate* liability (whether “criminal, civil or administrative”) is to be without prejudice to the liability of individuals who actually committed the offence. In other words, the liability of corporations and individuals should exist in tandem.

Corporate criminal liability: different tests

A difficult related issue concerns the extent to which, and the different ways in which, a company can be held responsible for the acts of individuals. Different states use different tests for corporate criminal responsibility. Traditionally, under English law, criminal responsibility would have to be imputed to a company through the behavior and intent of a senior manager or decision-maker, who could be seen as providing the company’s “directing mind and will.” This is known as the “identification” principle. However, this test has been much criticised as relying on an outdated understanding of how corporations, and especially large corporations, are actually run.⁶⁸

A number of states have moved away from the “identification” principle and are developing other, more sophisticated, tests for corporate criminal responsibility. These new tests focus more on management or systems failures, rather than the intentional acts of specific individuals, and are more rooted in the idea of negligence. The statutory test for corporate homicide under UK law,⁶⁹ and the “corporate culture” test for criminal liability under Australian criminal law,⁷⁰ are two examples of this more “negligence-based” approach.⁷¹

The international criminal regimes examined in this Part do not contain much guidance on how corporate criminal liability is to be determined. Most treaties leave this issue to be decided “in accordance with” or “consistent with” the legal principles of each state party. However, there is more detail in EU legislation, which typically suggests several possible bases of legal liability, though without expressly calling for corporate *criminal* liability. Under the 2002 EU Framework Decision on Combating Terrorism, for example, Member States are required to establish corporate liability based on: (a) acts done by individuals for the benefit of a corporation, based on the ability of that person to control, represent or make decisions on behalf of that corporation; *but also* (b) cases where a *lack of control* by senior managers or decision-

⁶⁸ See C. Wells, ‘Corporate Criminal Law’, a paper submitted to the International Commission of Jurists Expert Legal Panel; on Corporate Complicity in International Crimes, undated, copy on file with the author.

⁶⁹ See the UK Corporate Homicide and Corporate Manslaughter Act 2007, under which a company can be guilty of an offence “if the way in which its activities are managed or organised” causes a person’s death and amounts to a gross breach of a duty of care.

⁷⁰ Under the Australian Criminal Code Act 1995, the element of “fault” necessary to establish criminal liability can be attributed to a corporation where “a corporate culture existed within the body corporate that directed, encouraged, tolerated or led to non-compliance with the relevant provision; or ...[by] ... proving that the body corporate failed to create and maintain a corporate culture that required compliance with the relevant provision.” See Part 2.5, Division 12, s. 12.3. And the negligence of a corporation, for the purposes of ascertaining criminal liability, can be evidenced by “(a) inadequate corporate management, control or supervision of the conduct of one or more of its employees, agents or officers; or (b) failure to provide adequate systems for conveying relevant information to relevant persons in the body corporate.” section 12.4(3).

⁷¹ See further Allens, Arthur Robinson, “Corporate Culture” as the Basis for the Criminal Liability of Corporations: Prepared by Allens Arthur Robinson for the United Nations Special Representative of the Secretary General on Human Rights and Business’, February 2008, copy available at <http://www.reports-and-materials.org/Allens-Arthur-Robinson-Corporate-Culture-paper-for-Ruggie-Feb-2008.pdf>.

makers have *made possible the commission of ... offences*” for the benefit of the company (emphasis added).⁷² Similarly, the Council of Europe Convention on the Protection of Children Against Sexual Exploitation and Sexual Abuse contemplates corporate liability based on the acts of persons who represent or control or take decisions on behalf of the relevant corporate entity, *and also*, where “lack of supervision of control by a natural person ... has made possible the commission of an offence ... for the benefit of that legal person.”⁷³

4.12 Where a regime (unilateral or multilateral) applies to corporations, how do states regulate the acts of foreign corporate entities abroad?

Direct assertions of extraterritorial jurisdiction

None of the international regimes discussed above – sex tourism, counterterrorism and money laundering - requires the *direct* regulation of foreign companies in relation to extraterritorial activities. Legal provisions, insofar as they are applied to corporations, are only applied to “corporate nationals,” and in some cases “corporate residents,”⁷⁴ of the regulating state, i.e. corporations either “incorporated in” or “domiciled in” or “having their base of operations in” the regulating state.⁷⁵ The international conventions tend not to define “corporate nationality” for these purposes, leaving this issue to be dealt with under general domestic law principles.

At the domestic level, states do not, as a general rule, assert criminal jurisdiction over foreign companies (i.e. companies incorporated in other countries) for activities solely occurring overseas merely on the basis that the foreign company is owned by its own nationals or is the subsidiary of a locally-incorporated parent company. This strongly suggests that states do not generally regard foreign subsidiaries as their own “nationals” for the purposes of domestic criminal law regimes, even when the foreign subsidiary is effectively under the control of a local parent. There are very few exceptions.⁷⁶ Therefore, although the nationality of shareholders may be relevant to corporate nationality in other areas,⁷⁷ the tests of corporate nationality used to define the scope of domestic criminal jurisdiction tend to respect the idea of the “corporate veil” (i.e. the legal separation between shareholders and company, and between parent and subsidiary).

⁷² See Article 7. See also, EU Third Directive on Money Laundering, n. 13 above, Article 39(4).

⁷³ See n. 16 above, Article 26.

⁷⁴ See for instance Australian sex tourism legislation discussed above, which extends (in addition to Australian incorporated companies) to “any other [i.e. non-Australian] body corporate that carries on its activities principally in Australia” – the corporate equivalent of “residence.”

⁷⁵ On corporate nationality generally, see pp. 22-23 above.

⁷⁶ Occasionally, the US has extended the definition of “US persons” to cover foreign subsidiaries owned by US persons for the purposes of export sanctions regimes. This was done in 1982 in the context of a sanctions regime against the Soviet Union. See also the US Cuban Assets Control Regulations 15 CFR § 515.329(d).

⁷⁷ See for example, the ICSID Convention (the 1985 International Convention for the Settlement of Investment Disputes Between States and Nationals of Other States.), which allows a foreign subsidiary to be treated as having the nationality of its parent for the purpose of deciding whether an “investment dispute” is covered by the Convention. Under this Convention, in other words, the “place of incorporation” test of corporate nationality applies, except where the parties have agreed (for the purposes of the dispute) to attribute the company with the nationality of its controlling shareholders. See Article 25(2)(b).

States can, and sometimes do, prosecute foreign companies directly, for example, a foreign subsidiary of a local parent, or a foreign parent of a local subsidiary, on the basis that they were party to a conspiracy to commit a crime within the territory of the regulating state. This relies, not on the nationality principle, but on a version of the territoriality principle (i.e. subjective territoriality”).⁷⁸ Assertions of jurisdiction over foreign subsidiaries on this basis are often controversial, but have formed the basis of successful prosecutions by US authorities under anti-bribery laws, for example.⁷⁹

Parent-based regulation

Another consequence of the “legal separation” between a parent company and its foreign subsidiaries is that, in cases of wrongdoing by a foreign subsidiary, parent companies are much more likely to be prosecuted under accessory theories of liability than because of their direct involvement in a crime.⁸⁰ As discussed in chapter 1 above, secondary liability, such as “aiding and abetting,” “conspiring,” “facilitating” or “authorising,” provides a possible basis for criminal liability of parent companies for extraterritorial offences under anti-bribery regimes.⁸¹

Alternatively, a parent company could be held responsible on the basis that corporate failures to supervise the activities of a foreign subsidiary or partner adequately had created a corporate culture that tolerated encouraged or directly led to criminal breaches by that foreign party.⁸² As indicated above, through provisions “corporate culture,” management failures may also be the basis on which parent companies may be held criminally responsible under domestic criminal law in some states for grave breaches of human rights law occurring in other jurisdictions.⁸³

Supplementary and “supporting” measures

It is important to remember, though, that many criminal law regimes (and especially criminal regimes aimed at corporations) do not just criminalise the targeted activity (e.g. “bribery of foreign officials” or “money laundering”). They may also supplement these prohibitions with a range of supporting measures that are designed to further prevent and deter the targeted activity. These may be backed up with criminal sanctions, or non-compliance with them may amount to merely regulatory or administrative offences. Here, some limited use is made of the regulatory technique whereby a locally domiciled entity is made legally responsible for compliance, in

⁷⁸ See pp. 18-19 above.

⁷⁹ See, for instance, chapter 1, case study 4.

⁸⁰ Although parent companies have occasionally been held directly responsible for the criminal acts of other members of their corporate group on the basis that they were “acting through” their subsidiaries. On March 19, 2007, Chiquita Brands International, a US company, pleaded guilty to breaches of US Terrorism Sanctions Regulations and was ordered to pay a \$25 million fine. While the prohibited payments to a banned organisation were alleged to have been made by one of Chiquita’s foreign subsidiaries, Chiquita was charged on the basis that it had “acted through” its subsidiary and therefore ought to be held responsible under US law. See further D. Johnston, “Lifting the Veil on Corporate Terrorism: The Use of the Criminal Code Terrorism Framework to Hold Multinational Corporations Accountable for Complicity in Human Rights Violations Abroad,” (2008) 66 *University of Toronto Faculty of Law Review* 137 at pp. 171-172. This theory of liability is similar to the idea of “vicarious” or “agency” liability used in the civil context. See further pp. 170-171 below.

⁸¹ See discussion at para. 1.12 above. Although in practice, in the anti-corruption field, parent company liability is more likely to be based on book-keeping and reporting failures. For an example, see case study 3 at p. 46 above.

⁸² In relation to anti-bribery measures, see further para. 1.12 above.

⁸³ See Ramasastry and Thompson, n. 4 above. See also Allens, Arthur Robinson. n. 71 above.

another state, by a foreign entity, such as a subsidiary or a contractor. There is an example of this kind of “parent-based” regulation in EU money laundering law, discussed above, in which all credit institutions subject to the Act must ensure that their foreign branches and controlled subsidiaries, including those located *outside* the European Union area, abide by the enhanced customer due diligence checks.⁸⁴

4.13 Where regulation of foreign corporate entities by states is authorized or required under an international regime, does the regime directly address what states are required or encouraged to do in regulating the activities of corporate entities abroad? Or do states have flexibility in this regard?

While there are variations depending on the area of criminal liability involved, a fairly consistent pattern emerges. Obligations in relation to extraterritorial corporate activity tend not to be laid out specifically, but arise as a combination of more general obligations. These are: (a) criminalization of certain prescribed offences at domestic level, at least as far as individual offenders are concerned; (b) some degree of extraterritorial regulation, usually on the basis of connections of nationality” (or residence); and (c) corporate liability in some form or other over some or all of the offences prescribed.⁸⁵ Therefore, states have considerable flexibility regarding how they go about regulating companies abroad. Generally speaking, the treaty provisions do not impose obligations on corporations directly. This is a matter for implementation by states.⁸⁶

The FATF Recommendations are not legally binding although, as discussed above, they have been quite influential on domestic policy on the prevention of money laundering and terrorist financing. Recommendation 22 states that “[f]inancial institutions should ensure that the principles [set out in the FATF Recommendations] ... are also applied to branches and majority owned subsidiaries located abroad, especially in countries which do not or insufficiently apply the FATF Recommendations, to the extent that local applicable laws and regulations permit.” According to compliance monitoring exercised carried out so far by the FATF, this is a Recommendation that few (if any) states appear to implement explicitly, although it can be the practical effect of “risk-based” compliance monitoring by regulatory authorities.

4.14 Conclusions: Lessons for the B&HR sphere

There are significant overlaps between some of the regimes considered in this chapter and the B&HR sphere. The sex tourism case study raises human rights issues directly. It also recognises, in a limited way, the possibility of corporate involvement, although it is fair to say that to date prosecutions have focused overwhelmingly on individual

⁸⁴ See Box 8, pp. 127-128 above.

⁸⁵ Most of the international instruments discussed in this chapter 4 expressly provide for corporate liability, or “the liability of legal persons.” The exception is the Rome Statue of the International Criminal Court, which is confined to “individual” liability. However, this has not prevented a number of states, e.g. Australia, voluntarily extending their own laws, based on “universal jurisdiction” over serious international crimes, to companies. See further Ramasastry and Thompson, n. 4 above.

⁸⁶ Although note that some EU legislation is capable of having direct effect, by virtue of specific constitutional arrangements in EU member states.

offenders – by and large it is the individual offenders and not the corporate “service providers” who are seen as the main cause of harm.

The other extraterritorial regimes discussed in this chapter – counterterrorism and money laundering – were motivated, not by human rights concerns, but by the threats to national interests posed by terrorist groups and organised crime and the need for international cooperation to deal with those threats.

But there are similarities too. For each of these different areas of criminal law, extraterritorial regulation has provided a way of dealing with the problem of gaps in international regulatory regimes, frequently because of poor enforcement in some states, which have given rise to risks. In considering the future role of criminal sanctions in relation to extraterritorial B&HR regulation, it is useful to consider why they have been adopted in other areas, and what their limitations are in relation to the extraterritorial regulation of companies in particular. There are a number of lessons we can draw from the discussion above.

Lesson 1: States seem to be prepared to extend criminal regulation extraterritorially in their own national interest. The international response to the terrorist threat, which has included extraterritorial measures in relation to terrorist financing and money laundering, is a good example of this. As discussed above, this international response has been stepped up considerably in the wake of the 9/11 terrorist attacks in the US.

Lesson 2: States have also been moved, as a result of public, NGO and media pressure, to sanction criminal behavior abroad to help protect vulnerable and at risk groups in other, particularly developing, countries. The unilateral sex tourism regimes introduced by a number of states are a good example, although as noted above, these regimes are aimed primarily at *individual* offenders, rather than corporate activity and are typically based on the nationality principle. The lack of adequate child protection and enforcement in many of these “destination” countries in particular, and the impunity with which sex offenders appeared to be operating, was a key factor in persuading the “tourist sending” countries to act.

Lesson 3: Momentum in favour of extraterritorial regimes can sometimes generate quite quickly, but the “reasonableness” of extraterritorial regimes (as far as this can be determined from the reactions of other states) depends very much on the nature of the interests involved, and the degree of consensus regarding the objectives and methods of the regulation. Unilateral assertions of extraterritorial jurisdiction are much more likely to be opposed where they are motivated by a set of public and foreign policy objectives specific to one state. The extraterritorial enforcement of export sanctions regimes by the US has, for example, been extremely controversial. On the other hand, unilateral action against sex offenders who target children overseas has received no real opposition, and has even been welcomed by some “destination” states. Here, the level of international disgust generated by these kinds of crimes in particular has certainly played a part in the way these regimes have been received, and replicated. However, it should not be assumed that the reaction would be the same in relation to unilateral attempts to regulate extraterritorially to enforce other, more contested, human rights standards.

Lesson 4: Where criminal jurisdiction is taken over extraterritorial activities, this is overwhelmingly based on the “nationality” principle. Nationality is a well-established basis for extraterritorial criminal jurisdiction, and is frequently the only basis on which extraterritorial jurisdiction will be positively required of states under international criminal treaties. However, states tend to regard foreign companies (i.e. companies incorporated in other states) as foreign nationals, and therefore do not tend to take criminal jurisdiction over them unless other territorial connections exist between that foreign company, its conduct, and the regulating state. These territorial connections may include being party to a conspiracy aimed at breaking the laws of the regulating state, or where the effects of a foreign crime are felt within the regulating state (i.e. objective territoriality). The important point is that there have only been very few cases where states have attempted to regulate foreign subsidiaries based on nationality jurisdiction alone. These are frequently controversial and tend to be confined to US export sanctions law.

Lesson 5: While states tend not to assert criminal jurisdiction over foreign companies directly, they do make use of a range of parent-based methods of regulation (i.e. domestic measures with extraterritorial implications) under which a parent company may be held criminally responsible for contributions to the crimes of others, including the foreign conduct of foreign actors, or failures to ensure compliance by those over which it is able to exercise control. Liability for the crimes of third parties, including foreign actors, potentially arises under established principles of secondary criminal liability, such as aiding and abetting and conspiracy. In addition, some states have created new bases for corporate criminal liability whereby fault can be attributed to a company as a result of systems and management failures. These are domestic measures, but to the extent that they create liability for extraterritorial conduct, they can have profound extraterritorial implications in terms of the pressures they can exert on company management to improve oversight of foreign operations, including operations carried on by subsidiaries. Another example of parent-based regulation can be found in EU anti-money laundering law in which parent companies are made responsible for ensuring compliance by foreign subsidiaries and branches with customer due diligence requirements. The FATF has recommended that anti-money laundering principles be extended to foreign branches and majority owned subsidiaries (see Recommendation 22). In practice, though, states seem to prefer not to do this explicitly, rather through “guidance” to parent companies given in the course of group-wide monitoring and enforcement activities.

Lesson 6: Although “universality” is an accepted jurisdictional basis in theory, its use can be controversial where this is the sole basis for jurisdiction. States should be aware that assertions of extraterritorial jurisdiction on the basis of “universality” may lead to claims of unreasonable interference in the affairs of other states. Assertions of universal jurisdiction by Spanish and Belgian authorities appear, in a number of cases, to have given rise to considerable international tensions. More generally concerns have been expressed about the possible misuse of unilateral universal jurisdiction for political purposes.

Lesson 7: The crimes that are covered by extraterritorial criminal regimes can be extremely difficult to investigate and enforce in practice, especially without practical support from other key states. For example, although there is considerable support at the national and international levels for the idea that sex offenders should

be punished for offences abroad as well as at home, in practice the enforcement record of some states has fallen short of the expectations of some stakeholders, and it is difficult to determine what the impact of these regimes has been in terms of deterring criminal behavior. International cooperation, especially in the form of mutual legal assistance, is critical to the success of extraterritorial criminal regimes. This is recognised in the terms of international treaties creating extraterritorial criminal offences, although political will and resources are also needed to make these cooperative arrangements work in practice. This is more likely to be present where mutual interests are at stake.

Lesson 8: Particular consideration needs to be given to the needs of foreign witnesses in criminal trials, especially witnesses who are vulnerable. Consideration should be given to the way evidence is collected and how language and cultural barriers are to be overcome. In many cases, as noted in Lesson 7 above, the assistance of foreign law enforcement agencies will be crucial. Consideration also needs to be given to the way evidence is presented in court. While the defendant's counsel will generally want an opportunity to cross-examine witnesses, transporting witnesses from foreign countries can involve considerable expense and logistical issues. This can also be intimidating for witnesses, especially where there are language barriers and where the processes and procedures are unfamiliar. These problems have proved a challenge in relation to criminal trials under sex tourism laws, but some solutions have been found, including the use of video-taped evidence.

Lesson 9: Whether an international regime is "binding" or "non-binding" is perhaps not as significant as the extent to which there are incentives for states to comply. The FATF, though a "non-binding" regime, has been hugely influential as a source of inspiration for domestic efforts to combat money laundering. Because of the implications for domestic financial institutions of being branded a "high risk" jurisdiction, states have strong incentives to cooperate.

Chapter 5: Use of extraterritorial jurisdiction in civil matters generally

5.1 What is civil jurisdiction? In what ways can the exercise of civil jurisdiction be regarded as “extraterritorial”? For instance, do these rules involve direct assertions of extraterritorial jurisdiction over foreign parties or activities? Or do they merely have extraterritorial implications?

Civil jurisdiction refers to the jurisdiction taken by courts over private disputes between two or more parties. It differs conceptually from criminal jurisdiction¹ in that criminal matters generally involve a complaint by the state against an individual, whereas “civil” or “private law” cases are initiated by natural or legal persons – individuals and companies, for example – in their private capacity.

Civil jurisdiction is often described as being comprised of two separate elements: (a) personal jurisdiction (i.e. the jurisdiction enjoyed by the court over the parties to a dispute, the ability to require attendance and the production of evidence, for example, and the ability to make enforceable judgments); and (b) subject matter jurisdiction (i.e. the jurisdiction enjoyed by the court over the subject matter of the dispute, particularly the behavior or circumstances that form the basis of the claim).

Extraterritorial civil jurisdiction is often broken down in a similar way, so that extraterritorial personal jurisdiction refers to the personal jurisdiction of the court over foreign parties; and extraterritorial subject matter jurisdiction refers to the foreign aspects of the dispute itself (e.g. foreign land, foreign conduct, foreign injury etc.). Table 3 below gives some examples of cases where extraterritorial personal or subject matter jurisdiction are often said to exist. Note, however, that the cases described in this Table may not fall within the definition of extraterritorial jurisdiction used in this study² to the extent that the dispute concerns conduct taking place entirely within the territory of the forum state.³ Note, also, that in reality personal jurisdiction and subject matter jurisdiction go hand in hand – a court will not get subject matter jurisdiction over a dispute where it does not have personal jurisdiction over the parties, for example.⁴

As will become clear in the paragraphs that follow, civil jurisdiction is a matter that has largely been left to the domestic laws of states. As a result, there is some variation in these rules from state to state. A detailed comparison of these rules is beyond the scope of this study. Table 3 below is based primarily on European Union law - where the Brussels jurisdictional regime, discussed further below, has led to significant harmonization - but these bases of extraterritorial jurisdiction will hold for many non-EU jurisdictions as well.

One of the consequences of “globalisation” is that assertions of extraterritorial jurisdiction in private law cases, also referred to as “civil cases,” are now

¹ This is discussed in more detail in chapter 4 above.

² See p. 15 above.

³ See further comments at p. 145 below.

⁴ Some domestic criminal law systems allow for the possibility of trials of parties *in absentia* (i.e. the defendant is not physically present), however this is almost never the case in civil proceedings. See D. Donovan and A. Roberts, ‘Note and Comment: The Emerging Recognition of Universal Civil Jurisdiction’ (2006) 100 *American Journal of International Law* 142, at p. 156.

commonplace. The ability of people to travel to different countries and purchase products from abroad; the speed and versatility of modern telecommunications; and of course the presence of complex cross-border networks of international corporate groups, mean that there are many and varied cases in which it will be necessary for courts to take jurisdiction over foreign parties, or foreign activities or both, in order to hear and determine a case. The challenge for domestic legal systems is to manage this in a way: (a) that is fair to the parties; and (b) that takes proper account of the sovereign interests of other states.

As will be discussed in later sections of this chapter, courts may, provided certain criteria are fulfilled, assert extraterritorial jurisdiction directly over the foreign conduct of individuals and companies. But in understanding the extraterritorial scope of civil jurisdiction it is important to analyse the nature of disputes correctly. For example, a dispute involving the liability of a locally domiciled company for harm suffered abroad may not necessarily involve any exercise of extraterritorial jurisdiction (in the sense used in this study) if the focus of that dispute *is the acts and omissions of the parent company within the territory of the forum (or “regulating”) state*. However, this kind of potential liability is clearly capable of having profound extraterritorial implications (e.g. in terms of the remedies available to individuals abroad, and in terms of how a parent company approaches the management of foreign subsidiaries). Therefore, even if it does not involve the use of extraterritorial jurisdiction as such, it clearly falls within the category of “domestic measures with extraterritorial implications.”

In other words, in answer to the question posed at the beginning of this section, civil jurisdiction may involve direct assertions of extraterritorial jurisdiction, but it is also capable of having extraterritorial implications too.

Table 3: Extraterritorial personal and subject matter jurisdiction in civil matters

<p>The courts of State X may be able to exercise extraterritorial <i>personal</i> jurisdiction where ...</p>	<p>The courts of State X may be able to exercise extraterritorial <i>subject matter</i> jurisdiction where ...</p>
<p>(i) a foreign party has agreed that the courts of State X should have jurisdiction (e.g. under the terms of a contract, or as the dispute unfolds);</p> <p>(ii) the foreign party is a necessary and proper party to a claim which already involves a defendant domiciled in State X;</p> <p>(iii) the case is one in which the plaintiff is allowed to serve process on a foreign defendant (e.g. under EU law, the courts of State X can take jurisdiction over a foreign defendant in a tort case if State X is the “place where the harmful event occurred);</p> <p>(iv) a foreign party is domiciled, or “present,” in State X; or</p> <p>(iv) a foreign party has sufficient contacts with State X (e.g. on the basis of “doing business” in State X) and there are otherwise sufficient connecting factors between the dispute and State X. (Note: This is a more controversial basis of jurisdiction, but accepted in the US).</p>	<p>(i) the defendant is domiciled, or “present,” in the jurisdiction, but the facts giving rise to the dispute took place abroad;</p> <p>(ii) the facts giving rise to the dispute span more than one state (e.g. where negligence takes place in one country, but the effects are felt in several different jurisdictions);</p> <p>(iii) the claim arises out of an extraterritorial criminal offence over which State X has jurisdiction (i.e. in civil law states, where a civil action may be attached to a criminal prosecution); or</p> <p>(iv) the claim falls within the scope of other catch-all jurisdictional doctrines, e.g. “necessity” or “emergency” as a basis for jurisdiction. (Note: This head of jurisdiction is recognised in civil law jurisdictions such as Argentina, France and Germany).</p>

5.2 Is civil jurisdiction exercised unilaterally by states? Or in order to implement an international regime? Or both, and if so, which came first?

The rules governing the use of civil jurisdiction are derived from domestic law. Historically, each state has acted unilaterally in developing these rules, and their use of civil jurisdiction has not been regulated by international law to any great extent. Although there are areas of convergence across different countries and legal systems,⁵

⁵ See IBA Task Force Report, p. 125.

most academics do not regard this as evidence of *opinio juris*⁶ suggesting the existence of rules of customary international law.⁷

Nevertheless, it is always open to states to work together to simplify and harmonise rules on jurisdiction by way of treaty. This has already been done in the EU and the European Free Trade Area (“EFTA”), first by the Brussels and Lugano Conventions⁸ and then subsequently by the Brussels Regulation.⁹ The background to these regimes is discussed in more detail at para 5.5 below.

Outside the EU, attempts have been made to develop an international treaty harmonising rules on civil jurisdiction. This negotiating text was known as the Draft Hague Convention on Jurisdiction and Recognition and Enforcement of Judgments in Civil and Commercial Matters (the “Draft Hague Convention”).¹⁰ In the end, though, the project proved to be too ambitious. After years of negotiations it was still not possible to find harmonised solutions that suited the needs of key states, and the project was abandoned. The key issues dividing the parties are discussed in more detail at para. 5.5 below.

5.3 Is the jurisdiction claimed primarily prescriptive, adjudicative or enforcement jurisdiction? And what internationally recognised bases for jurisdiction are claimed (e.g. territory?, nationality?, “effects” doctrine, “universality”? etc).

The jurisdiction claimed in the civil law sphere is primarily adjudicative (or “judicial”) jurisdiction. But enforcement jurisdiction is involved as well, to the extent that courts have the power to enforce its decisions, or prescribe sanctions for non-compliance. It must be remembered too, that as well as being a means of enforcing private rights, civil jurisdiction can also be used as a way of enforcing public law requirements. Civil actions to enforce environmental laws in the US, or consumer safety laws in the EU, are good examples of this. In this way, prescriptive (or “legislative”) requirements provide the legal basis for enforcement by private individuals through the courts. The remainder of this chapter will focus, however, on

⁶ *Opinio juris* is a Latin expression used by international lawyers. It means “opinion of law” and refers to an actor’s belief that his acts have been done, not voluntarily, but because they were required by law. Under customary international law, any claim that a new rule of law has come into being must be backed up by evidence of *opinio juris* on the part of the states concerned.

⁷ See C. McLachlan, ‘The Influence of International Law on Civil Jurisdiction’ [1993] *Hague Yearbook of International Law* 125, 126. See also O. Kahn-Freud, ‘General Problems of Private International Law’ [1974] *III Recueil des Cours* 139, 165-196.

⁸ See the 1968 Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters, Brussels, September 27, 1968, in force 1 February 1973, OJ 1972 No. L299/32, 31 December 1972, (“the Brussels Convention”) and the 1988 Lugano Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, September 16, 1988, (1989) 28 *International Legal Materials* 620 (the “Lugano Convention”). The Brussels Convention covered the EU states, and the Lugano Convention still covers arrangements as between the EU and the EFTA states.

⁹ See Council Regulation No. 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ 2001 No. L12/1, 16 January 2001 (the “Brussels Regulation”).

¹⁰ Draft Hague Convention on Jurisdiction and Enforcement of Civil Judgments, draft Convention and related materials are available from <http://www.cptech.org/ecom/jurisdiction/hague.html>.

private law claims to enforce the private (or “personal”) rights that exist, for example, under tort and contract law.

The international law rules on jurisdiction operate differently, depending on whether criminal or civil jurisdiction is involved. As discussed in chapter 4 above, the use of extraterritorial criminal jurisdiction by State X must be able to be justified by at least one of the internationally recognised bases for jurisdiction, such as the nationality of the offender, or the fact that at least part of the offence was committed within the territorial boundaries of State X, or because the victim of the crime was a national of State X (“passive personality” jurisdiction). However, the jurisdiction exercised by courts in private law cases is not constrained in the same way.¹¹ Therefore, unlike the legislative or executive arms of government, courts are not required to justify their assertions of civil jurisdiction by reference to “territory” or “nationality” and so on. But their jurisdiction in civil matters is not unlimited. Instead they rely, in practice, on a more flexible notion of “connecting factors” between the dispute and their home jurisdiction. These “connecting factors” include: (a) the domicile of the main defendant, which is regarded by most states as a very strong basis for taking jurisdiction over a dispute; as is (b) the place where the conduct or activities giving rise to the dispute took place; and (c) the place where the effects of that conduct or those activities were felt (see further Table 3 above, and Box 10, p. 150 below).

In summary, therefore, extraterritorial criminal jurisdiction is constrained by international law, whereas extraterritorial adjudicative jurisdiction remains largely a matter for domestic law.¹² It is domestic law that sets out when and how extraterritorial jurisdiction may be taken, usually by reference to the factors that connect the dispute to the forum state. However, as with any other area of domestic law, it is always open to states to enter into international agreements governing the management of the issue.¹³

5.3A To what extent are states required to exercise extraterritorial civil jurisdiction? How much discretion do they have?

The amount of discretion a court is able to exercise over whether or not to take on an extraterritorial claim depends on the basis on which jurisdiction over the dispute is taken. In most, if not all, states – both common law and civil law – a person has the right to sue a defendant in the defendant’s home state, which is the state in which the defendant is domiciled or “resident.” The home state court would have jurisdiction over this defendant “as of right” and it would not have any general discretion to refuse to hear the claim. This means that the court must exercise its jurisdiction over the dispute and determine the matter, unless some other doctrine applies which permits it to decline jurisdiction, such as *forum non conveniens*, act of state or “non-justiciable political question.” These legal doctrines are discussed further at para. 5.4 below.

The courts of civil law countries also have jurisdiction as of right over tort cases where the tort was committed in that jurisdiction. Here, no extraterritorial subject matter jurisdiction is involved, although if foreign parties are involved, (i.e.

¹¹ See MacLachlan, n. 7 above.

¹² Although there are international law principles that are relevant to the way civil jurisdiction is used, such as “act of state” (discussed further below) and sovereign immunity. See further para. 5.4 below.

¹³ See further para. 5.2 above and para. 5.5 below.

individuals or companies domiciled in another state) then the jurisdiction enjoyed by the court over those foreign parties is often referred to as “extraterritorial personal jurisdiction.”¹⁴ If the tort has been committed partly in one state and partly in another, then a national court may have extraterritorial subject matter jurisdiction over those elements of the claim, such as foreign conduct, that took place outside that state’s territory as well as extraterritorial personal jurisdiction over any foreign parties (again, see Table 3 above).¹⁵

By comparison, the courts of common law states have traditionally enjoyed more discretion as to whether or not to take jurisdiction over foreign defendants, even where the wrongful acts took place within the territory of that state. Under English law, the commencement of proceedings against a foreign party (referred to by lawyers as “service out of the jurisdiction”) can only be done with the permission of the court (i.e. where the Brussels regime does not apply). The court has full discretion to refuse to permit service out of the jurisdiction and will only grant its permission if certain criteria are satisfied. The plaintiff must satisfy the court, in particular, that there is a serious issue to be tried,¹⁶ and that the English courts are, indeed, the most appropriate venue for determining the dispute.¹⁷ Traditionally, the courts of common law countries have been extremely cautious about allowing service out of the jurisdiction “believing that such jurisdiction was ‘exorbitant’ and interfered with the sovereignty of the country where service was to occur.”¹⁸ US courts, though less restrictive about the circumstances in which jurisdiction over a foreign defendant may be taken, still have the discretion to decline to exercise that jurisdiction where due process requirements have not been satisfied.¹⁹

The discretion of the English courts to refuse to take jurisdiction over foreign parties has been altered somewhat by the Brussels regime. Now, where the defendant is resident in another EU member state and the matter falls within the scope of the one or more of the Brussels regime jurisdictional rules, service of process on that party is a matter of right and is not up to the court’s discretion. The Brussels regime also removes the ability of the UK courts to decline jurisdiction on the basis of *forum non conveniens* where one of the defendants is domiciled in the UK, even where the alternate jurisdiction is not a state party to the Brussels regime.²⁰

For the purposes of the Draft Hague Convention on Jurisdiction, negotiators put forward a number of proposals, based on existing domestic law, as to when jurisdiction would be mandatory (the “white list”), prohibited (the “black list”) or optional, and therefore left to the domestic law of state parties (the “grey list”). Although final agreement was not achieved, the contents of these different “lists” provides a useful overview of how various states view their jurisdictional rights and obligations in relation to private claims. See summary at Box 10 below.

¹⁴ See para. 5.1 and Table 3 above.

¹⁵ IBA Task Force Report, p. 119.

¹⁶ *Seaconsar Far East Ltd. v Bank Markazi Jomhouri Islami Iran* [1994] 1 AC 438 (HL).

¹⁷ See further the English Civil Procedure Rules, CPR 6.20 and 6.21.

¹⁸ IBA Task Force Report, p. 100.

¹⁹ These vary from state to state but can broadly be summarised by reference to two requirements: (a) the defendant must have had “minimum contacts” with the jurisdiction and (b) the exercise of extraterritorial jurisdiction must have been “reasonable.” See IBA Task Force Report, p. 108.

²⁰ See further n. 22 below and accompanying text.

Box 10: The Draft Hague Convention on Jurisdiction and Enforcement of Judgments (2001 draft): mandatory, prohibited and optional grounds for jurisdiction of the forum state (“State X”)

Note: The provisions of the Draft Hague Convention are complex and the below is not an exhaustive list. Note also that many of the provisions of the 2001 draft were still contested by some states. [Square brackets] are used to indicate proposals on which a general consensus could not be reached.

“White list” (mandatory grounds)

- Where State X is the place where the defendant is “[habitually] resident”;
- Where the parties have agreed that State X shall have jurisdiction;
- Contract cases [where the defendant maintains a high degree of activity in State X];
- Where the defendant has a branch or agency in State X (provided that the dispute relates to the activities of the branch or agency) [and provided further that subsidiaries should not automatically to be regarded as a “branches” or “agencies” of a foreign company for this purpose];
- Tort cases (where State X is either (a) the place of commission of the wrongful act or (b) the place where the injury arose [OR where the defendant maintains a high degree of activity in State X provided that the claim arises out of that activity]);
- [Where the case concerns rights in immovable property located in State X].

“Black list” (prohibited grounds)

Where there is “no substantial connection” between State X and the dispute; and in particular, jurisdiction may not be based solely upon ...

- [The presence of property in State X owned by the defendant (except where the dispute relates to that property)];
- The fact that the plaintiff is a national or resident of State X;
- The fact that the defendant is a national of State X;
- [The mere fact that the defendant carries on business in State X (except where the claim arises from that business)];
- [The temporary presence of the defendant in State X;]
- [The location of a subsidiary of the defendant in State X].

[but jurisdiction should be preserved in relation to genocide, war crimes and crimes against humanity].

“Grey list” (optional grounds)

- Bases of jurisdiction recognised by domestic law of State X but not covered by the Convention (and not included in the “black list”).

5.4 What legal objections have been raised at the international and national levels in relation to exercises of extraterritorial civil jurisdiction? Are those objections still being raised?

Obviously, extraterritorial civil jurisdiction is often necessary for courts to be able to determine disputes with a foreign element, and it is generally accepted in principle. However, some bases for taking jurisdiction over foreign parties (i.e. individuals or companies domiciled in other states) have been controversial, and have been opposed by states with different legal traditions. One of the best examples is probably the flexibility enjoyed by common law states regarding taking jurisdiction over individuals and companies based on “mere presence” rather than domicile. This proved a major sticking point between the US on the one hand, and many European states on the other, in the context of the negotiations on the Draft Hague Convention on jurisdiction.²¹

In most cases, though, it is not the jurisdictional principle itself that is objected to, so much as its application in individual cases. But where a defendant feels that the taking of jurisdiction is “exorbitant” or inappropriate in the circumstances, there are a number of legal doctrines that may be invoked, depending on the particular circumstances and the jurisdictions involved. A selection of them is discussed here.

Objections based on forum non conveniens

A well-known basis for legal objections about extraterritorial civil jurisdiction, though largely confined to common law jurisdictions, is that the plaintiff has chosen the wrong forum in which to determine the dispute. That is, instead of launching proceedings in State X, the plaintiff should have chosen the courts of State Y. This is known as the doctrine of *forum non conveniens* (or “inconvenient forum”) and is a basis on which the courts of common law jurisdictions (i.e. US, UK, Australia, Canada, New Zealand) have been able to “stay” (or block) proceedings in their own courts involving people, companies, activities or things in other jurisdictions. In the UK, though, the ability of courts to rely on this doctrine has been severely curtailed following the ruling of the European Court of Justice in the case of *Owusu v Jackson*.²²

Approaches to the issue of *forum non conveniens* vary from state to state. UK decisions have emphasised the need for efficiency and convenience, but most importantly, the need for fairness to both parties.²³ In addition to these private interests, US courts, in their own version of the “balancing test,” also take account of the public interests involved, including the regulatory interests of the foreign state in the subject-matter of the dispute, and therefore in keeping jurisdiction over it.²⁴ On

²¹ See further para 5.5 below.

²² Case C-281/02 *Owusu v Jackson* [2005] 2 WLR 942. Following this decision, proceedings may not be stayed by UK courts on the basis of *forum non conveniens* where at least one of the defendants is domiciled in the UK, as this would be inconsistent with the Brussels Regulation.

²³ See the test laid down in *Spilada v Cansulex* [1987] AC 460, and the way the test was applied by the House of Lords in *Lubbe v Cape plc* [2000] 1 WLR 1545; [2000] 4 All ER 268 (HL) 277. See further para. 5.7 below.

²⁴ See *In Re Union Carbide Corporation Gas Plant Disaster at Bhopal, India in December, 1984*, 634 F Supp 842 (SNDY 1986).

the other hand, the Australian courts apply a test for *forum non conveniens* that means that they will hardly ever decline jurisdiction, requiring the objecting party to show that the Australian courts are “clearly inappropriate.”²⁵ The various national tests for *forum non conveniens* are discussed in more detail at para. 5.7 below.

Objections based on the doctrines of “act of state” and “non-justiciable political question”

Because civil (i.e. private law) proceedings are initiated by private entities rather than state authorities, states do not have the same control over proceedings as they do in relation to criminal matters. It is possible, therefore that private claims having an extraterritorial dimension may end up causing difficulties for foreign relations, or interfere with the policies or interests of other states. However, there are international law doctrines to help deal with the problem. Under these doctrines, a court can decline jurisdiction, or indeed hold that it has no jurisdiction, in relation to disputes that would require a court to pronounce upon the validity of a foreign “act of state” or which raise a “non-justiciable political question.” The “act of state” doctrine is derived from public international law and says that national courts should refrain from “sitting in judgement” on the acts of another state within its own territory. It operates as a check on domestic jurisdiction. The doctrine of non-justiciable political question “directs the courts to decline to decide a case otherwise properly presented for resolution because the dispute presents issues constitutionally assigned to the political branches of government.”²⁶

Many proceedings under the US Alien Tort Statute (“ATS”)²⁷ have been objected to on the basis that they raise a “non-justiciable political question.”²⁸ Assertions of extraterritorial jurisdiction by the US courts under this statute have been objected to by the US government many times, on the basis that this judicial action could interfere with “important foreign policy interests.”²⁹ This principle has also been invoked by the governments of affected foreign states (see case study 13 below).

Objections based on the broader principle of “non-interference” in the affairs of other states

The doctrines of “act of state” and “non-justiciable political question” are aspects of a wider obligation of non-interference in the domestic affairs of other states. This obligation, which derives from the international law principle of sovereign equality, requires that each state refrain from acting in such a way that constitutes an interference in the way other states and their governments operate within their own territories.³⁰

²⁵ See *Oceanic Sun- Line Special Shipping Co. Inc. v Fay* (1988) 165 CLR 197. See further para. 5.8 below.

²⁶ B. Stephens, ‘Upsetting Checks and Balances: The Bush Administration’s Efforts to Limit Human Rights Litigation’ (2004) 17 *Harvard Human Rights Journal*, 169 at p. 193.

²⁷ Codified at 28 USC § 1350. The ATS dates back to 1789 and grants extraterritorial jurisdiction to the US District Court in respect of “any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.”

²⁸ See further Stephens, n. 26 above.

²⁹ B. Stephens, ‘Judicial Deference and the Unreasonable Views of the Bush Administration’ [2008] *Brooklyn Journal of International Law*, 773 at pp. 773-4.

³⁰ On the issue of non-interference generally, see pp. 20-21 above.

On the other hand, the realisation of human rights, and the prevention of human rights violations, is something in which all states have an interest under international law. Serious human rights violations, including those committed by non-state actors, are increasingly seen as not purely a matter for the domestic jurisdiction of the state where the abuse occurred.³¹ Universal jurisdiction, which potentially gives all states criminal law jurisdiction over the gravest human rights abuses, wherever they are committed, is based on this idea.³² But “universal civil jurisdiction” remains a more controversial concept.³³ Some similar considerations may apply, but the distinction between private and public enforcement remains key for many states.

In practice, assertions of extraterritorial civil jurisdiction under the US ATS over alleged human rights violations in other states have been objected to by other states because of the potential for the proceedings to interfere with that state’s attempts to resolve the issue *at home*. In relation to the *Khulumani* claims (see case study 13 below), Thabo Mbeki, then the South African president, said that he thought it “completely unacceptable that matters that are central to the future of our country should be adjudicated in foreign courts that bear no responsibility for the well-being of our country and the observance of the perspective contained in our constitution of the promotion of national reconciliation.”³⁴

Case study 13: *Khulumani et al v Barclays Bank*

Khulumani et al v Barclays Bank, involved a claim for damages from a number of international companies. The claims arose out of the business dealings of those companies in South Africa during the apartheid era and were largely based on the ATS. In 2003, the South African government filed a declaration with the US courts opposing the litigation and stating:

“[i]t is ... the view of the government that the issues raised in these proceedings are essentially political in nature. These should be, and are being resolved, through South Africa’s own democratic processes. Another country’s courts should not determine how ongoing political processes in South Africa should be resolved ... The continuation of these proceedings ... will intrude upon and disrupt our own efforts to achieve reconciliation and reconstruction.”(1)

However, these objections by the South African government were withdrawn following a US District Court decision (handed down in April 2009) substantially narrowing the scope of the claims. In a letter dated September 1, 2009, the South African Minister of Justice, Mr Jeffrey Thamsanga Radebe, stated that, in the view of the Government of South Africa, the US District Court is indeed “an appropriate forum to hear the remaining claim of aiding and abetting in violation of international law” (2). The US government, too has filed a ‘statement of interest’ in relation to an

³¹ See S. Ratner, ‘International Law: The Trials of Global Norms’ (1998) 160 *Foreign Policy* 65.

³² See p. 20 and para. 4.3 above.

³³ See Donovan and Roberts, n. 4 above.

³⁴ President Thabo Mbeki, Statement to the National Houses of Parliament and the Nation, at the Tabling of the Report of the Truth and Reconciliation Commission, April 15, 2003, available at <http://www.anc.org.za/ancdocs/history/mbeki/2003/tm0415.html>, cited in D. Donovan and A. Roberts, n. 4 above, at p. 161.

appeal by the defendants based on the issue of non-justiciable political question (3). In its statement, however, the US government notes that, although the case could have foreign relations implications, “at no time did the United States explicitly inform the courts that the case-specific impact these suits would have on the United States’ foreign policy was a sufficient basis by itself for dismissal.”

Sources: (1) Declaration by Penuell Mpapa Maduna, Minister of Justice and Constitutional Development of the Republic of South Africa, dated July 11, 2003, copy available at <http://www.nftc.org/default/ussabc/Maduna%20Declaration.pdf>; (2) Letter from Jeffrey Thamsanqa Radebe, Minister of Justice and Constitutional Development to Judge Scheindlin of the US District Court, dated 1 September 2009, copy available at

http://www.khulumani.net/attachments/343_RSA.Min.Justice_letter_J.Scheindlin_09.01.09.PDF(3) ‘Statement of Interest of the United States’ in the case of *Balintulo et al v Daimler AG et al*, November 30, 2009. Relevant case materials can be accessed via the Business & Human Rights web-site

<http://www.business-humanrights.org/Categories/Lawlawsuits/Lawsuitsregulatoryaction/LawsuitsSelectedcases/ApartheidreparationslawsuitsreSoAfrica>.

5.5 What were the key policy drivers (political, economic etc.) underlying the development of international regimes on civil jurisdiction, and what were the policy obstacles? Are there still challenges to these regimes along policy lines? If so, from where?

The Brussels regime

A harmonised international regime on civil jurisdiction and enforcement of foreign judgments exists as between EU states dating back to the Brussels Convention of 1968. Judicial cooperation, and a common set of rules for national courts, was seen as vital for the member states’ objectives of a fully functioning internal market, and the economic and social integration that this requires. However, this raised a number of policy challenges, chief among which was the challenge of working the varying national approaches on jurisdiction, which have grown out of different legal systems and traditions, into a coherent single set of rules for the whole Community. A number of adjustments needed to be made at the national level to accommodate and implement the new regime.

The Brussels Convention was eventually replaced, in 2001, by a new piece of EU legislation known as the Brussels Regulation.³⁵ Work on the Brussels regime is still ongoing. In April 2009, the European Commission launched a new consultation process on the future of the Brussels regime, proposing harmonisation of jurisdictional rules for disputes involving defendants, property and activities in non-EU states.³⁶

³⁵ See n. 9 above.

³⁶ European Commission, ‘Green Paper on the Review of Council Regulation (EC) No 44/2001 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters’, Brussels, April 21, 2009, COM (2009) 175 FINAL, copy available at [http://www.ipex.eu/ipex/webdav/site/myjahiasite/groups/CentralSupport/public/2009/COM_2009_0175/COM_COM\(2009\)0175_EN.pdf](http://www.ipex.eu/ipex/webdav/site/myjahiasite/groups/CentralSupport/public/2009/COM_2009_0175/COM_COM(2009)0175_EN.pdf).

An attempt to create an international treaty on jurisdiction: the Draft Hague Convention

If the challenges of reconciling the different legal rules and traditions of the various EU states were not difficult enough, they were to prove overwhelming in the context of the negotiations on the Draft Hague Convention.³⁷ As noted in para 5.2 above, this was an attempt, dating back to the mid-1990s, to develop an international treaty on extraterritorial civil adjudicative jurisdiction. European states, by then fairly comfortable with the Brussels regime, were keen to replicate and improve on that regime and apply it internationally. The US, had initially seen the treaty as a chance to overcome a persistent problem – the imbalance between the US and European states in terms of the preparedness of the courts to recognise and enforce the judgments of the other. It was considered that US courts were far more prepared to act in this way than European courts. As one observer notes “[t]his perceived inequality of treatment was not seen just as a legal matter, but also as an economic one. If foreign judgment creditors could enforce their judgments more readily in the USA than American [creditors] could abroad, this amounted to a trade imbalance.”³⁸

But in the end negotiations foundered, largely due to differences between the US and EU states. European states were not comfortable with the idea of new requirements regarding the enforcement of foreign judgments without some reforms from the US side. Of particular concern was the fact that US law permitted civil actions in antitrust cases, which could be aimed at non-US companies, with the possibility of “treble damages.”³⁹ Another concern was the use of juries in civil trials, and the high levels of damages that sometimes resulted. Finally, European states were not inclined to recognise US judgments in cases relying on what they viewed as “exorbitant” extraterritorial jurisdiction, i.e. based on “mere presence” and “doing business” in the US. The US, on the other hand, complained about what it saw as a lack of respect for legal traditions, a lack of flexibility and a lack of clarity in the treaty text itself.⁴⁰ With no resolution to these problems in sight, the project was eventually shelved.⁴¹

5.6 Who were/are the main stakeholders driving (or opposing) the development of civil jurisdiction regimes? Are particular stakeholders associated with particular viewpoints or arguments?

Discussions around the proposals for an international treaty on civil jurisdiction provide a snapshot of the views of different interest groups on the use of

³⁷ See n. 10 above.

³⁸ P. North, ‘Rethinking Jurisdiction and Recognition of Judgments’ (2002) 55 *Current Legal Problems*, p. 416.

³⁹ See further p. 108 above.

⁴⁰ For a summary of US concerns see the Letter from Jeffrey D. Kovar, US Department of State Assistant Legal Adviser for Private International Law, to J. H. A. van Loon, Secretary-General dated February 22, 2000, copy available at <http://www.cptech.org/ecom/hague/kovar2loon22022000.pdf>.

⁴¹ IBA Task Force Report, pp. 91-92. For a useful background to this project see <http://www.hcch.net/upload/exp137e.pdf>. But although a mixed convention proved too difficult to negotiate, work continued on a scaled-down project and the Hague Convention on Choice of Court Agreements was finally agreed in 2005. It was signed by Mexico in 2007, and by the US and the EU in 2009, although it has yet to enter into force. See http://www.hcch.net/index_en.php?act=conventions.status&cid=98#mem.

extraterritorial civil jurisdiction. As noted above, states were keen to develop a more consistent, harmonised regime, while at the same time preserving existing domestic legal positions as far as possible. These two objectives proved impossible to reconcile.

Non-state actors were also active contributors to these discussions. One area of interest for non-state actors concerned e-commerce, where there was a difference of opinion between consumer groups and business groups about which state should have jurisdiction in the event of a dispute arising from e-commerce transactions. Consumer groups argued that consumers ought to retain the right to bring claims in their home jurisdictions. Business groups, on the other hand, argued that disputes should be referred to the courts of the state named as having jurisdiction in the consumer contract. Practically speaking, this will almost always be the jurisdiction chosen by the company.⁴²

The other key area of interest for non-state actors was in relation to human rights litigation. Human rights NGOs have supported, in various ways, much of the extraterritorial human rights-related litigation that has taken place under the US ATS, and also, in other jurisdictions, under the more general rules of tort.⁴³ When the Draft Hague Convention proposals were being developed in the late 1990s, there were a number of human rights-related cases already pending in relevant jurisdictions. Human rights NGOs were concerned that the Draft Hague Convention's "black list" of prohibited bases for civil jurisdiction could restrict the ability of victims groups to bring these kinds of extraterritorial claims.

Broadly speaking, while human rights NGOs and public interest lawyers have been concerned to maintain, and if possible enhance, the extraterritorial scope of civil jurisdiction in relation to human rights abuses, states (even those with fairly expansive jurisdictional rules in other areas) have been keen to limit it. The concern of some states to identify some limits to the use of jurisdiction in human rights-related civil cases is evident from the *amicus curiae* briefs filed by foreign (i.e. non-US) governments in the landmark case of *Sosa v Alvarez Machain*.⁴⁴ This case raised a number of issues under US law, including the geographical scope of a Federal tort statute and whether the ATS created a right of action for private individuals. The European Commission, Australia, Switzerland and the UK submitted amicus briefs setting out their views as to the appropriate limits of extraterritorial civil jurisdiction in serious human rights cases. Australia, Switzerland and the UK, in a joint brief, argued that, to limit the potential for infringing the sovereignty of other states, ATS should be reserved for cases connected to the US, or involving US nationals.⁴⁵ The European Commission argued that civil jurisdiction over foreign wrongs should be limited to cases involving very serious human rights abuses already covered by

⁴² North, n. 38 above, pp. 421-422.

⁴³ In theory, many human rights abuses give rise to a possible action based on the domestic law of tort. UK tort law provides possible remedies for personal injury and death, assault, battery and false imprisonment, for example. See further J. Zerk, 'Common Law Tort Liability for Corporate Participation in International Crimes' a paper submitted to the International Commission of Jurists Expert Legal Panel; on Corporate Complicity in International Crimes, dated September 15, 2006, copy on file with the author.

⁴⁴ 542 US 692 (2004).

⁴⁵ A copy of the joint amicus curiae brief filed of the governments of Australia, Switzerland and the UK can be viewed at <http://www.sdshh.com/Alvarez/Sosa%20Brief%20Final.pdf>.

universal criminal jurisdiction,⁴⁶ and where the victim would otherwise suffer a denial of justice, such as where there is no adequate, independent judicial body in the State with the closest links with the case, or no reasonable prospect of redress.⁴⁷

5.7 What have been the obstacles to states in implementing regimes relating to extraterritorial civil jurisdiction – for example, the procedural challenges involved in information sharing and joint enforcement activities? What cooperative arrangements are in place (formal and informal) between states? And how are jurisdictional conflicts resolved?

Investigating and prosecuting claims with an extraterritorial element

Unlike criminal cases, (see chapter 4 above), the burden of investigating and prosecuting a civil claim falls to the parties involved. Therefore there is generally no question of one state interfering with the investigative or prosecutorial functions of another, though of course there may be problems where the foreign state has a policy or practice of obstructing human rights defenders, especially where state actors are also caught up in allegations. While the parties to the dispute may request and receive help from foreign state authorities and non-state actors with respect to the collection of evidence, the main process through which information is divulged and collected is through the process of “discovery.” Under this process, each party must disclose to the other all information in her possession relating to the dispute, in good time to allow the parties to formulate their respective claims, counter-claims and defenses. The parties will also frequently be required to exchange witness statements setting out a summary of the evidence of each of the witnesses on which they, respectively, propose to rely.

Obviously, these civil procedure rules will apply equally to foreign parties and local parties subject to the relevant court’s jurisdiction. If any party (whether local or foreign) fails to comply with its discovery and disclosure obligations, it risks sanctions under the relevant civil procedure regime, which can include an order to stay or dismiss the proceedings (in the case of non-compliance by a plaintiff) ordering a default judgment against the non-compliant party (in the case of non-compliance by a defendant), or treating the non-compliance as contempt of court. The non-compliant party may also be ordered to pay costs.

There are cases, though, in which a foreign party’s discovery obligations in civil cases have come into conflict with its legal obligations in its own state of domicile, under banking secrecy or data protection laws for example. The problem arose in the US case of *Linde v Arab Bank plc*⁴⁸ which involved a claim by a number of US citizens for damages under US anti-terrorism laws on the basis of allegations that the bank had been providing finance and material support to terrorist groups. The defendant bank argued that a discovery order handed down by the magistrate in that case would cause the bank, if it complied with the order, to violate of banking secrecy laws in Jordan,

⁴⁶ See p. 20.

⁴⁷ See ‘Brief of Amicus Curiae of the European Commission in Support of Neither Party’ filed in the case of *Sosa v Alvarez-Machain*, a copy of which can be viewed at http://sdshh.com/Alvarez/ECBriefforSosavAlvarez_Machain_v1_%5B1%5D.pdf. For a more detailed discussion of the various amicus curiae briefs discussed above, see further Donovan and Roberts, n. 4 above.

⁴⁸ 384 F. Supp 2d 571 (SDNY 2005).

Lebanon and under Palestinian Monetary Authority rules. The US court upheld the discovery order, deciding that the US interests in combating terrorism should have priority over a foreign state's banking legislation. But the US court also recognised that this posed some difficulties for the bank and so extra time was given to enable the bank to seek the necessary permissions from the relevant foreign authorities.

Enforcement of foreign judgments

Enforcement of judgments and injunctions against foreign parties (whether final or interim) can pose problems for litigants. However, international arrangements have been put in place to help deal with this. The Brussels regime creates a system whereby each of the EU member states agrees to recognise and enforce the judgments of the other, except where an exception applies. Exceptions include where the judgment is contrary to public policy, where the judgment was obtained by fraud, where the judgment was a default judgment but the defendant was not given sufficient opportunity to respond, or where the judgment is not reconcilable with an earlier judgment given between the same parties.

Outside the EU, the status of a foreign judgment, and the steps required to enforce it, depend both on the domestic law of the state in which the judgment is proposed to be enforced, and the existence of any treaty, bilateral or multilateral, between the states concerned. States are under no obligation to ensure their courts recognise and enforce judgments given by the courts of another state unless there is an international treaty between those two states. In practice, though, even in the absence of a relevant treaty, domestic courts have been prepared to recognise and enforce the judgements of other states – either directly or in separate proceedings – provided certain criteria are met. For example, the foreign court must have had a proper basis for jurisdiction, there must be no public policy objections, there must have been respect for due process, absence of fraud, the judgment must have been final, and the judgment must be consistent with the public policy of the enforcing state.⁴⁹

Resolving jurisdictional conflicts

Given the effects of globalisation and the flexibility inherent in many of the jurisdictional rules, it is inevitable that there will be cases where two or more states have potential or actual jurisdiction over a civil dispute. In many cases this problem can be resolved by agreement between the litigants themselves. But in some cases a judicial determination is necessary. A number of legal principles and rules have been developed to help courts deal with the problem. The best known of these are discussed below.

(a) Declining jurisdiction in favour of a foreign forum

A court may decline jurisdiction on the basis that the dispute has closer connections with another state, and therefore the dispute should be litigated there. Jurisdiction can be declined at the outset, by refusing to allow service on a foreign party for example, or, if permitted under domestic law, at a later stage on the basis of *forum non conveniens*, as outlined at para. 5.4 above.

As a method of dealing with jurisdictional conflicts, “declining jurisdiction” is more associated with the courts of common law countries than civil law countries for two

⁴⁹ R. Kreindler, *Transnational Litigation: A Basic Primer*, (Oceana Publications. 1991), pp. 235-239.

reasons. First, the courts of common law countries are traditionally less inclined to regard themselves as having jurisdiction over foreign parties as of right (and therefore are more cautious about “service out of the jurisdiction”). Second, with few exceptions, the doctrine of *forum non conveniens* tends only to be recognised in common law states. This may be due in part to the fact that common law countries have traditionally had more liberal rules about service within the jurisdiction (service could be based on mere presence, for example), meaning that the common law courts were much more likely to be confronted with largely extraterritorial claims (i.e. involving both foreign parties and foreign subject matter) than their civil law counterparts.

The doctrine of *forum non conveniens*, as noted above⁵⁰ permits a court to stay proceedings on the basis that it is not the best (i.e. “most convenient” or “most appropriate”) forum for determining the dispute. The English courts traditionally applied a “two-part” test to determine whether they should retain jurisdiction, or dismiss a case in favour of another jurisdiction.⁵¹ Under the first part of the test, the judges asked themselves whether there was another available forum that was clearly more appropriate. If the answer to this question is “yes,” then the action would be stayed, unless the plaintiff could show that considerations of justice required the English courts to keep jurisdiction and adjudicate the matter there. However, as noted above, this doctrine has been severely curtailed in the UK as a result of the Brussels regime.⁵²

Different versions of the basic doctrine are in use in other common law states. New Zealand and Canada apply versions of the test for *forum non conveniens* that closely resemble the traditional English test. The Australian courts, however, apply a different test. Under the Australian version, the defendant has to persuade the court (a) that there is a more appropriate forum elsewhere and (b) that the Australian forum is “clearly inappropriate.”⁵³ This makes it highly unlikely that proceedings will be stayed by an Australian court on *forum non conveniens* grounds. As noted above,⁵⁴ the test applied in the US has parallels with the English test, but there are significant differences too. In particular, the US courts have held that the presumption that the plaintiffs has chosen the most convenient forum is treated a less strong when the plaintiff lives outside the US,⁵⁵ making it very likely that cases involving foreign plaintiffs will be stayed. The US test also allows the court to take account of “public interests” as well as private interests. This approach has been rejected by other common law jurisdictions, like the UK, who have preferred to place the private interests of the parties centre-stage. However, it must be remembered that, in most common law jurisdictions, “public interests” should have been taken into account as part of the assessment as to whether service out of the jurisdiction (on a foreign defendant) may take place in the first place.⁵⁶

⁵⁰ See para. 5.5.

⁵¹ *Spilada v Cansulex*, n. 22 above.

⁵² See n. 23 above and accompanying text.

⁵³ *Oceanic Sun- Line Special Shipping Co. Inc. v Fay* (1988) 165 CLR 197.

⁵⁴ See discussion at para.5.4 above.

⁵⁵ *Piper Aircraft Co. v Reyno* 454 US 235 (1981), pp. 255-6.

⁵⁶ See para. 5.4A above.

(b) The rule of *lis alibi pendens* (or “dispute pending elsewhere”)

Under the Brussels regime, states have agreed that where proceedings involving the same cause of action and facts are brought in two different states, then the court in which the proceedings were first commenced retains jurisdiction and the courts of other member states must defer to the first.⁵⁷ A similar provision was inserted into the Draft Hague Convention.⁵⁸ The idea is based on the civil law doctrine of *lis alibi pendens*, or “dispute pending elsewhere.” The common law approach is somewhat different, in that the court which has priority is the one where the judgment is delivered first. The legal principle of *res judicata*, which exists in both common law and civil law systems, means that once a dispute has been determined, while the parties may appeal within the same court system, they may not re-litigate their dispute in another court.

(c) International comity

A somewhat vague doctrine, inspired by the public international law principle of sovereign equality, is the doctrine of “international comity.” This doctrine – frequently invoked by courts though not considered by most commentators to be a positive legal requirement under public international law – refers to the need for each state to show respect for the laws, policies, traditions and aspirations of other states. It is difficult to define precisely, but it was influential in the decision by the US courts to dismiss the first round of litigation arising from the Bhopal disaster (see further case study 14 below). And it has also been used as a ground to dismiss some ATS-related claims.⁵⁹

(d) Deferring to the laws of a foreign state through “choice of law” rules

Where jurisdiction is taken over a foreign tort, courts have found ways to reconcile the competing interests of the states involved, and to reduce the risk of injustice to the parties, through rules on “choice of law.”

Under common law, the English courts, and the courts of other common law jurisdictions, tended to apply their own law to foreign torts (this is referred to as *lex fori* or “law of the forum”) as opposed to the law of the foreign state where the tort occurred (known as the *lex loci* or “law of the place of the tort”). The potential problems arising from this assertion of extraterritorial jurisdiction were mitigated by the rule of “double actionability.”⁶⁰ Under this rule, a tort taking place in State Y would only be actionable in State X, under the laws of State X, if the tort was also actionable under the laws of State Y.⁶¹

In the UK, the “double actionability” rule was abolished in 1995 by legislation⁶² which required that, as a general rule, the liability for torts outside the UK be

⁵⁷ See Brussels Regulation, n. 9 above, Article 2.

⁵⁸ See 2001 “interim” draft, Article 21.

⁵⁹ See *Sarei v Rio Tinto* 221 F Supp 2d 1116 (CD Cal 2002). Note, however, that this decision was reversed on appeal in August 2006. See *Sarei v Rio Tinto plc* 456 F 3d 1069 (9th Cir. 2006).

⁶⁰ This legal rule is similar to the concept of “double criminality” in criminal law, and requires that if a wrongful act took place in a foreign state, it can only be litigated in the court of a different state if the wrongful act could form the basis of a legal action in both places.

⁶¹ For English case law on this issue see *Philips v Eyre* (1870) LR 6 QB 1, as subsequently interpreted and explained in *Chaplin v Boys* [1971] AC 356 HL, and *Coupland v Arabian Gulf Oil Co.* [1983] 1 WLR 1136.

⁶² The Private International Law (Miscellaneous Provisions) Act 1995. See sections 11 and 12.

governed by the *lex loci* (i.e. the place where the injury was sustained). The courts of a number of other jurisdictions, including Australia and Canada, have also now rejected the double actionability rule in favour of a new rule adopting the *lex loci* as the governing law.⁶³ This essentially means that if those courts retain jurisdiction to hear the case, they will be applying the laws of another country.

Within the EU, choice of law rules for foreign torts are now governed by a Council Regulation known as “Rome II.”⁶⁴ In relation to torts, the general rule is that liability should be governed by the “law of the country in which the damage occurs” unless there are very strong reasons for applying the law of another country.⁶⁵ In most cases, therefore, the law applicable to an extraterritorial tort-based dispute (i.e. where damage was sustained in another country) will be the law of the place where the damage occurred, not the law of the forum state. However, the Rome II regime preserves the right of courts to refuse to apply foreign law where to do so would be “manifestly incompatible with the public policy (*ordre public*) of the forum.”⁶⁶ The preamble to the Rome II Regulation suggests that this might be the case where excessive punitive damages would be imposed under the foreign law.⁶⁷ Some experts have argued that it ought also to be the case where to apply foreign law would enable a defendant to escape liability for serious human rights violations.⁶⁸

To summarise, choice of law rules can help mitigate concerns about extraterritorial jurisdiction in civil cases. Where a tort was committed in another jurisdiction, the forum state may be able to apply the law of that other state to determine the dispute. Applying that other state’s own law to a dispute may help to diminish the argument that the forum state is directly interfering with the sovereignty of that other state. Other benefits of these “choice of law” rules are that they discourage “forum shopping” and may yield a fairer result to the parties, and especially defendants, who may reasonably expect when in State Y that their actions would be governed by the laws of State Y, rather than State X.

(e) Anti-suit injunctions

A more confrontational way of resolving jurisdictional conflicts is through “anti-suit” injunctions. An anti-suit injunction is an injunction awarded on the application of a party to a dispute with the aim of preventing another party to a dispute proceeding with a claim in another jurisdiction. Grounds for awarding such an injunction under English law, for example, are where the foreign proceedings are “vexatious,” “unconscionable” or “oppressive.”⁶⁹

⁶³ In Australia see *Renault SA v Zhang* (2002) 210 CLR 491. In Canada, see *Tolofson v. Jensen* [1994] 3 SCR 1022

⁶⁴ Council Regulation No. 864/2007 of 11 July 2007 on the law applicable to non-contractual obligations OJ 2007 No L199/40, 31 July 2007 (“Rome II”).

⁶⁵ See Rome II, Article 4(3) which requires that it be “clear from all the circumstances of the case that the tort/delict is *manifestly more closely connected* with [another] country.”

⁶⁶ *Ibid*, Article 26.

⁶⁷ *Ibid*, see para 32.

⁶⁸ See S. Joseph, *Corporations and Transnational Human Rights Litigation* (Oxford: Hart Publishing, 2004), p. 120.

⁶⁹ See *Société Nationale Industrielle Aerospatiale v Lee Kui Jak* [1987] AC 871; *Midland Bank plc v Laker Airways Ltd* [1986] QB 689.

5.8 What considerations are taken into account by regulatory authorities in deciding whether or not to commence enforcement action in relation to extraterritorial activities? For instance, how serious or systemic must the offences be? And how great the connection with the regulating state?

[omitted]

5.9 What remedies are provided by civil regimes?

Financial remedies

The aim of civil regimes is primarily compensatory – to put the plaintiff back into the position that he would have been in, had the wrongful act not occurred. However, some civil regimes offer the prospect of punitive or exemplary damages, which are designed not so much to compensate the plaintiff, but to punish and “make an example of” the defendant where the level of wrongdoing has been particularly serious. Punitive or exemplary damages are most associated with the US. Under US antitrust law, for example, civil enforcement actions involve the possibility of awards of “treble damages” in serious cases.⁷⁰ The US is also known for very high jury awards of punitive damages in tort-cases.⁷¹ In the UK, the circumstances in which “punitive” damages will be awarded are quite limited.⁷² However, other common law jurisdictions, Canada, New Zealand and Australia, make more use of this particular remedy. Civil jurisdictions, on the other hand, have traditionally emphasised the compensatory role of the law in private actions, and have tended to reject the idea of punitive damages in principle.⁷³

Other remedies

In some cases, civil remedies may also include injunctions to desist from certain behavior - such as publishing certain material, continuing with a construction project, making certain advertising claims, or engaging in unfair business practices - or to make specified reparations, such as cleaning up a polluted site, or putting in place a suitable compliance regime to prevent future problems. Failure to comply with judicial injunctions or orders is generally treated as contempt of court.

⁷⁰ See p. 108 above.

⁷¹ J. Fleming, *The American Tort Process* (Oxford: Oxford University Press, 1991), pp. 214-224 (1988). While the right to a jury trial in civil cases has been removed in most other common law jurisdictions, it is a right that is rarely waived by claimants in the US. Fleming, *ibid*, chapter 4.

⁷² See *Rookes v Bernard* [1964] AC 1129 in which Lord Devlin argued that punitive damages should be limited to three kinds of cases (i) unconstitutional or oppressive government action (ii) cases where the defendant’s conduct was calculated to make a profit for himself which would exceed any compensation, and (iii) where punitive damages are expressly authorised by statute.

⁷³ H. Koziol and V. Wilcox (eds), *Punitive Damages: Common Law and Civil Law Perspectives*, Tort and Insurance Law Yearbooks, Vol. 25 (Springer Publishing, 2009); See also T. Rouhette, ‘The Availability of Punitive Damages in Europe: Growing Trend or Nonexistent Concept?’, *Defense Counsel Journal*, October 1, 2007.

5.10 If the regulation is done pursuant to an international regime, does the regime primarily rely on administrative, civil or criminal remedial mechanisms – and at the international, regional or national level? Are non-judicial mechanisms relevant? To what extent are states able to choose enforcement methods? What are the consequences for states of non-compliance?

[omitted]

5.11 Are the targets of civil litigation individuals, companies, or both?

Clearly, both individuals and companies can be targets of civil litigation, although there are subtle differences between domestic legal rules regarding the extent to which individuals (e.g. directors or managers of a company) can themselves be held personally responsible for corporate acts and omissions.

Because of the doctrine of separate legal personality,⁷⁴ as a general rule directors and managers will not automatically be held responsible under domestic tort law for the wrongdoing of the companies with which they are involved. However, directors and officers can be liable in a limited range of circumstances (a) under theories of primary liability, when it can be shown that they themselves had personally owed the plaintiff a duty of care or (b) under theories of secondary liability on the basis that they had “aided and abetted” or “procured” the commission by the company of a tort.⁷⁵

Primary liability

In England, Australia and New Zealand a director or officer can be held primarily liable for a corporate tort,⁷⁶ along with the company itself, in rare cases where there has been a “voluntary assumption of responsibility” by the director for the performance of the relevant duty.⁷⁷ In the US, there have been cases where an officer has been held responsible for a corporate tort where the corporation’s duty had been “delegated” to the officer concerned.⁷⁸ There is even precedent, going back some way, for the idea that liability can be based on omissions as well as positive acts, including a failure to supervise the company’s affairs properly.⁷⁹

Secondary liability

Secondary liability differs from primary liability in that it relies, not on the existence of a duty of care, but on some intentional or “knowing” conduct on the part of the defendant director that contributed to the commission, by the company, of a tort.⁸⁰ But here, too, courts will not hold directors personally responsible unless there is a

⁷⁴ See Introduction above, pp. 22-23, and Box 1 (“Key Concepts”), at p. 28

⁷⁵ See further the discussion of these theories in the parent-subsidary context at para. 5.12 and para 5.13 below.

⁷⁶ Note that the discussion in this section is confined to actions against corporate officers based on the law of tort. It does not cover actions under company law arising from, say, a breach of directors’ duties.

⁷⁷ See *Williams v Natural Life Health Foods* [1998] 2 ALL ER 577. For a case involving property damage, see *Trevor Ivory Ltd.v Anderson* [1992] 2 NZLR 517 (New Zealand).

⁷⁸ *Canter v Coehring Co.* 283 So. 2d 716 (La. 1973).

⁷⁹ *Cameron v Kenyon-Connell Commercial Co.* 22 Mont. 312, 56 P. 358 (1899).

⁸⁰ See further para. 5.12 & 5.13 below on how this theory may potentially be translated to the parent-subsidary context.

very high level of personal involvement by the individual director in the circumstances leading up to the tort.⁸¹

5.12 & 5.13 To what extent do domestic civil regimes regulate companies abroad? In what circumstances and by what means will a company be held liable under the laws of its home state for the acts and omissions of its foreign subsidiaries, contractors and partners?

As discussed above, domestic civil regimes allow courts to assert jurisdiction directly over corporate actors (both locally domiciled and foreign) in relation to their foreign conduct, provided certain criteria are satisfied.

Domestic civil regimes may also have extraterritorial implications, without actually asserting direct jurisdiction over any foreign conduct, to the extent that they may impose liabilities on their own corporate nationals because of a company's own role in the circumstances leading up to foreign harm, even where that harm may appear to have been more directly caused by a third party (see case study 14 below for an example of a scenario in which this kind of liability could possibly arise). So far, most claims made on this basis have focused on the relationship of parent and subsidiary. However, this kind of liability, which tends to focus on corporate omissions rather than corporate acts, could also arise in the context of other corporate relationships where there is an element of control, such as franchiser/franchisee, manufacturer/supplier, manufacturer/distributor or company/contractor (see further case study 15 below).⁸² The question of direct jurisdiction over foreign companies is discussed immediately below. The question of "indirect" or "parent-based" regulation - which, as discussed in the Introduction to this study, is a subset of the regulatory methods referred to in this report as "domestic measures with extraterritorial implications"⁸³ - is considered at the end of this section.

Direct assertions of extraterritorial jurisdiction

As will be clear from the discussion above (especially paras. 5.1 to 5.5), the jurisdictional rules regarding foreign companies vary from state to state. Under the harmonised EU regime, EU member states do not have jurisdiction over foreign companies as of right, but may take jurisdiction over foreign companies where the foreign company is a necessary and proper party to the claim (e.g. as a joint defendant) or where the member state has subject matter jurisdiction over the case (e.g. where the civil case concerns a tort committed in State X, the forum state).

⁸¹ The leading case in the US is *Lobato v Pay Less Drug Stores* 261 F 2d 406 (10th Cir. 1958), which requires that there must have been "[s]pecific direction of or sanction of or active participation or cooperation in, a positively wrongful act or omission which operates to the injury or prejudice of the complaining party," at pp. 408-9. For the UK position, see *Performing Right Society v Caryl Theatrical Syndicate Ltd.* [1924] 1 KB 1, 14; *C Evans & Sons Ltd. v Spriteband Ltd.* [1985] 1 WLR 317, 325, which holds that directors may be "secondarily" liable for torts they have "directed or procured." Canadian courts, on the other hand, have developed a stricter test for directors' personal liability under which liability would only attach to "that degree and kind of personal involvement by which the director makes the tortious act his own," *Mentmore Manufacturing Co. Ltd. v National Merchandising Co. Inc.* (1978) 89 DLR (3d) 195, 203.

⁸² See generally J. Zerk, *Multinationals and Corporate Social Responsibility: Limitations and Opportunities in International Law* (Cambridge University Press, 2006), pp. 234-236.

⁸³ See pp. 15-16 above.

Common law states, on the other hand, have traditionally been much more flexible on the question of jurisdiction over foreign companies. In common law countries, such as the UK, Australia, Canada and the US, jurisdiction is based on “service of process” which means that, provided a foreign company was present in the jurisdiction and could be “served,” then the courts would have jurisdiction over it, even though they might still decline jurisdiction on the basis of *forum non conveniens* at a later stage.⁸⁴ Presence has been established “where the entity carries on business at a fixed and definite place, including where it uses an agent.”⁸⁵ This means that a foreign company having a branch within State X will be deemed to be present in State X. Importantly, though, a company will not automatically be regarded as being present in a jurisdiction merely because of the presence of a subsidiary.⁸⁶ This distinction derives, of course, from the idea that a subsidiary has a separate legal existence from its parent, whereas a branch does not.

A “foreign company” for the purposes of civil law regimes, is usually a company that is neither incorporated in, nor otherwise domiciled in, the forum state. Under the Brussels Regulation, the “domicile” of a company, for jurisdictional purposes, is the place where it has its “statutory seat,” its “central administration” or its “principal place of business.”⁸⁷ Within this overall framework, individual member states are allowed to apply their own tests to determine corporate domicile.⁸⁸ In the UK, the “place of incorporation” is treated as the clearest indication of domicile, but a foreign incorporated company may also be treated as domiciled in the UK if those with key decision-making roles within a company have the UK as their main place of work.⁸⁹

To sum up, domestic civil jurisdiction regimes place restrictions on the extent to which courts may assert jurisdiction over foreign companies in the absence of territorial connections between that foreign company, its activities and the forum state. The criteria used to establish the sufficiency of these territorial connections varies from state to state. Importantly, though, courts do not appear to regard themselves as having jurisdiction over foreign companies merely because of ownership links with locally domiciled companies. Instead, foreign companies are treated as legally distinct from any locally domiciled parents or subsidiaries, regardless of how closely they may be related or controlled. In these cases, the question of whether extraterritorial jurisdiction may be exercised or not is governed by more general tests, such as whether the foreign company is indeed a “necessary and proper party” to the dispute.

⁸⁴ See para. 5.3A above in relation to “service” and paras 5.4 and 5.7 in relation to *forum non conveniens*.

⁸⁵ IBA Task Force Report, p. 98, citing *The Theodohos* [1977] 2 Lloyd’s Rep 428 and *Commonwealth Bank v White* [1999] VSC 262 (Australia).

⁸⁶ See *Doe v Unocal*, 27 F Supp 2d 1174 (CD Cal 1998) 1184, 1188 in which it was held that the court could not take jurisdiction over Total SA (a French Company) on the basis of the presence of a Total “subsidiary” in the US. The level of control exercised by Total SA over its US subsidiary was held to be not so great that the US subsidiary could be regarded as the “alter ego” of its French parent, and neither was the subsidiary the “agent” of Total SA for these purposes. This case can be contrasted with *Wiwa v Royal Dutch Petroleum Limited* 226 F 3d 88 (2d Cir 2000) in which it was held that jurisdiction *could* be exercised over the Royal Dutch Petroleum Company (incorporated in the Netherlands) and the Shell Transport and Trading Company (incorporated in the UK) on the basis that it had agents in New York in the form of an Investor Relations Office and its manager.

⁸⁷ See Brussels Regulation, n. 9 above, Article 60.

⁸⁸ *Ibid*, Article 60(3).

⁸⁹ See *Alberta Inc v Katanga Mining Ltd* [2008] EWHC 2679.

Indirect and parent-based methods of regulation (i.e. domestic measures with extraterritorial implications)

At present, there is a dearth of decided case-law on the liability of companies for the acts of foreign subsidiaries and contractors, which makes it difficult to define a parent company's supervisory responsibilities with any great certainty. Although many cases have been commenced against parent companies in relation to extraterritorial harm, almost all have either been settled out of court or dismissed on procedural grounds. However, there are established legal principles, derived from a wide range of civil cases, that could potentially be used as the basis of legal argument in favour of the idea of parent company responsibility for harms associated with the operations of subsidiaries or contractors in other countries. These principles are summarised briefly below. They are based largely on the principles of tort law developed in the common law jurisdictions of the US, Australia, Canada and the UK. But from recent litigation in other countries, such as the Netherlands, Switzerland and Ecuador,⁹⁰ they would appear to have wider relevance too.

Primary liability

A parent company could be held primarily responsible for the wrongdoing of a foreign subsidiary or contractor on the basis that the parent company itself owed a duty of care to the affected parties, which is separate and distinct from any duty of care owed by the foreign subsidiary or contractor. The first round of US proceedings arising out of the Bhopal case appeared to have been constructed on this basis (see further case study 14 below).

⁹⁰ See n. 93, n. 103, n. 112 and n. 113 below.

Case study 14: Union Carbide and the disaster at Bhopal: In Re Union Carbide Corporation Gas Plant Disaster at Bhopal, India in December, 1984, 634 F Supp 842 (SNDY 1986).

On December 3, 1984 a catastrophic gas leak from a pesticide plant owned by Union Carbide India Limited (“UCIL”), resulted in widespread death and injury in Bhopal, Madhya Pradesh, India. At the time, UCIL was a subsidiary of Union Carbide Corporation, (“UCC”), a US company.

In March 1985 the Government of India passed the Bhopal Gas Leak Disaster (Processing of Claims) Act 1985, under which the Government assumed control of all claims for compensation arising from the Bhopal disaster. Under this legislation the Government then filed a legal action in the US District Court, New York. The US claims were based on US tort law. The claimants argued, in essence, that UCC ought to be held responsible for the gas leak disaster because of its role in the design and construction of the Bhopal plant, and subsequent safety monitoring. UCC, on the other hand, argued that it ought not be held responsible for the acts of UCIL, a separate legal entity. Responsibility for plant management and safety matters had, according to UCC, been entirely delegated to its Indian subsidiary.

In July 1985 Judge Keenan dismissed the US proceedings on grounds of *forum non conveniens*. The judge held that, on balance, the Indian courts were the more appropriate venue for the claims to be heard. The Government of India then filed a claim for US\$3.3 billion in the Indian courts. In February 1989, the Indian Supreme Court ratified a settlement offer by UCC and UCIL for US\$470m.

However, the settlement package did not bring an end to the Bhopal-related litigation. The settlement itself was subject to a constitutional challenge. And further proceedings were commenced in the US courts in 1990, 1999 and 2004. The 1999 claims were based on the ATS and continued to be directed against the parent company. In 2000 these proceedings (like the 1990 proceedings) were dismissed for lack of standing (as a result of the 1985 Indian legislation, see above), and because they were barred by the 1989 settlement agreement. Some environmental claims were reinstated on appeal, but eventually struck out in 2003, mainly on grounds of lack of standing. The 2004 claims, for damages arising from water pollution, drew on several different theories of primary, secondary liability and vicarious liability. However, these claims were not successful either.

The idea that the parent company could owe a duty of care to injured employees of a subsidiary was also at the heart of the claim in the UK case of *Lubbe v Cape plc*.⁹¹ Lawyers for the plaintiffs in that case proposed a theory of “process liability” as a potential basis of primary parent company liability in cases like Bhopal and Lubbe, where a parent company has developed a hazardous process or technology, which it

⁹¹ See [2000] 1 Lloyds Law Reports 139 (Court of Appeal) at 146.

has then exported for use by a foreign subsidiary.⁹² However, in the end, this case settled out of court before going to trial.⁹³

Case study 15: Liability in the context of contractual relationships: The case of Trafigura

On November 10, 2006, proceedings were filed in the UK courts against Trafigura Limited (a UK company) and Trafigura Beheer BV (a company incorporated in the Netherlands). The case concerned a tort-based action for damages involving around 30,000 claimants. The claimants, all residents of Abidjan, Ivory Coast, claimed to have been injured as a result of exposure to toxic substances allegedly carried to the Ivory Coast aboard the ship, *The Probo Koala*.

The claim against the two Trafigura companies was based on the allegations that the Trafigura group had chartered the ship, and had ordered it to proceed with its cargo to the Ivory Coast when they knew or ought to have known that the substances aboard were dangerous to human health and that there were not adequate facilities in Abidjan to dispose of them safely. Furthermore, the claimants alleged that the Trafigura group ought not to have entrusted the task of disposing of the substances to a local contractor without first ensuring that the company was properly resourced and qualified to carry out the work. Therefore, it was argued, even though the acts of the local contractor were arguably the most direct cause of the injuries suffered, Trafigura should be held legally responsible.

Trafigura, on the other hand disputed the claimant's allegations that the substances aboard the *Probo Koala* were toxic, and denied that they caused the injuries claimed. On October 23, 2008, Trafigura signed a case management agreement with the claimants' UK solicitors, stating that, while they were not prepared to admit legal liability, if it were established that the waste actually caused the injuries alleged, Trafigura would pay compensation without requiring plaintiffs to establish that any duty of care was breached.

The proceedings settled out of court in September 2009 before the matter reached trial, without any admissions of liability by Trafigura. Under the reported terms of the settlement agreement, the Trafigura group would pay an amount representing around

⁹² R. Meeran, 'Process Liability' of Multinationals: Overcoming the Forum Hurdle' [1995] *Journal of Personal Injury Law* 170, at p. 170. The author analogises from theories of "product liability," under which legal liability for hazardous products is well established.

⁹³ However, for an ongoing case involving "process liability"-type grounds, see *Maria Aguinda Salazar et al v. ChevronTexaco Corporation* (Superior Court of 'Nueva Loja', in Lago Agrio, province of Sucumbios, Ecuador). This is a claim against a US parent company for damage alleged to have arisen from the activities of an Ecuadorian subsidiary. In this claim, the plaintiffs argue that the Ecuadorian subsidiary was 'economically, technically, and administratively subjected to [the US parent company] [and] the policies and directives of its headquarters'. They submit that the decisions related to the methods, procedures and exploration techniques applied by the Ecuadorian subsidiary in Ecuador were 'conceived or, at least known and approved by Texaco Inc.' Complaint, 2003, para 4. An English translation of the complaint can be accessed via

<http://chevrontoxico.com/assets/docs/2003-ecuador-legal-complaint.pdf>. Chevron, on the other hand, has denied legal liability, and have argued that the environmental and social problems complained of are the responsibility of the Ecuadorian government. See further <http://www.chevron.com/documents/pdf/texacopetroleumecuadorlawsuit.pdf>.

US\$1,500 for each claimant. A dispute about the distribution of these funds then resulted in further litigation in the courts of the Ivory Coast.

Separate criminal proceedings are still ongoing in the Netherlands against Trafigura BV and several individuals, including the captain of the *Probo Koala* and an employee of Trafigura Limited. These charges relate to the period prior to the removal of the substances to Abidjan and include charges of falsification of the ship's documents and breaches of EU rules concerning the shipment of hazardous wastes between the EU and ACP states (see further case study 17 below).

Secondary liability

The idea that a person can be criminally liable for “aiding and abetting” or “being an accessory to” a crime is well established in criminal law.⁹⁴ This is known as “secondary” or “accessory” liability. But the concept of “secondary liability has also been used in tort law in some jurisdictions.⁹⁵ This was one of the bases of the litigation against BHP, known as the “Ok Tedi Case,” that took place in the Australian courts during the 1990s.⁹⁶ Also, in the ATS-based case of *Doe v Unocal*, the Court of Appeals of the Ninth Circuit thought that the defendant at least had a case to answer based on theories of secondary liability. The claimants in that case had alleged that Unocal had supplied material assistance to the Burma/Myanmar military in the form of maps, materials and other logistical support. In doing so, the claimants alleged that Unocal had “aided and abetted” human rights abuses committed by the Burma/Myanmar military.⁹⁷

One of the key differences between secondary and primary liability is that in a case based on secondary liability, it is not necessary to prove that the secondary party owed a duty of care to the plaintiff, or even that its actions were the primary cause of the tort. Instead, liability generally attaches to a material contribution, consciously made, to the commission of a tort by another - or, as the US courts have put it, a “knowing and substantial contribution.”⁹⁸

Allegations of secondary liability are central to many of the recent and current human rights related claims against companies, and decisions are emerging, at least at the procedural level, that are starting to shed light on what secondary liability might mean, at least in the ATS context. In *Doe v Unocal* the Court of Appeals of the Ninth Circuit defined “aiding and abetting” for the purposes of corporate liability under ATS as “knowing practical assistance or encouragement which has had a substantial effect on the perpetration of a crime.”⁹⁹ However, in a 2009 ruling in the ATS-based case of *Presbyterian Church of Sudan v. Talisman Energy, Inc.*,¹⁰⁰ the US Second

⁹⁴ See para. 4.12 above.

⁹⁵ D. Cooper, ‘Secondary Liability for Civil Wrongs’, PhD thesis, University of Cambridge (1995).

⁹⁶ This claim concerned BHP’s liability for environmental harm suffered in Papua New Guinea alleged to have been the result of a pollution incident from a mine operated by a PNG subsidiary of BHP. See *Dagi v BHP* (No. 2) [1997] 1 VR 428.

⁹⁷ *Doe v Unocal* 395 F 3d 932, 951.

⁹⁸ *Halberstam v Welch* 705 F 2d 472 (DC Cir. 1983).

⁹⁹ 395 F 3d 932, 951.

¹⁰⁰ *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, Docket No. 07-0016-cv (available at http://www.ca2.uscourts.gov/decisions/isysquery/7d99d145-a9a8-4f58-ab13-eb32243ee540/4/doc/07-0016-cv_opn.pdf).

Circuit court held that, following the principles laid down in the US Supreme Court decision in *Sosa v Alvarez-Machain*,¹⁰¹ the appropriate standard for aiding and abetting liability under the ATS should be informed by international law, not domestic law. The court then went on to apply a test that appears more stringent than that generally used in US domestic tort law, and which is certainly stricter than that used in the *Doe v Unocal* case. According to the *Talisman* ruling, a company would only be liable for aiding and abetting violations of international law where it has provided substantial assistance with the specific aim of furthering the violation.¹⁰²

In a more recent case in Switzerland, the court thought that there was at least an arguable case against IBM, a US company, in relation to allegations of complicity in human rights abuses by the Nazi regime during World War II. The plaintiffs' claims of "complicity" in that case were based on allegations that IBM's Geneva office may have provided IBM technology for use by the Nazi regime. However, this case was eventually dismissed in 2005 on limitation grounds.¹⁰³

"Vicarious" or agency liability

This theory of liability is based on the idea that the relationship between parent and subsidiary is analogous to that of master and servant, or of principal and agent. The argument goes that, just as a company might be held liable for what an employee does in the scope of this employment – or for what an agent does in the scope of its agency – so a parent company ought to be held liable for what its subsidiary does on its behalf. The challenges posed by this idea to the principle of separate legal personality are obvious, and so the agency argument has not historically had much success before the common law courts.¹⁰⁴

However, agency type arguments may be starting to have an impact in the US, at least the context of ATS litigation.¹⁰⁵ In *Bowoto v Chevron*,¹⁰⁶ Judge Ilston thought that a

¹⁰¹ 542 US 692 (2004).

¹⁰² For a wider discussion of the role of "secondary" liability as a possible basis of liability for companies for serious human rights violations (which obviously pre-dates the *Talisman* ruling discussed above) see International Commission of Jurists, 'Report of the Expert Legal Panel on International Crimes', esp. volume 3, copy of report available from <http://www.business-humanrights.org/Updates/Archive/ICJPaneloncomplicity>

¹⁰³ *Gypsy International Recognition and Compensation Action v International Business Machines Corporation, Recognition and Compensation Action*, Case No 4C.296/2004, BGE 131 III 153, December 22, 2004, (Federal Tribunal Switzerland). See further A. Ramasastry, 'A Swiss Court Decides to Allow Gypsies' Holocaust Lawsuit to Proceed' July 8, 2004, found at <http://writ.news.findlaw.com/ramasastry/20040708.html>.

¹⁰⁴ The question of whether a subsidiary could be regarded as an agent of its parent company was considered in the English case of *Adams v Cape Industries* [1990] Ch 433. The English Court of Appeal found that, while the subsidiaries' activities were no doubt of assistance to the multinational group as a whole, they were carried out by the subsidiaries as their own businesses on their own account. A crucial feature of the "agency" relationship under English law is the power of the agent to bind the principal to contractual obligations. But the court noted that in this case the subsidiary had no such power in relation to any other members of the group, nor was there any evidence that any such transaction was entered into, see esp. pp. 545-9.

¹⁰⁵ See *Doe v Unocal*, n. 97 above; 'Ruling on the Defendants' Motion for Judgment,' Decision of the Superior Court of California, County of Los Angeles', September 14, 2004, unreported, copy available from <<http://www.earthrights.org/unocal/index/shtml>>, p. 7. Note, however, that the issue of Unocal's vicarious liability was not finally determined as the matter settled out of court. See also *Bowoto v Chevron* 312 F Supp 2d 1229 (ND Cal 2004).

¹⁰⁶ *Ibid.*

close relationship or domination between the parent and subsidiary” would be relevant, as well as “a finding that the injury allegedly inflicted by the subsidiary ... was within the subsidiary’s authority as agent.”¹⁰⁷ In a 2009 decision handed down in the *Khulumani* case, the US District Court found that the defendants had at least a case to answer based on vicarious liability arguments. The court noted the claimants’ allegations about the high level of control exercised by the defendants over their South African subsidiaries, and also allegations that some of the defendant companies’ internal structures and sourcing arrangements may have been influenced by home state export controls.¹⁰⁸ However, as with the other possible sources of parent company liability, these theories have not as yet been properly tested at trial stage.¹⁰⁹

Enterprise liability

This theory of liability is based on the idea that multinational groups that are highly integrated ought to be held jointly and severally liable for wrongs committed by members of that group. But while this idea has been influential in some specific regulatory contexts, most notably bankruptcy law,¹¹⁰ it frequently receives short shrift in the private law sphere. This is undoubtedly, again, because of the direct challenge it poses to the principle of separate legal personality.

There are civil cases where the idea of “enterprise liability” has received support,¹¹¹ but these are few and far between. Nevertheless, a case is currently before a court in the Netherlands that appears to be based, in large part, on notions of enterprise liability. This case concerns a claim for environmental damage in Nigeria, which is alleged to have been caused by a leak of oil from a pipeline owned by a subsidiary of Royal Dutch Shell plc. According to the statement of claim, the Dutch court is entitled to take jurisdiction as “Royal Dutch Shell plc operates as one entity, setting terms as its headquarters with which the entire concern must apply. Local subsidiaries conduct their business according to these terms.”¹¹² In late December 2009, the Dutch court handed down a decision rejecting Shell’s arguments that it lacked jurisdiction over the company’s Nigerian activities. The court decided to retain jurisdiction over the claims against both the parent company and the Nigerian subsidiary on the basis that the facts underlying the claims are interconnected.¹¹³ However, this dispute is still pending, and the fact that jurisdiction has been confirmed does not necessarily mean that these enterprise liability arguments will ultimately be accepted.

¹⁰⁷ *Bowoto v Chevron*, n. 105 above, at p. 1239.

¹⁰⁸ *Khulumani v. Barclays National Bank Ltd.*, 617 F Supp. 2d 228 (SDNY 2009), at pp. 274-5.

¹⁰⁹ The *Bowoto* case was eventually determined by a federal jury in favour of Chevron on December 1, 2008. The claimants’ request for a new trial was refused in March 2009. This decision is now on appeal to the Ninth Circuit Court of Appeals.

¹¹⁰ Zerk, n. 43 above, pp. 55-56.

¹¹¹ See for instance Judge McGarr in *Amoco Cadiz* [1984] 2 Lloyd’s Law Reports 304, at p. 338 and Judge Seth in *Union Carbide v Union of India*, Decision of the Madhya Pradesh High Court at Jabalpur, Civil Revision No. 26 of 88, April 4, 1988.

¹¹² See *Oguru, Efanga, Vereniging Milieudefensie v Shell Petroleum Development Company of Nigeria Ltd* (Court of the Hague). A copy of a translation of the pleadings is available at

http://multimedia.milieudefensie.nl/globalisering/CvA_in_bevoegdheidsincident_Oruma_English.pdf

¹¹³ ‘Dutch court will hear Shell Nigeria Claims’, *The Daily Telegraph*, December 30, 2009, copy of article available at

<http://www.telegraph.co.uk/finance/newsbysector/energy/oilandgas/6913335/Dutch-court-will-hear-Shell-Nigeria-claims.html>.

Another legal theory which overlaps with the idea of enterprise liability is the “alter ego doctrine.” Essentially, the idea is that in some cases the interests and the activities of a parent company and its subsidiary are so entwined that the subsidiary is no more than the “alter ego” of the parent, in which case it is legitimate to disregard the corporate veil and treat the parent and subsidiary as one and the same. This doctrine is raised from time to time in the context of ATS litigation. It is controversial in the context of parent-subsidiary relationships, but in the *Doe v Unocal* litigation the judge did not rule it out entirely. In that case, the judge appears to suggest that factors such as: (a) the extent to which there was co-mingling of funds; (b) the extent to which subsidiaries had control over their own assets and daily operations; (c) the extent to which subsidiaries were adequately capitalised; and (d) the reasons for the creation of the subsidiary (e.g. whether this was to avoid existing liabilities) might all be relevant.¹¹⁴ The subtle difference between the “alter ego” doctrine and the theories of agency and vicarious liability outlined above is that agency and vicarious liability theories view the liable party as “acting through” another separate legal entity, whereas the “alter ego” doctrine would impose liability on the basis that the two parties are effectively one and the same.

5.14 Conclusion: lessons for the B&HR sphere

An understanding of the extraterritorial scope of civil jurisdiction is important for two reasons: first, because civil regimes are already providing a vital means by which those affected by human rights violations can seek to enforce their rights; and second, because of the growing use of civil enforcement mechanisms as an alternative to criminal enforcement in business regulation generally. It is quite possible, therefore, that private claims will have a key role to play in the B&HR sphere in the future, and the discussion above suggests a number of lessons that could be considered in devising any future regime.

Lesson 1: The jurisdictional rules appear more flexible where private claims are concerned, than in the criminal (i.e. public law) sphere. Jurisdiction in private law cases tends to be defined by reference to “connecting factors” between the dispute and the jurisdiction concerned. This is a more flexible way of assigning jurisdiction than the international law tests of “nationality” and “territoriality” etc that apply in relation to the extraterritorial assertions of criminal jurisdiction. However, there is still space for consideration of public policy factors in the various “balancing tests” used by courts to determine whether to take and keep jurisdiction over cases involving foreign conduct or activities and raising factual issues in other jurisdictions. Affected states can and do make their interests and concerns known to the forum court by way of amicus curiae briefs.

Lesson 2: There seems to be almost universal agreement that the domicile of a corporate defendant (usually the place of incorporation) is a strong basis for jurisdiction, including in relation to extraterritorial activities. This is borne out by the negotiations on the Draft Hague Convention, where the inclusion of jurisdiction based on domicile in the “white list” was one issue on which the state parties seemed to be in agreement. Jurisdiction based on domicile is also a key feature of the Brussels

¹¹⁴ See *Doe v Unocal*, ‘Ruling on the Defendant’s Motion for Judgment’, September 14, 2004, n. 105 above, pp. 2-3.

regime. The domicile of a company is frequently the place of incorporation, but it may also refer to the place from which control is exercised.

Lesson 3: But jurisdiction based on more tenuous links (e.g. “doing business” in that jurisdiction) is often contested. There is a sharp difference between common law states on the one hand (and especially the US) and European states on the other hand regarding the taking of jurisdiction over foreign companies based on “mere presence” or “doing business.” This proved a major point of difference in the negotiations on the Draft Hague Convention. Many states continue to regard this basis of extraterritorial jurisdiction as “exorbitant.”

Lesson 4: The unrestricted use of “universal” jurisdiction in private, human rights related claims is controversial. States seem to want the use of “universal civil jurisdiction” restricted to cases involving the most serious human rights violations (i.e. those already covered by international criminal law) and some wish to see further restrictions, such as (a) the requirement for some connection between the dispute and the state seeking to exercise jurisdiction and/or (b) a requirement to “exhaust local remedies” (i.e. possible remedies in the state of injury) before an extraterritorial claim can be commenced in another jurisdiction.

Lesson 5: Extraterritorial civil jurisdiction exercised by courts in State X is generally controversial where it is used to enforce the public laws of State X (especially where those laws are particularly prescriptive), or in cases which carry the possibility of sanctions which are not recognised in State Y, or which the courts of State Y would regard as excessive and unjustified. Extraterritorial private enforcement of prescriptive public law requirements is more likely to give rise to legal conflicts for parties – and therefore tensions between states – than “principles-based” tort litigation for example. As discussed in chapter 3 above, this has been a problem in antitrust law. And some states (especially European states) have been concerned about the implications for their own companies of the possibility of very large damages awards in claims originating from the US based on extraterritorial jurisdiction, and have resisted the development of reciprocal judgment recognition and enforcement arrangements with the US for this reason.

Lesson 6: Even in civil cases, states place great importance on the principle of “non-interference” in the affairs of other states, and have developed a number of techniques to enable the competing interests of states to be reconciled. These techniques include the doctrine of *forum non conveniens*, the requirement (in common law countries) for the consent of the court prior to service on foreign parties, the doctrines of “act of state,” “non-justiciable political question” and “international comity.” Also relevant are “choice of law” rules that require disputes to be determined in accordance with foreign law (rather than domestic law) in some cases, which can reduce perceptions of interference in another state’s internal affairs.

Lesson 7: But while national courts may try to take account of the interests of foreign states, this deference may be trumped where a key national interest is at stake or where there is a serious risk of a denial of justice to the claimant. Courts seem less “deferential” in cases raising issues of national security (see, for instance,

Linde v Arab Bank)¹¹⁵ or aimed at anti-competitive behavior having serious economic effects in their own state (see, in relation to antitrust enforcement, para. 3.4 above). But there are occasions, too, when private considerations, as opposed to public policy considerations, carry the day. In a number of *forum non conveniens* cases, courts have decided to retain jurisdiction over disputes involving injuries sustained in other jurisdictions, and seemingly having a greater connection with foreign states, because of the risk that the claimant may not receive a fair hearing or adequate compensation in his own state. And national courts are not only concerned to protect the rights of local claimants. While local claimants may receive some preferential treatment in some jurisdictions, notably the US, national courts have also been willing to take on the responsibility for providing access to justice for foreign claimants too, where that claimant's chances of obtaining a remedy at home are slim.

Lesson 8: Extraterritorial civil jurisdiction is of limited use without international cooperation in relation to enforcement. Unlike the criminal law sphere, the investigation and prosecution of a claim is largely the responsibility of the parties concerned. Parties generally do this without state assistance, and therefore there is not the same call for international cooperation at the investigation stage. But international cooperation with respect to enforcement of foreign judgements is crucial. Without the benefit of automatic recognition of judgments in other states, the successful party faces the prospect of costly additional proceedings, and, in the worst case, the risk that a judgment in his favour may not be able to be enforced at all.

Lesson 9: States view uneven and inconsistent rules on jurisdiction and enforcement of foreign judgments as a problem. The insight that different national approaches to civil jurisdiction produces anti-competitive effects was one of the main reasons for the development of the Brussels regime, which now provides a set of harmonised rules for all EU states. It was also a key motivation for the US, and undoubtedly other states as well, in seeking to develop a wider, international harmonised regime. In that case, though, a harmonised solution, which took account of the differences in legal traditions between states, was not able to be found.

Lesson 10: But overarching international regimes (especially regimes requiring extensive modifications to existing domestic legal structures) can be extremely difficult to negotiate and conclude. As noted above, the problems encountered in the negotiations on the Draft Hague Convention illustrate the difficulties in developing a harmonised position on civil extraterritorial jurisdiction as between a diverse group of states. While compromises are inevitably necessary, these can have knock-on effects that can be hard to manage. International regimes need to be capable of accommodating different legal structures and traditions.

Lesson 11: There are a number of potential bases for “parent-based” regulation of multinational groups already available in the private sphere (and especially under the law of tort). Parent companies may already be subject to duties of care, as regards the use and operation of hazardous facilities and technology in particular. They may also potentially be liable for the acts of their subsidiaries and other entities under theories of secondary liability, such as “aiding and abetting” torts committed by others. However, there remains a lack of case-law on this question, despite a recent

¹¹⁵ See n. 48 above.

upsurge in litigation. Claimants and companies alike therefore still lack legal guidance on this issue.

Lesson 12: But states are unlikely to accept proposals for “parent-based” methods of regulation that do not respect the principle of separate legal personality. Courts in common law and civil law jurisdictions alike tend to place great weight upon the principle of separate legal personality (a) in deciding whether to take jurisdiction (a company is not treated as present in a jurisdiction, for example, merely because of the presence of a subsidiary) and (b) in deciding questions of liability (directors and officers will not generally be held personally liable for corporate faults, for example, and parent companies are not held responsible for the acts of subsidiaries merely by virtue of their shareholding). Courts are yet to give alternative arguments for parent company liability (e.g. based on the idea of “agency” or “enterprise liability”) significant consideration.

Chapter 6: Environmental regulation

6.1 In what ways can environmental regulation be regarded as “extraterritorial”? For instance, does the regulation involve direct assertions of extraterritorial jurisdiction over foreign parties or activities? Or does it merely have extraterritorial implications?

Environmental problems are frequently “transboundary” in nature. However, states do not, as a general rule, attempt to extend their environmental laws to other states. States do apply their environmental laws extraterritorially to “global commons,” or areas that are not subject to the jurisdiction of any one state. This is normally done under bespoke international regimes.¹ This section, however, is concerned primarily with regulation of activities, individuals or companies located within the territorial boundaries of other states.

Despite the limitations of a strictly “territorial” approach in this area, states clearly regard control over environmental quality as a matter over which each state should have sovereignty within its own territory, and as closely bound up with other economic interests. Even in cases where a state has a clear stake in poor environmental standards in other states (e.g. where pollution emanating from State Y causes environmental harm in State X), direct assertions of extraterritorial jurisdiction over activities abroad are, in practice, quite rare.²

However, states frequently impose requirements on actors operating within their territories in an attempt: (a) to reduce transboundary environmental risks (i.e. risks emanating from within their territorial boundaries with the potential to cause environmental damage abroad); (b) to control the export of environmental hazards to other states; (c) generally to discourage poor environmental practices beyond their own jurisdictions. These kinds of “outward-looking” regimes do not involve direct assertions of extraterritorial jurisdiction over foreign persons or conduct. Instead, they fall within the definition, used in this report, of “domestic measures with extraterritorial implications.” They include:

- Obligations to conduct pre-project environmental impact assessments, covering extraterritorial environmental risks as well as territorial ones;³

¹ For instance, under the international law of the sea, the “flag state” of a ship (i.e. the state in which a ship is registered or whose flag the ship is entitled to fly) has responsibility to regulate that ship effectively, which includes setting and enforcing standards designed to prevent marine pollution wherever that ship travels in the world. See further case study 16 below. And state parties to the 1959 Antarctic Treaty (and its 1991 Environmental Protocol) are required to regulate the impacts of their own nationals on the Antarctic environment, which includes the preparation of environmental impact assessments before any activities are carried out. Under the 1967 Outer Space Treaty, states must take steps to avoid harmful contamination of space, and generally conduct their activities with due regard for the interests of other states

² Note that courts do have jurisdiction over foreign entities in private law claims for damages arising from transboundary pollution. See further chapter 5 above. But this chapter is primarily concerned with the enforcement of public law rights, rather than claims arising from private law.

³ See for instance the 1991 Convention on Environmental Impact in a Transboundary Context (the “Espoo Convention”) which requires environmental impact assessments to be carried out in relation to projects with the potential to have significant transboundary environmental impacts, and to ensure that the relevant documentation and information is provided to affected state parties. See further para. 6.2 below. A copy of the Convention is available at

- Obligations to notify authorities in other countries of possible transboundary environmental risks of projects within the territory of the regulating state;⁴
- Obligations to notify authorities in other countries of the risks associated with hazardous exports;⁵
- Measures aimed at limiting the availability of home state support to environmentally harmful projects overseas, and measures conditioning availability of support on good environmental performance;⁶
- Measures to control the extraterritorial environmental impacts of ships (i.e. through safety and construction standards);⁷ and
- Restrictions on imports of products that have been produced or harvested in an environmentally damaging way.⁸

It is also fairly common, now, for states to require some degree of environmental reporting as part of corporate disclosure regimes. These requirements frequently entail (sometimes explicitly, but more often implicitly) reporting of *extraterritorial* environmental impacts as well as territorial impacts, where these are material to a

<http://www.unece.org/env/eia/documents/legaltexts/conventiontextenglish.pdf>. Note, however, that the scope of this regime is limited to projects that come within the requirements of the Convention which include being subject to a governmental decision, and being of a type that is explicitly listed in an annex to the Convention itself.

⁴ See the 1991 Espoo Convention, *ibid*.

⁵ See for instance the regimes laid down by the 1989 Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal (the “Basel Convention”), in relation to trade in hazardous waste, text available at <http://www.basel.int/text/con-e-rev.pdf>; the 1998 Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade (the “Rotterdam ‘PIC’ Convention”), in relation to exports of hazardous chemicals, text available at

http://www.pic.int/en/ConventionText/RC%20text_2008_E.pdf; and the 1993 ILO Convention Concerning the Prevention of Major Industrial Accidents, (the “ILO Major Accidents Convention”) In relation to exports of ‘hazardous substances, technologies or processes’, see Article 22.

⁶ See for instance the US Foreign Assistance Act of 1961, 22 USC § 2197, which obliges the US Overseas Private Investment Corporation (“OPIC”) to notify the relevant foreign government officials of any issues arising under international guidelines or under US law (which would apply if the project were to be implemented in the US) before giving US government assistance to any “environmentally sensitive” foreign projects. Recent legislation was also passed directing OPIC’s President to issue “a comprehensive set of environmental, transparency and internationally recognized worker rights and human rights guidelines with requirements binding on the Corporation and its investors that shall be consistently applied to all projects, funds and sub-projects supported by the Corporation.” These guidelines should be no less rigorous than the World Bank Group’s environmental and social policies: 22 USCA § 2191b.

⁷ Under international marine protection treaties, regulation of safety standards (including standards designed to prevent collisions at sea and accidental pollution) is primarily the responsibility of each ship’s “flag state.” See further case studies 16 and 21 below. But see further discussion at 6.8 below.

⁸ See for instance the US Marine Mammal Protection Act of 1972 under which the US banned imports of yellow fin tuna caught using methods that also kill dolphins. See further case study 18 below. But see further discussion at para. 6.4 below regarding the legality, under international trade law, of unilateral import bans. For an example of an international regime mandating import bans on products derived from environmentally damaging practices see the 1973 Convention on International Trade in Endangered Species of Wild Fauna and Flora (“CITES Convention”).

company's long-term financial performance.⁹ Where group reporting is provided for, such as under the UK's corporate disclosure regime,¹⁰ companies may be required to report on environmental issues affecting all subsidiaries within the group, including foreign subsidiaries, as well as the environmental impacts of the parent. Of course, the main objective of these kinds of provisions is not extraterritorial environmental protection. These reporting requirements are motivated primarily by the need to ensure that investors in companies have the information they need to make informed decisions about companies' future prospects. However, these kinds of regulatory methods are worth considering in this context, because of their possible extraterritorial implications for how international groups of companies are run.¹¹

In summary, states do frequently take steps to *influence*, if not to regulate, extraterritorial environmental impacts and performance. But this is overwhelmingly done indirectly, though *domestic* regulation that utilises the territorial jurisdiction that states have over actors domiciled within and activities taking place within their respective jurisdictions. Only rarely is extraterritorial jurisdiction *directly* asserted over actors and activities abroad in the environmental field.

6.2 Have “extraterritorial” (or “cross-border”) environmental initiatives been adopted unilaterally by states? Or in order to implement an international regime? Or both, and if so, which came first?

As noted above, many domestic environmental regimes have an extraterritorial dimension, in the sense that they are not concerned purely with environmental quality *within* the territorial boundaries of the regulating state. Some are concerned with the problem of cross-border pollution, some are concerned with wider, sometimes global, risks.

A few of these have been implemented unilaterally. Some examples are mentioned at the end of this section. The vast majority, however, have been introduced pursuant to international treaty regimes *requiring* states to take specified regulatory steps in relation to activities within their own territorial boundaries, in order to address a wider environmental problem.

International regimes relating to cross-border or global risks

The regulatory steps required of state parties differ according to the nature of the problem. Below is a brief outline of some international regimes under which states

⁹ See, for instance, the UK Companies Act 2006, Part 15, chapter 5, which requires the preparation of an annual “directors’ report.” Section 417 provides that for certain companies, predominantly listed ones, this annual report must include information about the environmental impacts of the company’s businesses. Section 415 states that, where the company is a parent company producing group accounts, the directors’ report must cover all of the undertakings in the consolidation, which would arguably include overseas companies. Several other countries have also imposed environmental reporting requirements that potentially relate to foreign impacts, including Denmark, France, Norway and Sweden. See further documentation relating to the SRSG’s ‘Corporate Law Tools Project’, available at: <http://www.business-humanrights.org/SpecialRepPortal/Home/Materialsbytopic/Corporatelaw/CorporateLawTools>. In February 2010, the SEC issued guidance for companies on their reporting obligations regarding climate change risks and opportunities. A copy of this guidance can be viewed at <http://www.sec.gov/rules/interp/2010/33-9106.pdf>

¹⁰ See n. 9 above.

¹¹ See further para. 6.9 below.

parties have agreed to take steps to help deal with wider, transboundary or global environmental problems, and the kinds of domestic regulatory methods involved.

(a) Treaties requiring cross-border consultation and exchange of information

The 1991 Espoo Convention¹² and the 1998 Aarhus Convention¹³ are good examples of international regimes designed to deal specifically with cross-border environmental risks. The Espoo Convention requires state parties to give early notice to other states of domestic projects that may have environmental implications beyond their own borders, and to consult on areas of concern. It also requires state parties to ensure that potentially affected people in other states receive timely and adequate information about the project, and have the right to participate in environmental assessment procedures. The Aarhus Convention is aimed at further improving the participatory rights of those affected by environmentally sensitive projects. Although this regime is designed for use primarily by individuals and affected groups *within* the territory of the relevant state, they are also extended to those in other states by virtue of the requirement of “non-discrimination.”

The 1991 Espoo Convention and the 1998 Aarhus Convention suggest a number of different ways that domestic environmental legislation can potentially have extraterritorial implications, e.g. through measures designed to help identify and reduce the risks of transboundary harm, and through measures extending enforcement rights to people outside the jurisdiction.¹⁴ While these regimes do not envisage any extraterritorial “regulation” as such, implementing measures taken by states are capable of providing extraterritorial assistance to foreign nationals and foreign regulatory authorities in relation to cross-border risks.

(b) Treaties on long-range pollution and other global environmental risks

There are a number of international environmental regimes in place requiring states parties to limit sources of pollution within their own territories as part of a co-operative effort to deal with global environmental problems, such as long-range air pollution, the degradation of the ozone layer and climate change. Under these treaties (see for example, the 1979 Geneva Convention on Long Range Transboundary Air Pollution, and the 1985 Vienna Convention for the Protection of the Ozone Layer), states agree to limit pollution from sources within their own territories, and, in the case of ozone protection, to work towards specific targets.

Pollution reduction targets have also been an important feature of the international regime for combating climate change,¹⁵ although the recent Copenhagen summit

¹² See n. 3 above.

¹³ 1998 Aarhus Convention on Access to Information, Public Participation in Decision Making and Access to Justice in Environmental Matters, (“Aarhus Convention”), copy available at <http://www.unece.org/env/pp/documents/cep43e.pdf>.

¹⁴ Some observers refer to these kinds of “extraterritorial rights” as “diagonal” rights (as opposed to “vertical” rights), in the sense that “they are held by individuals or groups against the governments of states other than their own.” J. Knox ‘Diagonal Environmental Rights’ in M. Gibney and S. Skogly (eds), *Universal Human Rights and Extraterritorial Obligations* (University of Pennsylvania Press, 2009).

¹⁵ See the 1992 UN Framework Convention on Climate Change, copy available at

concluded without the agreement of binding targets for the period beyond 2012.¹⁶ As in other areas, these carbon emissions targets apply to sources of pollution *within* the jurisdiction, although under the Kyoto Protocol, states also have the flexibility to count reductions in other countries towards their own emissions targets under the Clean Development Mechanism (or “CDM”).¹⁷ This therefore gives industrialised states parties a potential economic interest in encouraging and facilitating investments by its nationals in carbon reduction projects in other countries. Each participating state is required to designate a national body with responsibility for vetting prospective projects, before they are referred to the CDM Executive Board.

Only rarely do the regulatory responsibilities of states under international environmental treaties extend to actually prescribing and enforcing standards for areas beyond their territorial boundaries. “Flag state jurisdiction” under marine prevention pollution treaties is an exception (see case study 16 below).

Nevertheless, each of the regimes discussed above clearly recognises the fact that the regulatory policies and practices of individual states can have far-reaching environmental consequences. In many cases, these problems cannot be addressed except through international cooperation. And this is especially the case where the threatened resources are beyond the jurisdiction or control of any one state.

http://unfccc.int/essential_background/convention/background/items/2853.php, as supplemented and amended by the 1997 Kyoto Protocol, copy available at http://unfccc.int/kyoto_protocol/items/2830.php.

¹⁶ See further the “Copenhagen Accord,” copy available at <http://unfccc.int/2860.php>. The Copenhagen Accord is outlined further as case study 20 below.

¹⁷ The CDM was introduced under the Kyoto Protocol and allows emissions reduction and removal projects to earn certified emissions reduction (“CER”) credits. CERs have an economic value. They may be traded, or applied towards the emissions targets of the project owner/operator’s home state. The CDM is overseen by the CDM Executive Board, which reports to the parties who have ratified the Kyoto Protocol. For further information see <http://cdm.unfccc.int/about/index.html>.

Case study 16: Pollution of the sea by ships: the special case of “flag state jurisdiction”

Under the international law of the sea, which comprises both customary and treaty law, “flag states” of vessels have responsibility for the regulation of standards of ships flying their flag, including construction and safety standards. Each ship is treated as having the nationality of the country whose flag it flies.

Many of these standards are now governed by international treaties. The 1973/1978 MARPOL Convention on the Prevention of Pollution by Ships requires the “flag state” of a ship to take responsibility for the monitoring and enforcement of safety and design standards and MARPOL discharge regulations. These enforcement obligations exist wherever the breach occurs, including breaches in the territorial waters or Exclusive Economic Zones (“EEZs”) of other states. Note, however, that jurisdiction over spills in another state’s EEZ or territorial or internal waters is, in principle, shared with that other state (see further case study 21 below).

Port states play a key role in this enforcement regime, with rights to inspect ships to determine compliance with flag state certification, and in cases where a violation of discharge regulations is suspected. Port states may prosecute violations taking place in their own internal waters or territorial seas, but must still report all suspected violations of MARPOL requirements to the flag state, which is then required under the terms of the Convention to take appropriate enforcement action.

(c) Treaties on the export of environmental hazards

There are several treaties designed to deal with the problem of international trade in hazardous substances. The best known of these is the 1989 Basel Convention,¹⁸ which was created in an attempt to prevent dumping of hazardous wastes, particularly by richer countries on the territory of poorer ones. The Basel Convention is based on the principle of “prior informed consent” which means that exports of waste from one country to another can only take place when the receiving country consents, having first been informed of the nature of the wastes and their risks to human health and the environment. Moreover, exporting states are required to take steps at the domestic level to ensure that exports do not take place if they have reason to believe that “the wastes in question will not be dealt with in an environmentally sound manner.”¹⁹

The principle of prior informed consent (or “PIC”) has also been employed in a separate regime relating to the export of hazardous chemicals. The 1998 Rotterdam PIC Convention, which follows the Basel Convention model fairly closely, is aimed at ensuring that countries that import dangerous chemicals (and particularly developing countries that may lack the necessary regulatory infrastructure for vetting and monitoring the use of new chemicals) do so with an adequate knowledge of the risks involved and, importantly, the kinds of restrictions on use that apply in the exporting state. Under the Convention, states parties must inform the Secretariat of bans applicable in their own jurisdictions, and this information is conveyed to other state

¹⁸ See n. 5 above.

¹⁹ Ibid, Article 4(2).

parties. A PIC procedure applies in advance of the export of particularly dangerous chemicals, and each state party must take steps to ensure that exporters “within its jurisdiction” comply with those restrictions.

These regimes do not require extraterritorial regulation as such. They do not, for instance, require or authorise states parties to oversee the disposal or use of the wastes or chemicals once they have been received into another state, provided they have been exported in accordance with the relevant regime.²⁰ While they do not rule out the use of direct extraterritorial jurisdiction altogether,²¹ they rely primarily on “territorial measures” attaching to the activity of exporting, such as labelling and packaging requirements,²² or other documentary requirements.²³ However, as case study 17 below shows, these largely procedural requirements can still help to increase corporate accountability for serious environmental breaches in other jurisdictions, by providing a basis for enforcement action that exists independently of any jurisdiction over foreign pollution incidents themselves.

Case study 17: Domestic enforcement of the Basel regime: The Probo Koala prosecutions in the Netherlands

These criminal proceedings in the Dutch courts arose following a widely reported incident in 2006 (which also led to civil proceedings in the UK, see further case study 15 above), in which a cargo, alleged to have included toxic substances, was carried by the *Probo Koala* from Amsterdam, via Lagos in Nigeria, to Abidjan, Ivory Coast. When it reached Abidjan it was, according to the findings of criminal proceedings in Ivory Coast, illegally dumped at several different locations. The *Probo Koala* had been chartered by Trafigura Limited, a UK subsidiary in the Trafigura group. Trafigura Limited’s parent company, Trafigura BV is incorporated in the Netherlands. The cargo had initially been taken to the Port of Amsterdam for processing. However, the Dutch authorities reportedly allowed the waste processing company (Amsterdam Port Services) to load the cargo back onto the *Probo Koala*. It had been alleged (by claimants in the UK civil proceedings, see case study 15 above) that this was because of concerns about the level of hazard posed by the waste.

Between April and June 2008, Dutch prosecutors began criminal proceedings against Trafigura BV and a number of individuals, including the captain of the *Probo Koala* and an employee of Trafigura Limited. The charges against Trafigura BV include alleged breaches of EU law relating to movements of toxic waste between the EU and members of the African, Caribbean and Pacific Group of States (EEC Regulation No. 259/93) and alleged falsification of ship’s documents relating to the cargo of the

²⁰ Although note that under the Basel Convention, states may be required to take back wastes that have been exported illegally, see Article 9(2)(a).

²¹ In theory, a state party to the Basel Convention could, if “appropriate” (see Article 4(4)) extend its jurisdiction over transboundary movements of waste (e.g. based on the nationality principle, or arguably the protective principle). See further paras. 6.3 and 6.12 & 6.13 below. See also P. Birnie, A. Boyle and C. Redgwell, *International Law and the Environment* (Oxford University Press, 2009), p. 478. And the Rotterdam PIC Convention, n. 5 above, requires each exporting state to take steps in relation to “exporters within its jurisdiction” (see Article 11) which potentially includes “nationality-based” extraterritorial jurisdiction, if this is recognised and used by the relevant state party.

²² Basel Convention, Article 4(7)(b); Rotterdam PIC Convention, Article 13.

²³ Basel Convention Article 6(9).

Probo Koala. Also prosecuted was a Dutch waste processing company (Amsterdam Port Services). Claude Dauphin, a French national and director of Trafigura BV, was also charged, as was the Amsterdam City Council, but these charges were dropped. The decision to drop these charges is currently on appeal.

Amsterdam Port Services was found guilty on February 5, 2009 of breaches of Dutch and EU environmental law connected with the decision to load the cargo back on to the *Probo Koala*. The trial of the remaining charges is due to take place in June 2010.

(d) Treaties requiring import restrictions on endangered plants and animals, and products derived from endangered species

The 1973 CITES Convention²⁴ requires states parties to set up a licensing system to control trade in specimens of endangered species. Species are categorised according to their threat of extinction and level of protection in different states, so that trade in “Appendix I” species is only permitted in exceptional circumstances, and trade in “Appendix II” species is tightly controlled. Imports and exports of CITES-listed specimens are only permitted with the required licence (which is issued by domestic regulatory authorities). This must be presented to customs at the point of entry or exit. Again, this is a system that relies on the “territorial” jurisdictional controls enjoyed by each state over its own borders. However, this Convention is a good example of how coordinated export and import controls can be used to help stamp out an environmentally damaging trade that is global in scale.

Unilateral state action in relation to extraterritorial problems

States do not, as a rule, seek to regulate environmental issues in other countries and therefore unilateral regulatory decisions tend to be concerned with domestic environmental quality. However, issues sometimes arise in relation to the intended geographical scope of domestic environmental laws. For example, “does this statute create rights that individuals in other states can rely on?” Or “was this statute intended to apply to harm originating from outside the state’s own territory?”

Where a law is ambiguous or unclear as to its geographical scope (e.g. the extent to which it imposes obligations regarding the environment outside territorial boundaries, or creates extraterritorial rights) national courts are frequently obliged to apply a “presumption against extraterritoriality” when interpreting the statute. This is the case in the US, for example, where “legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States.”²⁵

As can be seen, there are a few US cases where the courts have been prepared to extend regulatory provisions to foreign activities and actors, but the case-law suggests that this will usually be done only in unusual circumstances, involving, e.g. effects within the US, or actions by the federal government in areas not within the territories of other states.²⁶

²⁴ See n. 8 above.

²⁵ *EEOC v Arabian American Oil Co (Aramco)* 499 US 244, 248 (1991).

²⁶ See in particular *Lujan v Defenders of Wildlife* 504 US 555 (1992) (esp. comments of Justice Stevens) and *Pakootas v Teck Cominco Metals Ltd.* 452 F 3d 1006 (9th Cir.) 2006.

Box 11: A brief summary of some leading US cases on extraterritorial jurisdiction in the environmental field

In *Amlon Metals v FMC Corporation*, 775 F Supp 668 (SDNY 1991) plaintiffs claimed relief under the US Resources Conservation and Recovery Act (“RCRA”) in relation to a hazardous substance shipped to England from the US. However, the court decided that the presumption against extraterritoriality should apply, as Congress had passed this Act with effects within the US in mind.

A number of US cases have since been brought by environmental campaigners aiming to establish that US environmental statutes create environmental law obligations *outside* US borders, but there is still not a consistent line of case law on this point.

Environmental Defense Fund v Massey 986 F 2d 538 (DC Cir. 1993) was a legal action brought by a US-based NGO to stop the National Science Foundation from incinerating waste at an installation in Antarctica. The claimants argued that the incineration was contrary to the US National Environmental Policy Act (“NEPA”). The court held that NEPA *could* be applied to the activities of the National Science Foundation in Antarctica on the basis that the decision to incinerate waste was taken in the US, and also that the US scientific mission was within US control, in an area not subject to the jurisdiction of another state. The court also made more general comments in support of the idea that the presumption against extraterritoriality could be displaced in relation to conduct producing effects within the US.

Lujan v Defenders of Wildlife 504 US 555 (1992) was an attempt by a Washington-based NGO to establish that the legal obligations of US federal agencies to consult regarding the potential impacts of agency-funded projects on endangered species were not limited to potential impacts on endangered species *within* the US. The claimants argued that these agencies were also obliged, under the US Endangered Species Act, to consult with respect to possible extraterritorial impacts. The court dismissed the action on the grounds that the claimants lacked standing to bring the claim. However, Justice Stevens added that even though he thought the “presumption against extraterritoriality” would apply in this case, the Act might still apply to foreign projects with the potential to have adverse impacts on endangered species *within* the US.

The case of *Arc Ecology v US Dept of the Air Force* 294 F Supp. 2d 1152 (N.D. Cal. 2003) was a joint action brought by several different parties, including two NGOs (one American and one Filipino). The case concerned the question of whether land used by the US military in other states could come within the scope of the US Comprehensive Environmental Response, Compensation and Liability Act (“CERCLA”). The court held that CERCLA would not apply to land used as US military bases in the Philippines.

In *Pakootas v Teck Cominco Metals Ltd.* 452 F 3d 1006 (9th. Cir.) 2006 the court held that CERCLA would apply to a Canadian smelter, but on the basis that the act which gave rise to liability under CERCLA – i.e. the release of polluting substances – occurred on US, not Canadian, territory. Furthermore, rather than being an act directed at controlling a polluter’s behavior, CERCLA was concerned with clean up, of US sites, after the event. However the reasoning behind this decision has been criticised. (See further L. Zhang ‘Case note: Pakootas v Teck Cominco Metals Ltd’ (2007) 31 *Harvard Environmental Law Review* 545).

As can be seen, the US courts have yet to develop a consistent line of authority on when domestic environmental provisions will and will not apply beyond the territorial boundaries of the United States. In any case, states hardly ever apply their public environmental laws to foreign polluters, even in cases where that pollution produces adverse environmental effects within their own territories. On the other hand, redress may potentially be obtained at the private law level. As discussed in chapter 5, the courts of State X will have extraterritorial adjudicative (tort-based) jurisdiction in civil law cases against foreign persons and activities that cause environmental injury within State X.

Where “outward-looking” goals are concerned, such as protection of habitats beyond the territorial borders of a state, or responses to global environmental concerns, states have a clear preference for *indirect* methods of regulation (i.e. “domestic measures with extraterritorial implications”) under *international* regimes. However states do occasionally act unilaterally in response to extraterritorial environmental concerns. One example is the application of unilateral import bans to products made or harvested in ways that the regulating state deems environmentally harmful.²⁷ Another example would be the imposition of environmental conditions on overseas investor support facilities, such as export credits.²⁸ These regulatory methods are discussed in more detail below.

6.3 Is the extraterritorial jurisdiction claimed primarily prescriptive, adjudicative or enforcement jurisdiction? And what internationally recognized bases for jurisdiction are claimed (e.g. territory?, nationality?, “effects” doctrine?, “universality”? etc.)?

In theory, states could prosecute environmental offences taking place in other states on the basis of (a) the nationality principle, where the perpetrator is a national of the regulating state, or (b) on the basis of objective territoriality or the effects doctrine, where pollution in a neighbouring state crosses over the border into the regulating state.²⁹ In extreme cases, extraterritorial jurisdiction might be based on the protective principle (where polluting activities in a neighbouring state threaten the vital interests

²⁷ Although note that these kinds of measures raise issues under WTO rules. A discussion of how the WTO rules affect the ability of states to take account of environmental issues in their trading arrangements is beyond the scope of this report, but see case study 18, and p. 188 below for a brief discussion of the leading cases decided by the GATT panel during the 1990s.

²⁸ See n. 6 above. See further pp. 195-196 below. In relation to the UK Export Credit Guarantee Agency, see the Business Principles Unit “Case Impact Analysis Process” which envisages environmental, social and human rights screening for most “civil, non-aerospace” transactions using a methodology “similar to that used by the World Bank Group.” Copy available at <http://www.ecgd.gov.uk/index/public-information/case-impact-analysis-process.htm>. See further the OECD’s 2007 Revised Council Recommendation on Common Approaches on the Environment and Officially Supported Export Credits, Box 12 below.

²⁹ In US case-law on the “presumption against extraterritoriality,” discussed above, it has been suggested that the presumption will not apply “where the failure to extend the scope of the statute to a foreign setting will result in adverse effects within the United States.” See *Environmental Defense Fund v Massey* 986 F 2d 538 (DC Cir. 1993). Recently, in *Pakootas v Teck Cominco Metals Ltd*, see n. 26 above, the court had an opportunity to clarify the extraterritorial scope of a piece of US environmental legislation (i.e. CERCLA) in relation to foreign activities having environmental impacts *within* the US. However, the court sidestepped the issue. See further Box 11 above.

of the regulating state). However, it is doubtful whether universality would provide a legitimate basis for *direct* assertions of extraterritorial jurisdiction in the environmental field, except, perhaps, in relation to deliberate and very serious environmental damage tantamount to war crimes or genocide.

The 1998 Council of Europe Convention on the Protection of the Environment through Criminal Law³⁰ introduces the possibility of extraterritorial criminal jurisdiction over environmental offences based on objective or subjective territoriality, and nationality. Article 5 requires states parties to adopt “appropriate measures” to establish jurisdiction over environmental offences committed “in its territory”³¹ which, according to the Convention’s explanatory report, includes cases where the effects of a polluting act in a neighbouring state are felt within the territory of the state party.³² The Convention also contemplates the use of extraterritorial jurisdiction where an offence has been committed “by one of its nationals,”³³ although the scope of extraterritorial jurisdiction under this provision is restricted by the principle of “double criminality.”³⁴ Under Article 5 of the Convention, if the offence was committed within the territorial jurisdiction of another state, the offence must be “punishable under criminal law where it was committed.”³⁵

However, the CoE Convention has yet to enter into force, having only been adopted by one member state so far.³⁶ In practice, *direct* assertions of extraterritorial jurisdiction in the environmental field appear to be confined to:

- the special case of “flag state” jurisdiction over ships (see case study 16 above), which is both authorised and required under international maritime law and involves both prescriptive and enforcement jurisdiction;
- jurisdiction over foreign polluters causing cross-border environmental damage within the territory of the regulating state which may involve (a) prescriptive and enforcement jurisdiction (e.g. where the foreign polluter has breached water or air quality standards in the regulating state) and potentially (b) adjudicative jurisdiction as well, where private enforcement is permitted (but see discussion at Box 11 above); and
- jurisdiction over a foreign polluter in a private tort-based claim, which involves extraterritorial adjudicative jurisdiction.³⁷

³⁰ 1998 Council of Europe Convention on the Protection of the Environment through Criminal Law, ETS No. 172, copy available at <http://conventions.coe.int/Treaty/en/Treaties/Html/172.htm>.

³¹ Ibid, see Article 5(1)(a).

³² See 1998 Council of Europe Convention on the Protection of the Environment Through Criminal law, Explanatory Report, copy available at <http://conventions.coe.int/Treaty/EN/Reports/Html/172.htm>, commentary on Article 5, para 1/a.

³³ See, n. 30 above, Article 5(1)(c).

³⁴ This is the principle that says that a state should not punish extraterritorial criminal offences unless they also attract criminal liability (or its equivalent) in the state where the offences were committed.

³⁵ See Article 5(1)(c).

³⁶ Only one ratification, by Denmark, had been recorded by the beginning of 2010. See <http://conventions.coe.int/treaty/Commun/QueVoulezVous.asp?NT=172&CL=ENG>.

³⁷ See further chapter 5 above for a more detailed discussion of extraterritorial tort-based jurisdiction.

6.4 What legal objections have been raised at international and national levels in relation to extraterritorial environmental regulation? Are those objections still being raised?

As will be clear from the discussion so far, states have a clear preference for cooperative, multilateral approaches to environmental problems. So it is not surprising that complaints about over-use of extraterritorial jurisdiction in this field are quite rare. However, the unilateral application of import bans for environmental purposes is an exception. These regulatory tactics have been extremely controversial and have attracted legal challenges by other states under GATT and WTO rules. The *Tuna-Dolphin* dispute between Mexico and the US is the probably best-known example of this. See case study 18 below for a brief summary of this case. This case is included here as an example of a historical controversy arising from a unilateral environmental initiative, although note that the decision outlined below has effectively been overruled by subsequent panel decisions.³⁸

Case study 18: The Tuna-Dolphin case: Mexico v US

In February 1991, Mexico made a complaint under the GATT dispute resolution proceedings about a ban imposed by the US on imports of yellowfin tuna. The ban had been imposed under the US Marine Mammals Protection Act and prohibited the importation of yellowfin tuna harvested with purse-seine nets in the Eastern Tropical Pacific Ocean unless it could be established that:

“(i) the government of the harvesting country had a programme regulating the taking of marine mammals, comparable to that of the US, and

(ii) the average rate of incidental taking of marine mammals by vessels of the harvesting nation was comparable to the average rate of such taking by US vessels.”

The GATT panel held that this ban was not permitted under the terms of the GATT. While regulations relating to the product itself were permitted, import bans based on the wider environmental impacts of the harvesting methods were not. A secondary boycott of tuna products from countries that sourced tuna from countries that did not meet US standards was also ruled inadmissible by a second GATT panel. Both panels felt that these boycotts were not so much environmental standards relating to products, which would have been permitted, as trade measures taken to force other countries to change their environmental policies, and therefore failed the relevant legal tests. However, as these decisions were not formally adopted by the GATT Council they were never legally binding on the parties. Instead, US and Mexico settled “out of court.”

Sources: *Tuna-Dolphin I Case*, US-Restrictions on Imports of Tuna, Report of the Panel, (1991) 30 *International Legal Materials*, 1598; and See *Tuna-Dolphin II Case*, US-Restrictions on Imports of Tuna (1994) 33 *International Legal Materials*, 839.

³⁸ See, in particular, *US – Import Prohibition of Certain Shrimp and Shrimp Products*, Report of the Appellate Body, WT/DS58/AB/R (1998).

In the *Tuna-Dolphin* cases, the GATT panel ruled that the import restrictions imposed by the US on “dolphin-unfriendly” tuna products were incompatible with the US’s obligations under GATT. However, in later cases involving similar issues (i.e. the *Shrimp-Turtle*³⁹ and *US Gasoline Standards*⁴⁰ cases), the GATT panel took a more flexible view. This change in approach may be a response to criticisms that earlier restrictive interpretations of GATT rules gave too little scope to states to deal with extraterritorial environmental issues that are of real concern to their own citizens.⁴¹ Other factors – such as the level of international agreement about the nature of the underlying problem, and the level of acceptance of scientific evidence as to the risks involved – may also be relevant factors in deciding whether or not a unilateral import ban is justifiable or not. As some commentators have observed “[t]he more vital the common interests or values pursued, the easier it would be to accept as ‘necessary’ measures designed to achieve those ends.”⁴²

In light of this, it is interesting to note that the US Waxman-Markey Bill,⁴³ presently before the US Congress, proposes trade measures as one of a package of US initiatives to combat climate change. The Bill would allow the President, in the absence of an “equitable” international agreement, to impose a regime that would effectively extend a new “cap and trade” system to foreign goods. Under this regime, importers would have to acquire “emissions allowances” for imported products before they could be sold in the US. The proposal clearly raises issues under the WTO rules, and much will depend on its implementation, should this proposal eventually pass into law.

6.5 What have been the key policy drivers (political, economic etc) underlying international environmental regulation and what were the policy obstacles? Are there still challenges to international environmental initiatives along policy lines? If so, from where?

For obvious reasons, states are protective of their right, recognised by international law, to determine their own industrial, economic and development policies, consistent with their international obligations, and tend to resist initiatives from outside that could undermine this autonomy. While the initiatives discussed in this part are all international co-operative initiatives, and do not involve direct assertions of extraterritorial jurisdiction by individual states, they do give an insight into some of the reasons why states take an interest in environmental standards and practices in other countries, the international tensions that can arise as a result, and some possible solutions.

³⁹ See n. 38 above..

⁴⁰ *US – Standards for Reformulated and Conventional Gasoline*, Report of the Appellate Body, WT/DS2/AB/R (1996); (1996) 35 *International Legal Materials* 274.

⁴¹ Birnie, Boyle and Redgwell, n. 21 above, p. 774.

⁴² *Ibid.*

⁴³ American Clean Energy and Security Act, ACES, H.R. 2454

Key policy drivers

(a) Regimes setting out procedural obligations with respect to transboundary risks

States parties will usually have mutual interests in cooperating with respect to projects carrying the risk of transboundary harm, simply because pollution does not necessarily respect national boundaries and potentially flows both ways. Treaties on this issue can be viewed as an elaboration of existing customary law obligations on the management of transboundary risks arising from industrial activity. These customary obligations include a duty to notify potentially affected states of the threat of damage,⁴⁴ to consult in good faith as to the potential cross-boundary environmental impacts of industrial proposals⁴⁵ and generally to regulate industrial activity within their territories to prevent, or at least minimise, the threat of serious harm to interests in other jurisdictions.⁴⁶

In Europe, though, there has also been a drive towards greater harmonisation of environmental law, including environmental rights, to bring about greater compatibility between Eastern and Western European standards.⁴⁷ The development of “diagonal” rights under international environmental treaties (i.e. rights exercisable by individuals and groups against states other their own)⁴⁸ can be attributed, to a large extent, to developments in the field of human rights law, and particularly to growing recognition of the links between environmental quality and the enjoyment of other human rights, and the importance of participatory rights as an accountability tool.

(b) Special purpose regimes

Special purpose regimes are frequently driven by a specific environmental event, or significant developments in scientific knowledge, or a combination of both. For instance, the international “strict liability” regime for oil pollution damage under the 1969 Civil Liability Convention, together with the 1971 Fund Convention, were put in place as a direct response to the *Torrey Canyon* disaster of 1967. In 1992, construction standards for ships under the MARPOL Convention were amended to require “double hulls” for all vessels following the *Exxon Valdez* disaster. The 1979 Geneva Convention on Long Range Air Pollution was largely motivated by growing concern about the problem of acid rain, especially in Europe. The international regime on the protection of the ozone layer (the 1985 Vienna Convention and, more importantly, the 1987 Montreal Protocol) was motivated by a growing body of scientific evidence about the causes and consequences of ozone depletion. The growing body of scientific evidence on the effects of human activities on the global

⁴⁴ Birnie, Boyle and Redgwell, n. 21 above, p. 177.

⁴⁵ Ibid. See esp. the *Lac Lanoux* arbitration (1957) 24 *International Law Reports* 101 in relation to shared watercourses. See, also, the recent International Court of Justice decision in *Argentina v Uruguay (Case concerning Pulp Mills on the River Uruguay)*, 20 April 2010, copy available at http://www.haguejusticeportal.net/Docs/Court%20Documents/ICJ/Argentina_Vs_Uruguay_judgment.pdf, in which it is suggested that environmental impact assessment (in cases of significant potential transboundary harm, particularly to a shared resource) may now be considered a requirement of general international law.

⁴⁶ Birnie, Boyle and Redgwell, n. 21 above, at p. 143.

⁴⁷ Ibid, at pp. 72-73.

⁴⁸ See Knox, n. 14 above.

climate was obviously crucial in the development of the UN Framework Convention on Climate Change, and continues to shape the regulatory debate.⁴⁹

Key policy obstacles

International regimes relating to issues like the protection of the atmosphere, ozone depletion and climate change have been particularly difficult to negotiate because of their implications for many states' economic and industrial policies. At the same time, the problems of ozone depletion and climate change are global in scope and the location of the sources of these problems have no bearing on where the impacts are felt. The solution, therefore, has to be a global one.

The international tensions arising from the negotiation of the international regimes on ozone depletion and climate change give an insight into the difficulties of reconciling the different interests of different groups of states (see case studies 19 and 20 below). States clearly have different views as to the appropriate international response, depending on their own stage of development, the measures already taken at the domestic level to address the problem, and how they allocate the burden of responsibility for the problem in the first place. In each case it was recognised, though, that unless significant efforts were made to deal with the particular challenges faced by developing states, the international regime was unlikely to be successful.

Case study 19: The 1985 Vienna Convention for the Protection of the Ozone Layer and the 1987 Montreal Protocol

“UNEP [i.e. the United Nations Environment Programme] initiated negotiation of a treaty to protect the ozone layer in 1981. As with the 1979 Convention on Long-range Transboundary Air Pollution, the interests of several groups had to be reconciled. These included developing countries, such as India, China and Brazil, which were primarily concerned that restraints on the use of ozone-depleting substances might inhibit their industrial development, or that alternative technologies might not be available to them. The United States, which had earlier acted unilaterally to reduce domestic production and consumption of CFCs [i.e. chlorofluorocarbons], did not wish to remain at a disadvantage while others went on using them, and its position was strongly in favour of an international control regime. The EC represented the largest group of producers and was reluctant to commit itself to measures that might prove costly to implement. Moreover, some EC states resisted controls on the grounds that the harmful effects had not been proven, and that the risk remained long-term and speculative. Unlike air pollution, however, no regime would be likely to work unless it was global, since the impact of ozone-depleting substances is the same wherever or however they originate, and would affect all states. Thus, as many parties as possible would have to be persuaded to join and there would have to be strong disincentives to deter relocation of CFC production to non-parties.” *Extract from P. Birnie, A. Boyle and C. Redgwell International Law and the Environment (OUP, 2009), pp. 349 (footnotes omitted).*

The provisions set out in the Vienna Convention itself were weak, the only concrete obligations imposed related to further research, exchange of information and The

⁴⁹ See the “Copenhagen Accord,” n. 16 above, paras 1 and 2, in which the parties “recogniz[e] the scientific view that the increase in global temperature should be below 2 degrees Celsius” and that “deep cuts in global emissions are required according to science” (see further case study 20 below)

provisions set out in the Vienna Convention itself were weak, the only concrete obligations imposed related to further research, exchange of information and technology. However, two years later, the parties were able to negotiate the Montreal Protocol, which contained firm targets for the reduction of consumption and production of ozone-depleting substances. Further amendments were made in 1990 and 1992, following further scientific advances. Special accommodation was made for the needs of developing states. Developing states were given more time to comply with a phase-out of CFC production and use, together with financial and technical incentives to facilitate the switch to alternative technologies. The Montreal Protocol also makes it clear that the obligations of developing states “depend on” their ability to take advantage of provisions regarding financial cooperation and technology transfer.

These themes are being played out again in the context of the international negotiations on a post-2012 regime on climate change, although with greater intensity. This is because:

“The economic implications of climate change are much greater. Whereas industrial processes that deplete the ozone layer are relatively discrete, control of greenhouse gas production goes to the heart of energy, transport, agricultural and industrial policy in all developed states and increasingly in developing ones too. Moreover, the role of carbon sinks means that deforestation, protection of natural habitats and ecosystems, sea-level rise, and sovereignty over natural resources are also important elements of the problem.”⁵⁰

Particularly contentious issues in the lead up to the Copenhagen Conference in December 2009 included the extent of emissions cuts by developed countries, the timing of cuts by large developing nations such as China and India, the extent to which countries will be able to avoid making cuts at home in exchange for helping with cuts abroad (i.e. “offset”) and the amount of assistance (financial and technical) that will flow to developing countries from developed ones. Finding a resolution to all of these problems proved too great a challenge, and no binding agreement was reached at Copenhagen. However, the conference did adopt a non-binding statement, brokered by Brazil, China, India, South Africa and the US towards the end of the conference. This document is known as the “Copenhagen Accord” (see case study 20 below)

⁵⁰ Birnie, Boyle and Redgwell, n. 21 above, p. 356.

Case study 20: The “Copenhagen Accord”

The Copenhagen Accord includes a number of non-binding “political commitments” by parties to the UN Framework Convention, including:

- A commitment to make “deep cuts” in global emissions of greenhouse gases in order to hold the increase in global temperature below 2 degrees Celsius;
- Cooperation to ensure that peaking of emissions occurs “as soon as possible”;
- For Annex 1 (i.e. industrialised) countries, quantified “economy-wide” emissions targets for 2020 (that were required to be notified to the secretariat by January 31, 2010);
- Least developed countries “may undertake actions voluntarily and on the basis of support”;
- Substantial finance to help reduce emissions through deforestation and forest degradation, and to help with adaptation, technology development and transfer and capacity building (a collective commitment is made to provide the equivalent of US\$30 billion for the period 2010 to 2012).
- Greater use of market mechanisms to promote mitigation; and
- A new Technology Mechanism “to accelerate technology development and transfer.”

A full text of the Copenhagen Accord is available at

http://unfccc.int/files/meetings/cop_15/application/pdf/cop15_cph_auv.pdf

6.6 Who were/are the main stakeholders driving (or opposing) the use of extraterritorial regulatory initiatives in the environmental area? Are particular stakeholders associated with particular viewpoints or arguments?

Calls for greater use of extraterritorial regulation in the environmental field have come primarily from environmental NGOs and campaigners. In the US, several cases have been brought by environmental NGOs in an attempt to settle the question of the extraterritorial scope of US federal environmental laws (see Box 11, p. 184 above).

One issue that has attracted a lot of attention from NGOs recently concerns the extent to which Export Credit Agencies (“ECAs”) should be concerned about the extraterritorial environmental implications of the projects they support. Several legal cases have been brought by NGOs in an attempt to clarify the legal obligations of ECAs. *Friends of the Earth v Spinelli*⁵¹ was an attempt by two environmental campaigning organisations and three US city authorities to establish that, prior to funding or supporting fossil fuel projects in other countries, OPIC and Ex-Im bank were legally obliged to follow the screening and EIS procedures laid down by NEPA.⁵² In August 2007, the World Wildlife Fund (“WWF”) mounted a legal challenge to an “agreement in principle” by the UK Export Credits Guarantee Department (“ECGD”) to provide investment support to the Sakhalin II project in Russia. The WWF argued, among other things, that conditional support should not

⁵¹ Also known as *Friends of the Earth v Watson*. Case No. 3:02-CV-04106.

⁵² OPIC and Ex-Im bank argued that NEPA did not apply. However, the matter settled before the jurisdictional issues could be finally determined.

have been granted before a proper environmental impact assessment was conducted. However, the legal challenge was dropped when the Sakhalin partners withdrew their applications for UK and US government support, citing concerns about delays and the uncertain decision-making timetables of the ECAs from which they were seeking support.⁵³

NGOs have also campaigned for much greater transparency from ECAs in relation to the environmental impacts of supported projects. In 2004, a group of NGOs, including Friends of the Earth (Germany), launched legal proceedings against the German government in a bid to force them to disclose details of climate change impacts of foreign projects supported by the German government through its export credit system. The Berlin Administrative Court found in the applicants' favour in a decision handed down in December 2006.⁵⁴

The main argument employed by environmental NGOs in favour of extraterritorial environmental regulation is that this is needed to help fill the "enforcement gap" that exists where companies operate through their subsidiaries in states with weak regulatory regimes. If home states of multinationals were more prepared to regulate extraterritorially, it is argued, this would help raise standards and provide more people with a form of redress. These ideas underpin a number of recent legislative proposals. In the UK, a private members bill known as the "CORE Bill" was introduced into the UK parliament in 2003. It proposed a number of reforms, including an extension of directors' duties to cover environmental issues, but it also envisaged a form of parent-based regulation⁵⁵ in which standards would not be applied to foreign subsidiaries directly, but would be the responsibility of the UK parent company to implement. According to the proponents of the Bill, some support had been expressed for some aspects of it by a cross-party group of MPs, but it was never formally debated due to scheduling constraints, and the proposal was withdrawn.

Other attempts to introduce extraterritorial environmental regulation include the McKinney Bill in the US⁵⁶ and the Australian "Code of Conduct" Bill.⁵⁷ The Australian Code of Conduct Bill, unlike the CORE and McKinney Bills, was backed by a minority political party, the Australian Democrats. However, an Australian parliamentary committee decided that it could not support the legislation for a number of reasons, including its extreme extraterritorial scope (the legislation would have applied *directly* to foreign subsidiaries) and concerns that Australia, in seeking to regulate foreign environmental and social standards, might be accused of "arrogance" and "paternalism."⁵⁸

⁵³ 'Sakhalin abandons petition to UK and US export credit agencies', *Environmental Finance*, March 6, 2008, copy of article available at <http://www.environmental-finance.com/onlinews/0306sak.html>.

⁵⁴ See <http://aarhusclearinghouse.unece.org/news.cfm?id=1000116>.

⁵⁵ See pp. 15-16 above.

⁵⁶ See further J. Zerk, *Multinationals and Corporate Social Responsibility* (Cambridge University Press, 2006), pp. 167-168.

⁵⁷ Zerk, *ibid*, pp. 165-167.

⁵⁸ *Ibid*, p. 164.

6.7 Where extraterritorial environmental regulation exists, what are the main obstacles to its implementation, for example, the procedural challenges involved in information sharing and joint enforcement activities? What co-operative arrangements are in place (formal and informal) between states? How are jurisdictional conflicts resolved?

As states take a largely territorial approach to environmental regulation,⁵⁹ the procedural and evidentiary challenges discussed in other parts of this report largely do not arise. Action is taken on a cooperative basis, usually under an international treaty framework. Typically, each state is made responsible for regulation of polluting activities within its own jurisdiction, and its regulatory efforts are then subject to some degree of scrutiny under the relevant treaty's supervisory mechanisms.

However, the regulatory regime under the 1973/78 MARPOL Convention is an exception. This regime, designed to deal with the problem of pollution by ships, relies heavily on the exercise of direct extraterritorial jurisdiction (well established in international law) by "flag states." It also creates a scheme for allocating regulatory responsibilities in cases where more than one state has jurisdiction. See further case study 21 below.

Case study 21: Allocating regulatory responsibilities: "flag states," "coastal states" and "port states" under the MARPOL regime

The 1973 International Convention for the Prevention of Pollution by Ships (the "MARPOL Convention") was one of a series of international treaties to deal with the problem of pollution from ships. The MARPOL Convention, however, was more concerned with the problem of "operational" pollution, as opposed to the more spectacular cases of accidental oil pollution, and covered a range of different polluting substances, including chemicals, harmful packaged products and sewage. It was subsequently amended by a 1978 Protocol before coming into force, and eventually received enough ratifications to enter into force in 1983.

Under the MARPOL regime, the primary regulator of design, construction and safety standards, and the primary enforcer of breaches under the regime, is the flag state. Legally speaking, the flag state has jurisdiction over the ship wherever it is travelling, including when it is in the coastal waters of another state, or another state's port. The obligations of the "flag state" include periodic inspections of the vessel, and the issue of an "international oil prevention certificate" without which, the vessel cannot sail.

However, where breaches are discovered in another state's internal or territorial waters, that jurisdiction over those breaches is shared. Port states, in particular, have a crucial role to play in the enforcement of the MARPOL regime. Port states can ask for production of documentation while the vessel is in port, and may inspect the vessel for compliance. If the vessel is found not to be compliant, port state authorities must not allow the vessel to depart unless they are sure that the vessel does not present an unreasonable threat to the marine environment. But possible breaches of MARPOL

⁵⁹ Except, perhaps, in relation to "global commons," or areas that are not subject to the jurisdiction of any one state. See n. 1 above.

regulations must be reported to flag state authorities in any event, and those authorities are then obliged to take appropriate action.

The port state also has the option of prosecuting under its own laws. In cases of a suspected violation of discharge regulations, it is open to any state to request an inspection of the vessel if there is sufficient evidence that a breach has occurred “in any place.” Port states, however, only have the power to prosecute pollution offences taking place within their own internal and territorial waters. Prosecution of offences taking place outside these areas is the responsibility of the flag state but coastal states may also institute such proceedings under Article 4(2) of the MARPOL Convention where the pollution takes place within a state’s territorial waters or EEZ. The flag state fulfils the role of “enforcer of last resort” if the other states fail or choose not to take action. Prosecution proceedings must be brought by the flag state (if no other state) where there is sufficient evidence of a breach occurring, regardless of where in the world the pollution occurs. But in taking enforcement action, evidence collected by other states, and especially port states, is often crucial to securing a successful prosecution.

6.8 What considerations are taken into account by regulatory authorities in deciding whether or not to take enforcement action in relation to extraterritorial environmental breaches? For instance, how serious or systematic must those breaches be? And how great the connection with the regulating state?

In the purely *domestic* context, the factors that are often relevant to a decision whether or not to prosecute environmental offences include: (a) the seriousness of the breach; (b) the efforts take by the company or individual to avoid the offence; (c) the quality of that person’s risk management systems; (d) any history of offending; and (e) the deterrent effect a prosecution may have on others.⁶⁰ These factors may well be relevant in an extraterritorial case too. In reality though, as will be clear from the discussion so far, states only rarely assert extraterritorial jurisdiction over environmental breaches occurring outside their own borders (with the exception of flag states – see case studies 16 and 21 above). And it is worth noting that the few cases identified in this report where this has happened (outside the area of flag state jurisdiction) have involved civil and administrative, rather than criminal jurisdiction.

A possible enforcement role for ECAs?

One way that home states could possibly encourage better environmental standards by private actors in other countries is by imposing environmental conditions on the provision of export credit support. Theoretically, it would be within the power of ECAs, as a matter of contract law, to withdraw support for projects that do not live up to the commitments given at the time the support was given. Up until recently this has almost never happened.⁶¹ However, in 2007, the German, Swiss and Austrian

⁶⁰ See for example UK Environment Agency ‘Enforcement and Prosecution Policy’, August 7, 2008, copy available from <http://www.environment-agency.gov.uk/static/documents/enforcement-policy.pdf>.

⁶¹ There was press speculation, however, that environmental problems played a significant part in the decision by OPIC in 1995 to withdraw political risk insurance for a copper mining project in Indonesia operated by a subsidiary of Freeport McMoRan. See K. Gooding, ‘OPIC withdraws mine cover: Irian Jaya waste is degrading rainforest says US insurance corporation’, *Financial Times*, November 8, 1995, p. 6.

governments all withdrew their support for the controversial Ilisu Dam project in Turkey, reportedly because of environmental and human rights concerns surrounding the project (see case study 22 below).

Case study 22: European ECAs and the Ilisu Dam Project

The Ilisu Dam project in Turkey has been a controversial project and has been the subject of a sustained campaign by NGOs because of what they have described as “unacceptable” environmental and human rights risks. In 2007, the German, Swiss and Austrian governments agreed to support the project with a combined commitment to provide €450m in state export loan guarantees, but required that a committee of independent experts be put in place to evaluate and monitor the dam project, including its social and environmental impacts. Reportedly because of concerns about compliance with social and environmental mitigation commitments, the German, Swiss and Austrian governments decided, according to press reports, to put their support arrangements on hold at the end of 2008, giving the project more time to comply with more detailed social and environmental criteria. However, citing continuing concerns about the impacts of the project on the environment, local communities and cultural heritage, the European agencies decided to withdraw their support for the project altogether in July 2009.

Sources: ‘European States Pull Plug on Ilisu Dam Insurance’ *Financial Times*, July 8, 2009; ‘Governments Withdraw Financial Support for Ilisu Dam in Turkey’ Amnesty International, July 7, 2009, copy of article available at <http://www.amnesty.org/en/news-and-updates/news/governments-withdraw-financial-support-ilisu-dam-turkey-20090707>.

No doubt political considerations play a part in the reluctance of ECAs to impose and enforce environmental conditions placed on foreign projects. As a matter of policy, there are often concerns about the wider competitive impacts of imposing higher standards than other states’ ECAs do. At the more specific case level, withdrawal of support may risk jeopardising a whole project, exposing companies to the risk of considerable financial losses. Nevertheless, the 2007 OECD Recommendation on Common Approaches on Environment and Officially Supported Export Credits⁶² clearly envisages an ongoing monitoring role for ECAs, while stopping short of prescribing exactly what enforcement action should be taken. Article 16 provides that OECD member states:

“should ensure that procedures are in place to monitor, as appropriate, the implementation of the project ... to ensure compliance with the conditions of their official support. In the case of non-compliance with the conditions of official support by applicants, Members should take any action that they deem appropriate in order to restore compliance, in accordance with the terms of the contract for official support.”

⁶² Copy available at [http://www.oalis.oecd.org/olis/2007/doc.nsf/LinkTo/NT00002B8E/\\$FILE/JT03228987.PDF](http://www.oalis.oecd.org/olis/2007/doc.nsf/LinkTo/NT00002B8E/$FILE/JT03228987.PDF). See further Box 12 below. Note, however, that this Recommendation is currently under review.

6.9 Are extraterritorial environmental regimes based on: penalties, incentives, civil action, or transparency requirements? Or a combination of these?

Most of the regimes discussed in this chapter can only loosely be described as “extraterritorial.” To the extent that states take *unilateral* steps to try to influence environmental performance and standards abroad, these are largely confined to domestic measures having extraterritorial implications, rather than direct assertions of extraterritorial jurisdiction.

Incentives and penalties

Criminal sanctions are almost never imposed in relation to extraterritorial environmental offences, except in the context of pollution of the sea from ships. As this is authorised by an international regime, it is discussed separately at para 6.10 below. Nevertheless, domestic environmental regimes do make use of other incentives and penalties to deal with extraterritorial environmental concerns, such as through export credit assistance⁶³ and import restrictions.⁶⁴

Transparency

Transparency requirements have not been a widely used method of “indirect” extraterritorial regulation so far, except in the context of corporate disclosure obligations under company law. Here though, as noted above, the primary objective is not to *regulate* environmental standards abroad, but rather to ensure that investors are adequately informed of issues that could potentially affect a company’s performance over the longer term. Nevertheless, the express inclusion of certain non-financial issues, such as environmental impacts, as part of a company’s reporting obligations can also have the effect of encouraging management to improve their oversight and control of these issues, at home and abroad.⁶⁵

Transparency in relation to extraterritorial environmental impacts is also becoming an increasingly important issue in the context of the work of ECAs. This was an important theme of a 2007 OECD Recommendation to member states regarding the treatment of environmental issues by ECAs (see Box 12 below).

⁶³ See n. 6 above, and accompanying text.

⁶⁴ See n. 8 above, and accompanying text.

⁶⁵ See n. 9 above.

Box 12: Transparency, the environment and ECAs: The OECD's 2007 Revised Council Recommendation on Common Approaches on the Environment and Officially Supported Export Credits

This Recommendation, which supersedes the 2003 Recommendation of the same name, sets out the OECD Council's recommendations to member states regarding environmental requirements for export deals before they qualify for governmental (i.e. export credit) assistance. The main objectives are: (a) greater coherence between national and international approaches and standards, leading to a greater contribution towards sustainable development; (b) convergence of approaches, as lack of equivalence could lead to trade distortions; and (c) promoting good environmental practice and higher standards of environmental protection.

To achieve these objectives, Member States are asked "to foster transparency, predictability and responsibility in decision-making," and specifically to

- carry out proper environmental screening;
- require an environmental impact statement for the most polluting (i.e. Category A") projects, which shall include the results of any public consultations with shareholders;
- benchmark projects against relevant international standards (e.g. World Bank, IFC, Regional Development Bank or EC standards), as well as against "host country" standards;
- publish national ECA policies, principles and procedural guidance;
- publish, or require publication of, details of and materials relating to Category A projects seeking support, including environmental impact information at least 30 days prior to final decision on support;
- publish, annually, details of projects which are to receive support, including environmental information; and
- exchange views on a regular basis with civil society.

Source: [http://www.oelis.oecd.org/olis/2007doc.nsf/LinkTo/NT00002B8E/\\$FILE/JT03228987.PDF](http://www.oelis.oecd.org/olis/2007doc.nsf/LinkTo/NT00002B8E/$FILE/JT03228987.PDF). Note that this Recommendation is currently under review.

Civil action

There is also the possibility of civil law claims against private actors with respect to foreign environmental damage under the law of tort (or, in the US, under the Alien Tort Claims Act). This is discussed separately in chapter 5 above. As noted in that chapter⁶⁶ a case is currently before a court in the Netherlands in which the claimants are seeking damages for environmental damage in Nigeria which they allege was caused by a leak of oil from a pipeline owned by a subsidiary of Royal Dutch Shell. The court has recently confirmed that it does indeed have jurisdiction over those aspects of the case that concern the Nigerian subsidiary, as well as the Dutch parent company, on the basis that the claims are interconnected.⁶⁷

⁶⁶ See p. 171 below.

⁶⁷ Ibid.

It may also be possible, under some domestic legal systems, to enforce public law regulatory requirements through civil law suits. This is especially the case in the US, where there have been a number of attempts, some successful, to enforce US federal environmental statutes in relation to extraterritorial activities (see Box 11 above).

6.10 Where extraterritorial environmental regulation is authorised or required under an international environmental regime, does the regime primarily rely on administrative, civil or criminal remedial mechanisms, and at which level (i.e. international or national?). Are non-judicial mechanisms relevant? To what extent are states able to choose enforcement mechanisms?

Choice of remedial mechanisms

As noted above, the 1998 Council of Europe Convention on Protection of the Environment through Criminal Law⁶⁸ has only been ratified by one state so far. However, it contains some interesting provisions on how environmental offences may be categorised and enforced. The Convention divides environmental offences into “intentional offences,” “negligent offences” and “other criminal offences or administrative offences.” “Intentional” and “negligent” offences are the most serious and must be criminalized by state parties. In the case of “negligent offences,” standards of behavior are judged against a standard of “ordinary diligence.” For “other or administrative” offences, state parties have a choice whether to impose criminal or “administrative” sanctions.

Generally speaking, because of the need to be compatible with a wide range of legal systems, international environmental regimes tend not to be too prescriptive as to the precise mode of enforcement at domestic level. The usual formulation is that states must take “appropriate [legal, administrative and other] measures.”⁶⁹ The Basel Convention, however, makes it clear that illegal transboundary movements of hazardous wastes are “criminal.”⁷⁰ Under the Basel Convention’s “Model Law”⁷¹ a person commits a “crime” under domestic law if he or she “carries out a [prohibited] transboundary movement of hazardous waste,” or aids, abets or attempts to do the same.⁷²

Compensation mechanisms

Some environmental treaty regimes include provisions on liability and compensation in the event of environmental damage. The 1969 Civil Liability Convention and the 1971 Fund Convention (see Box 13 below) are probably the best-known international civil liability regimes. But compensation mechanisms have been developed for the purposes of other regimes too. For instance, the parties to the Basel Convention have

⁶⁸ See n. 30 above.

⁶⁹ See, for instance, CITES Convention, n. 8 above, Article VIII(1); Rotterdam PIC Convention, n. 5 above, Article 10(1).

⁷⁰ Basel Convention, n. 5 above, Article 4(3).

⁷¹ The Model Law has been issued by the Basel Legal Working Group and is said to be based on existing national legislation. It is designed to “assist Parties in developing and/or updating their national legislation and institutional arrangements.” Copy available at <http://www.basel.int/pub/modlegis.pdf>.

⁷² Ibid, Part VII “Illegal Traffic,” para. 2.

negotiated a further Protocol on Liability and Compensation.⁷³ This Protocol, upon entry into force, would provide for “strict” or “no fault” liability for waste generators, exports, shippers, importers and disposers of waste. There is a financial cap on the sums recoverable in cases of “strict liability,”⁷⁴ but, to ensure that compensation is available, all potentially liable parties would be required to obtain some form of financial security, in the form of “insurance, bonds or other financial guarantee.”⁷⁵ Additional compensation is to be made available via a special fund maintained by the state parties themselves, but it is only accessible by the less developed state parties, or those with “economies in transition.”

Box 13: The 1969 Civil Liability Convention and the 1971 Fund Convention: a treaty-based system for compensation for oil pollution damage

Civil damages for oil pollution damage can be claimed under the 1969 Civil Liability Convention and the 1971 Fund Convention. The Civil Liability Convention creates “strict” liability for the vessel owner, but this is capped by an amount linked to the vessel’s tonnage where the owner can prove that the pollution occurred through no fault of its own. The 1971 Fund Convention created a special compensation fund that would be made available to victims of pollution. It is made up of contributions by oil importers on the basis that they, as the owners of cargo, ought to bear some of the financial responsibility for spills.

A special case: “flag state jurisdiction” under marine pollution regimes

Marine protection regimes utilising “flag state jurisdiction” deserve special mention here as they are, as noted above, very possibly the only context where the use of extraterritorial jurisdiction by states is explicitly required, even where a breach takes place within the territorial boundaries of another state. As noted in case study 16 above, the 1973/78 MARPOL regime relies to a large extent on administrative controls exercisable by: (a) a flag state over ships registered in its jurisdiction; or (b) port states over vessels located within their territories, together with the possibility of civil or criminal sanctions in the event that violations are discovered.

MARPOL does not specify what kind of sanctions must be imposed at the domestic level for breaches of standards – e.g. whether “administrative,” regulatory or criminal – only that the flag or port state must institute proceedings in accordance with its own laws and must establish appropriate sanctions. However, it would not be surprising if many states opted for criminal liability, as the UK has done.⁷⁶ Non-judicial mechanisms are not a feature of this regime, although the International Maritime Organization (“IMO”) recommends that each party include opportunities for public participation as part of its compliance programmes.⁷⁷ However, as noted above, civil damages may be claimed under a separate regime in cases of oil pollution (see Box 13 above).

⁷³ Basel Protocol on Liability and Compensation for Damage Resulting from the Transboundary Movements of Hazardous Waste and Their Disposal, December 10, 1999, copy available at <http://www.basel.int/meetings/cop/cop5/docs/prot-e.pdf>.

⁷⁴ Note, however, that this cap does not apply to “fault-based” liability.

⁷⁵ Basel Protocol on Liability and Compensation, Article 14

⁷⁶ See for example, in the UK, the Merchant Shipping (Prevention of Oil Pollution) Regulations 1996.

⁷⁷ IMO, *MARPOL – How To Do It* (IMO, 2002), p. 30.

6.11 Are the targets of extraterritorial environmental regulation individuals, companies, or both?

At the domestic level, both individuals and companies may be liable for environmental offences. For instance, while a company is most likely to be prosecuted for pollution resulting from a company's operations, it may well be possible, under domestic law, to prosecute individual managers and officers as well, if it can be shown that the environmental damage was done with their consent, or that their personal negligence was a material factor.⁷⁸

In practice, as noted above, states do not generally seek to extend their criminal laws to cover extraterritorial pollution incidents. However, both individuals and companies may potentially face criminal prosecution under domestic regimes designed to deal with international environmental problems, such as transboundary movement of hazardous waste (see, for an example, case study 17 above).

6.12 & 6.13 How do states regulate corporate entities abroad? What do the relevant treaties have to say?

States hardly ever extend their public ("criminal" and "administrative") environmental laws to foreign corporate entities operating abroad. In the US case of *Pakootas v Teck Cominco Metals Ltd*⁷⁹ the court was careful to explain that it was not seeking to regulate the foreign activities of a foreign company, but to determine whether US clean-up legislation would apply to damage within the US. It did not, therefore, regard this as a case of extraterritorial regulation. However states can and do take adjudicative jurisdiction over companies operating abroad in private law cases (e.g. tort-based claims for cross-border environmental damage) on the basis that a key part of that tort (i.e. the injury) occurred within the forum state. Grounds for extraterritorial civil jurisdiction in environmental cases are discussed in more detail in chapter 5 above.⁸⁰

Regulatory requirements under international regimes

As explained in paras. 6.1 and 6.2 above, the vast majority of international environmental regimes are based on the territorial jurisdiction that states enjoy over commercial and industrial activity taking place within their own territorial boundaries. Although many international environmental treaties have an extraterritorial "dimension," very few contain express requirements with respect to the regulation of corporate activity outside territorial boundaries. The 1991 Environmental Protocol to 1959 Antarctic Treaty is one possible exception,⁸¹ but this is addressed to the

⁷⁸ See, for instance, UK Environment Agency Enforcement and Prosecution Policy, n. 60 above, p. 6

⁷⁹ See n. 26 above.

⁸⁰ See pp. 144-148 below.

⁸¹ This Protocol designates the Antarctic as "a natural reserve, devoted to peace and science." Article 8 of the Protocol requires environmental impact assessments to be carried out in relation to activities carried out in the Antarctic Treaty area, including tourism. The Protocol has been implemented in the UK, for example, under the 1994 Antarctic Act. This legislation sets up a permit system for visitors to Antarctica on "British expeditions" (which would include tour operators based in the UK). The Act also prohibits mineral activities by "United Kingdom nationals," including companies incorporated in the UK, without a permit. Criminal penalties apply to breaches of the Act by individuals and UK companies, including directors and officers of companies.

protection of an area that is not subject to any internationally recognised jurisdictional claims by any one state. “Flag state” jurisdiction over vessels and their foreign (usually corporate) owners is another exception. But, again, this regime is designed primarily to fill the regulatory gap that would otherwise exist when ships are travelling on the high seas. Moreover, vessel owners have a choice as to where to register their vessels, and so a decision to register a vessel in State X is effectively a decision to submit to the jurisdiction of State X as far as the regulatory requirements relating to that vessel are concerned.

There are other treaties, like the Basel Convention, that do not positively exclude assertions of extraterritorial jurisdiction to fulfil the aims of the treaty. But they provide no real guidance on the issue either. In practice, when faced with an international environmental problem, states tend to focus their efforts on what can be achieved using domestic measures such as domestic targets, transparency and notification obligations, and import and export controls.

6.14 Conclusions: lessons for the B&HR sphere

Clearly, there are overlaps between the environmental and B&HR spheres. Environmental degradation can severely impair the enjoyment of human rights, such as the rights to life and health, and the rights of indigenous groups to self-determination. Failures by states to respond adequately to environmental impairment may also breach other civil and political rights, such as the right to an effective remedy.

But it is the ability of environmental problems to transcend national borders – the fact that human activities in one jurisdiction can have a physical impact on resources in another – that poses the greatest regulatory challenge for individual states. Beyond the risks of cross-border pollution, there are risks to global resources on which we all depend. Many of the most serious environmental threats – to marine resources, the ozone layer, biodiversity and the global climate – are not issues that any one state can regulate alone. Damage can be felt far from the place where the harm originated, and can be cumulative, so that it is very difficult to link particular harms with particular regulatory failures. Therefore, states have a strong self-interest in developing international cooperative solutions to environmental problems and in gaining international commitments from other states regarding their own regulatory policies and practices.

Environmental regulation is a huge and complex area. But, focusing on the “outward-looking” international environmental regimes in particular, such as the Basel Convention, the Rotterdam PIC Convention and various European treaties on the management of cross-border environmental risk, a number of themes emerge that have resonance for the B&HR sphere. These include notions of “shared responsibility” for certain environmental problems, and particularly for exports of technologies and processes that could cause harm abroad; the need to reconcile respect for the sovereignty of other states with the sense of responsibility that comes from having been the originator of a harm; and, finally, recognition of the special challenges facing many of the world’s poorest states. There are, therefore, a number of lessons we can usefully draw from the way states have approached environmental issues – both unilaterally and cooperatively – that are relevant to the B&HR sphere.

Lesson 1: States will tend to resist measures that undermine their ability to determine their own industrial, economic, developmental and environmental policies. This is clear from the way states have approached new regimes on environmental problems such as climate change and ozone depletion. States, and particularly developing states, have been extremely wary of new regulation that could undermine their ability to set their own development priorities and policies. And attempts to link trading rights to minimum environmental standards have been vigorously opposed, especially by developing states, which have argued that this amounts to “hidden protectionism.” States clearly regard environmental quality as an issue over which each state has sovereignty, which should not be subject to interference from outside. This is evident from the extreme reluctance of states to extend their laws extraterritorially in relation to environmental issues, and from their clear preference for cooperative regimes - provided in most cases that those regimes rely on each party’s own territorial jurisdiction and otherwise entail sufficient discretion for states to maintain control over their own domestic policies.

Lesson 2: As regulatory cooperation or convergence is pursued, special consideration must be given to the particular needs of developing states. International environmental regimes provide a number of examples of initiatives that may help, including aid, capacity building, technology transfer, facilitating greater private sector investment (e.g. through market-based incentives), and longer phasing-in periods for compliance. But empty promises are not enough. Failures to live up to past commitments can create problems later on, as the negotiations at the 2009 Copenhagen Climate Change Conference clearly show.

Lesson 3: Participatory rights have a crucial role to play in international regimes relating to cross-border risks or the export of hazardous materials. These rights include rights of access to information, rights to be consulted about new projects and proposals, rights to participate in environmental assessment procedures, and rights to remedy. The Aarhus Convention sets out a number of different ways that individuals could, and should, participate in environmental decision-making processes. As discussed above, these rights are capable of being extended, either unilaterally or under international cooperative regimes, to potentially affected individuals in other states. Where this is the case, these rights are sometimes referred to as “diagonal” rights, in the sense that they are “held by individuals or groups against the governments of states other than their own.”⁸² “Diagonal rights” have a particularly important place in the context of cross-border risks and hazardous exports, especially for individuals living in states where the regulatory apparatus is weak, corrupt, or poorly resourced.

Lesson 4: Special-purpose compensation mechanisms would seem to have a role to play too. Liability and compensation mechanisms have been established by international agreements to make it easier for those affected by serious environmental damage to make a claim, and to ensure that sufficient financial resources are available to compensate victims. The regime created by the 1969 Civil Liability Convention and the 1971 Fund Convention – which establishes strict, but capped, liability for vessel owners, plus a special compensation fund – is the clearest example. But states

⁸² See Knox, n. 14 above.

have developed liability regimes for use in other contexts too. A Protocol to the Basel Convention (not yet in force) creates strict liability for generators, exporters, importers and disposers, depending at which point in the chain the damage occurred, compulsory insurance or financial guarantee requirements, and a special compensation fund (though available only to developing or “transition”) states. Although this Protocol is not yet in force, it provides a possible regulatory model that could conceivably be adapted for other purposes.

Lesson 5: States have a preference for domestic measures with extraterritorial implications (over direct assertions of extraterritorial jurisdiction) – and for coordinated measures over unilateral measures – when it comes to managing and reducing extraterritorial or cross-border risks. These are measures based on territorial jurisdiction (e.g. over importers, and exporters, or industrial activities *within* the jurisdiction) that offer benefits (e.g. in terms of environmental protection, or participatory rights) to those in other states. The Basel Convention is a good example of this. In other spheres, procedural obligations, such as the obligation to produce a proper environmental impact assessment, plus transparency obligations are popular devices and reflect the growing importance of “participatory rights” in environmental law (see Lesson 3 above). The principle of “prior informed consent” has also proved a useful basis for international cooperation in relation to the export of hazards. “Parent-based” methods of regulation of corporate groups, on the other hand, appear not to be used to any great extent, except in the context of corporate disclosure regimes, or as part of vetting and monitoring compliance with environmental commitments made in the context of an application for overseas investor support.

Lesson 6: While soft law instruments have been important in the development of international environmental law, binding treaties are the preferred basis for more complex and detailed regulatory regimes. States have entered into a number of treaties to better manage cross-border and global environmental risks, and to help plug some of the regulatory gaps that are inevitable in a “territorially-based” system. And where a regime depends for its effectiveness on each state pulling its weight – as many environmental regimes do – nothing less than a full-blown treaty will provide sufficient guarantees of each state party’s commitment. However, in many cases international environmental regimes have fallen short of expectations. This is often due to deficiencies in supervisory mechanisms, such as a lack of powers to deal effectively with non-compliant states, or simply a lack of resources.

Lesson 7: But effective international regimes can take time to develop. Patience is often necessary. It may be that in the first instance, a soft law instrument, or “framework agreement” is all that can be achieved. But, as experience with the Vienna Convention for the Protection of the Ozone Layer shows, it may be possible, as consensus develops and scientific knowledge improves, to build on those first efforts to eventually create a much stronger regime.

Lesson 8: States recognise a concept of “shared responsibility” for the extraterritorial environmental implications of products and problems generated within their respective jurisdictions, at least as far as physical exports are concerned. The regimes that have been developed in relation to movements of transboundary wastes, and exports of dangerous chemicals, suggest wide acceptance of the idea that a “generator” of an environmental risk bears responsibilities for that

risk that continue even after the relevant shipment or product has left its state of origin. Only once that product or shipment has been transferred to the custody of another person, in accordance with the requirements of the international regime, does that responsibility cease. But so far, the notion of “shared responsibility” (e.g. for identifying and dealing with environmental risks) appears to be confined to physical exports. It does not yet apply in the context of foreign investments except, perhaps, where a foreign project has been supported financially by the state itself (e.g. through export credit guarantees) and even then it remains controversial.

Lesson 9. Finally, states have recognized that in principle, they should strive to ensure that activities within their respective jurisdictions do not cause extraterritorial environmental harm: This rule finds expression in Principle 21 of the 1972 Stockholm Declaration and implementation in numerous international instruments ever since. While this principle does not authorise direct assertions of extraterritorial jurisdiction in the environmental sphere, it has undoubtedly provided the basis and inspiration for numerous domestic measures with extraterritorial implications.

Chapter 7: Conclusion

Much has been written at the theoretical level about extraterritorial jurisdiction. But the reality proves much more complex. While assertions of direct extraterritorial jurisdiction over private actors or activities abroad are frequently controversial, this is not always the case. There are situations where other states appear indifferent. There are cases where the use of direct extraterritorial jurisdiction is tolerated and accepted by affected states, and in some cases even welcomed. There are international regimes in which the use of direct extraterritorial jurisdiction is a positive legal requirement. And there are many cases where potentially problematic or conflicting jurisdictional claims have been resolved by international negotiation and cooperation.

In some cases, regulatory methods commonly described as “extraterritorial” turn out not to be extraterritorial at all. The imposition of corporate governance and reporting requirements on foreign companies seeking cross-listing under domestic securities regimes is one example.¹ A finding in a tort-based case that a company domiciled in the forum jurisdiction has negligently failed to supervise a foreign subsidiary or contractor, based on their actions or inaction at home, is another.² To the extent that these forms of regulation are concerned with corporate conduct and dealings *within* the territory of the regulating state, they are better understood as “domestic measures with extraterritorial implications.”

As well as being misunderstood, the importance of domestic measures with extraterritorial implications is often overlooked. Such measures can do much to influence domestic actors to conduct their activities at home in such a way as to also facilitate responsible and legally compliant behavior overseas, by them as well as their private foreign partners,³ often without the attending controversy that can accompany exercises of direct extraterritorial jurisdiction. This is particularly apparent in the anti-corruption area, e.g. in the form of transparency and accounting requirements.

International law provides a set of threshold tests to help identify whether an assertion of direct extraterritorial jurisdiction is likely to be considered legal or not. It must, as discussed below, be justifiable by reference to one or more established bases of jurisdiction. But beyond this, international law tells us little about what is and is not acceptable, except that the regulation and its enforcement must be “reasonable.” Much depends, therefore, on the context and the regulatory methods used.

7.1 What causes states to try to control or influence private actors and their activities abroad?

States tend not to take action in relation to private foreign actors and activities on a *unilateral* basis unless there are very strong reasons of national self-interest. These may be threats to national reputation, or national security interests or potential damage to local markets from abroad. The key reasons for unilateral state action identified in this report are discussed immediately below. In addition, there have been cases where states have joined together under international treaty regimes to deal with

¹ See discussion at pp. 61-62 above.

² See discussion at p. 145 above.

³ See discussion at pp. 15-16 above.

global threats to security (e.g. in the areas of counterterrorism and money laundering, see further chapter 4 above) or threats to global environmental resources (see further chapter 6 above) or to bring greater convergence in regulatory approaches. It is not uncommon for these regimes either to authorise or require some form of direct extraterritorial jurisdiction, or the use of domestic measures with extraterritorial implications, and many examples are given in this report. The different motivating factors that may have influenced attempts to control or influence private foreign conduct and conditions in the various regulatory areas considered in this report are summarised in Table 4 below.

Threats to national security

Threats to national security are a significant factor behind many extraterritorial regimes, particularly in the areas of counterterrorism, counter-terrorist financing and organised crime (see chapter 4 above). In these areas, states have not only acted unilaterally to deal with these threats, but they have also worked together under international regimes that support and encourage the use of extraterritorial jurisdiction to help remove the ability of terrorists and criminals to escape prosecution merely by putting themselves and their activities beyond the territorial jurisdiction of interested states.

Threats to national markets

States have taken jurisdiction over private foreign actors to protect national markets from harm from abroad. The best-known context in which this takes place is antitrust regulation (see chapter 3 above) in which national and regional regulatory authorities, especially in the US and EU, have sought to control mergers and other activities taking place outside territorial boundaries which have the potential to have an anti-competitive effect within the jurisdiction. This kind of regulation also takes place in the securities field, in which the US has taken jurisdiction over private foreign actors whose conduct overseas threatens damage to US securities markets.

Threats to national reputation

In some cases states have been motivated to exercise direct extraterritorial jurisdiction, particularly over activities overseas by their nationals, by a need to prevent damage to their national reputations. As discussed in chapter 1 above, this was one of the drivers behind the US's ground-breaking anti-corruption legislation, in the form of the 1977 Foreign Corrupt Practices Act. However, while improving the US's image abroad may have been viewed by some as an end in itself, a key concern of US legislators was the potential damage that involvement in foreign corruption might do to US export and investment opportunities in the long run.

Sex tourism is another area in which states have been motivated by concerns about the potential damage to national reputations resulting from the involvement by their nationals in serious crimes abroad, particularly crimes against children. In this case, though, the governments of tourist sending states appear also to have acted out of a sense of moral obligation, specifically, a sense of responsibility for an industry that causes a great deal of harm to vulnerable people. There seems to be an acknowledgment that many destination states may find it difficult to investigate and punish these kinds of offences themselves. This is not just because of a lack of resources but also because of the nature of the offences and the fact that offenders do not tend to remain very long in the state where the offences are committed. In this

area, the use of extraterritorial jurisdiction has been largely uncontroversial. Universal revulsion at these kinds of crimes has resulted in a series of international initiatives that support and encourage the use of direct extraterritorial jurisdiction to ensure that offenders and prosecuted are prosecuted and punished, though largely on the basis of the offender's nationality.⁴

Threats to national resources

Protecting national resources from cross-border environmental damage emanating from abroad is a potential basis for extraterritorial environmental regulation although, as discussed in chapter 6 above, publicly enacted environmental laws are rarely extended to actors and conduct in other states. However, this is a potential basis for civil jurisdiction (see chapter 5 above) in which a national court will usually have jurisdiction over a foreign pollution event that causes damage within the territory of the forum state.

Threats to global resources

States regulate extraterritorially to protect resources in which they have a common interest but which are beyond the jurisdiction of any one state. Protecting the high seas from pollution from ships is one such area that relies on the use of extraterritorial jurisdiction by states. The protection of the Antarctic environment is another example. However, as discussed in chapter 6 above, this kind of extraterritorial regulation tends only to be done in the context of an international regime in which the regulatory responsibilities of different states are clearly allocated. For obvious reasons, states do not, by and large, act unilaterally to protect global environmental resources.

A sense of shared responsibility

The idea of "shared responsibility" for extraterritorial harms is implicit in domestic criminal regimes relating to sex tourism, discussed above. In this case, states have agreed (at first unilaterally, but subsequently in the context of international regimes) to take on the responsibility for investigating and prosecuting crimes committed in other jurisdictions in which their own nationals are involved. In practice, these regimes rely heavily on cooperation and information-sharing between the law enforcement bodies of both "tourist-sending" and "tourist-destination" states.

A similar idea of shared responsibility underlies the various environmental regimes relating to export of hazards, of which the Basel Convention and the Rotterdam Convention are probably the best examples. Under these regimes, the authorities of the exporting countries agree to share information about exports and their safe disposal and use with the authorities of importing states, and not to export hazardous wastes and substances to states that do not have the resources to cope with them. As discussed in chapter 6 above, this kind of regulation does not rely on the use of extraterritorial jurisdiction. Instead, these regimes rely on domestic measures by states parties to prevent harm to other states (i.e. domestic measures with extraterritorial implications).

⁴ Rather than, say, on the basis of the universality principle.

Table 4: Possible influences in attempts by states to seek to control or influence foreign conduct or conditions

	National security	National markets	National reputation	Natural resources (national)	Natural resources (global)	“Shared responsibility”	International regime?
Anti-corruption	Maybe	Yes	Yes	No	No	Yes	Yes
Securities	No	Yes	Yes	No	No	Maybe	Yes, though non binding
Antitrust	No	Yes	No	No	No	No	No
Criminal e.g. (1) sex tourism	No	No	Yes	No	No	Yes	Yes
Criminal e.g. (2) money laundering	Yes	Yes	Yes	No	No	Yes	Yes
Criminal e.g. (3) counterterrorism	Yes	No	Yes	No	No	Yes	Yes
Civil*	No	Maybe	Maybe	Maybe	No	Maybe	Yes, where applicable
Environment	No	Maybe	Maybe	Yes	Yes	Yes	Yes

* i.e. especially. tort, but not including private enforcement of public laws.

7.2 Patterns of state action: which approach when?

A cross-comparison across the various different regulatory areas suggests that states may tend towards different methods of regulation depending on whether an extraterritorial regulatory regime is primarily “inward-looking” or “outward-looking.” Generally speaking, “inward-looking regimes” (i.e. regimes concerned primarily with the protection of interests within the territorial boundaries of the state) tend to favour direct assertions of extraterritorial jurisdiction. Regimes concerning market abuse, in both the antitrust and securities fields, as well as regimes concerning criminal

activities connected with terrorism and terrorist financing appear to fit this general pattern.

On the other hand outward-looking regimes, arguably rely more heavily on the kinds of measures referred to in this report as domestic measures with extraterritorial implications. This is certainly true of many of the environmental regimes discussed in chapter 6.⁵ It is also arguably true of anti-corruption regimes that, while authorising (or even requiring) the use of direct extraterritorial nationality-based jurisdiction, also rely heavily on “parent-based” transparency requirements for their implementation. These, as explained above, fall within the category of domestic measures with extraterritorial implications.

The two stand-out exceptions to this general pattern are, of course, extraterritorial regimes on sex tourism and the use of universal jurisdiction by some states in relation to international crimes. These are both examples of “outward-looking” regimes that make use of direct assertions of extraterritorial jurisdiction. They are often justified based on the immoral or egregious nature of the abuse, though the use of universal jurisdiction in relation to international crimes remains controversial in some instances.

7.3 Arguments for and against (a) direct extraterritorial regulation and (b) domestic measures with extraterritorial implications.

Just as the reasons why states may seek to control or influence private actors and their conduct abroad will vary from context to context, so do the policy arguments for and against it.

Arguments against

The key reason why such regulatory attempts may be opposed by other states is because of the challenge it is seen as posing to their own sovereignty. This applies to the direct use of extraterritorial jurisdiction in particular. Laws that undermine states’ abilities to determine their own industrial and regulatory policies may constitute, it is frequently argued, an interference in their domestic affairs, contrary to international law. As discussed further below, these potential objections are taken account of, in theory at least, by the international law requirement of “reasonableness” where public laws are concerned and, in the private law sphere, by various domestic law doctrines that require the national courts to respect and give due weight to the regulatory interests of other states.⁶

Exercises of direct extraterritorial jurisdiction, especially on a unilateral basis, have also been opposed by companies, especially in areas such as antitrust and securities law. Companies have argued that this creates an uneven playing field, exposing some companies to competitive disadvantages vis-à-vis companies from states that do not impose the same extraterritorial constraints.⁷ Companies have also objected where certain domestic measures have exposed them to conflicting regulatory requirements (e.g. when a company must comply with the laws of the home state as well as the host

⁵ With the exception of flag state jurisdiction over ships, which requires flag states to take some responsibility for enforcement of extraterritorial breaches, even where these occur in the territorial jurisdiction of other states. See further case studies 16 and 21 above.

⁶ See further chapter 5 (civil jurisdiction) and esp. pp. 158-161 above.

⁷ See, for example, the reactions of companies to the US FCPA, discussed at pp. 38 above.

state).⁸ This has been an expensive problem for companies, particularly in relation to securities regulation.⁹ In some cases, it has been maintained that the legal and financial risks and uncertainties created by extraterritorial regulation may cause companies to avoid investing and operating in certain jurisdictions altogether. These problems are real ones.¹⁰ However, as this study shows, it is possible for the difficulties associated with the use of direct extraterritorial jurisdiction, as well as domestic measures with extraterritorial implications, to be mitigated in practice by international cooperation. Gradual harmonisation and convergence of domestic approaches (as has been done in the field of anti-corruption regulation, and is beginning to be done in other areas, such as securities regulation) and regulatory flexibility that takes proper account of regulatory requirements and compliance abroad, has also helped to reduce regulatory conflicts.

Arguments in favour

The previous section discussed the various reasons why states have been prepared to take steps to control or influence foreign conduct in the specific areas considered in this report. From this, some more general themes emerge. In the criminal law sphere, a powerful argument in favour of direct extraterritorial jurisdiction has been the need for criminal justice. The use of nationality-based jurisdiction increases the prospects that the perpetrator of a serious crime will be apprehended and punished (especially where the state in which the crime occurred may be unable or unwilling to launch a prosecution). This is illustrated by the case studies on sex tourism and counterterrorism legislation that appear in chapter 4. Similarly, jurisdiction based on the international law principle of “universality” helps to implement the idea that there should be “no safe haven” for the perpetrators of international crimes.¹¹

A more general argument made in favour of direct extraterritorial jurisdiction, and domestic measures with extraterritorial implications, concerns the need to fill “regulatory gaps” in the current international regulatory framework. Direct extraterritorial jurisdiction, it is argued by environmental and human rights NGOs in particular, can help to overcome some of the shortcomings of the current system. While territorial sovereignty remains a fundamental principle, inequalities, resource constraints, lack of political will and corruption can all help to create governance gaps, which operate to the detriment of affected individuals and communities. The idea that extraterritorial jurisdiction (assuming it abides by international legal requirements) provides a practical solution to these gaps has been influential in the development of a number of cooperative criminal law regimes, as well as in the private law sphere.

⁸ This has been a problem in securities regulation and also in antitrust regulation, see pp. 66-69 and pp. 97-98 above.

⁹ See, in particular, pp. 66-69, and case study 5, above.

¹⁰ See further International Chamber of Commerce, Policy Statement ‘Extraterritoriality and Business’ The ICC Task Force on Extraterritoriality, July 13, 2006. Copy available at <http://www.iccwbo.org/uploadedFiles/ICC/policy/trade/Statements/103-33%205%20Final.pdf>. See also an “Issues Paper” produced by the Australian Chamber of Commerce and Industry, ‘The Extraterritorial Application of National Laws: An Unwarranted Burden for International Business’, August 2006, copy available at http://www.acci.asn.au/text_files/issues_papers/Trade/Extraterritorial%20Application%20of%20National%20Laws%20August%202006.pdf.

¹¹ See further p. 20 and p. 119 above.

7.4 Assessing the reasonableness of states' uses of extraterritorial jurisdiction

As noted at the outset of this report, in order to assert jurisdiction over foreign conduct or activities, it is not enough for a state to be able to rely on one or more of the internationally recognised bases for extraterritorial jurisdiction. It is generally agreed that this exercise of jurisdiction must also be “reasonable.” There is no single international law definition of “reasonableness.” This is, no doubt, because reasonableness is so dependent on the context, including the mode of regulation and the degree to which the regulation affects other states’ interests. Instead, states have developed tools such as “balancing tests” to help decide whether or not an exercise of jurisdiction is reasonable in a given case. But these inherently and necessarily flexible tests are not always consistently applied and do not appear to give sufficient certainty to stakeholders.

While not conclusive, the reactions of states to assertions of direct extraterritorial jurisdiction by other states provide important clues as to what is and is not considered reasonable in different contexts. But whether an assertion of extraterritorial jurisdiction is reasonable or not is rarely answered with a simple “yes” or “no.” Very often, there are factors pointing both ways and different states and other stakeholders may have different views. Moreover, as seen in relation to anti-bribery (see chapter 1 above) and securities (see chapter 2 above), extraterritorial regulatory regimes may involve a mix of measures – some involving the use of direct assertions of jurisdiction, and some falling in the category of “domestic measures with extraterritorial implications.” Therefore, even within a single regulatory regime, some regulatory methods may be more problematic than others.

Drawing from chapters 1 to 6 of this study, Table 5 below sets out the kinds of factors that may point towards regulatory initiatives involving the use of direct extraterritorial jurisdiction that are “reasonable” (“Green Lights”) and those that might suggest the opposite (“Red Lights”). Obviously, this is provided as a summary only. Satisfying one or two “green light” requirements does not automatically mean that the regulatory initiative is considered to be “reasonable.” And the presence of one or two “red lights” will not necessarily mean that the regulatory initiative is not permitted. The aim of this table is to enable an overall impression to be drawn about the reasonableness (or otherwise) of a regulatory proposal, looking at the regulatory initiative as a whole.

Table 5: Factors potentially relevant to “reasonableness”?

GREEN LIGHTS	RED LIGHTS
The regulation is authorised or required under a multilateral regime.	The regulation is unilateral. It is not authorised or required under a multilateral regime.
The regime is concerned with an issue about which there is international concern.	The regime is concerned primarily with the national interests of the regulating state.
There is international consensus that the regulated activity is wrongful, undesirable or offensive.	There is a lack of consensus that the regulated activity is wrongful, or that there is a need for regulation.
There is a reasonable degree of international consensus as to the appropriateness and proportionality of any penalties proposed.	There is a lack of consensus among states as to the appropriateness and proportionality of any penalties proposed.
Any substantive standards of conduct are internationally agreed.	Substantive standards of conduct are not internationally agreed.
The regulation has been developed in consultation with potentially affected states.	The regulation has not been developed in consultation with potentially affected states.
The regulation is flexible, principles-based and outcomes oriented	The regulation is inflexible, and is based on detailed prescriptive standards.
The regulation is based on the nationality of the relevant actor (i.e. the actor is a national of the regulating state) where nationality is established according to internationally accepted tests.	The regulation is based on disputed claims of nationality.
The regulation is based on strong territorial connections between the regulating state and the relevant activity.	The regulation based on weak territorial connections between the regulating state and the relevant activity.

GREEN LIGHTS	RED LIGHTS
The regulation confines its substantive obligations to those parties and in relation to those activities over which it has (at least some) territorial and/or nationality jurisdiction.	The regulation imposes substantive obligations on foreign actors in relation to purely foreign conduct.
Enforcement bodies and courts have flexibility to decide whether prosecutions and other enforcement actions are reasonable in individual cases.	Enforcement bodies and courts have little flexibility to decide whether prosecutions and other enforcement actions are reasonable in individual cases.
The regulation takes account of the interests of foreign states (e.g. contains provision for joint enforcement action with foreign regulatory authorities, or obligations to consult with foreign regulatory authorities prior to taking enforcement action).	The regulation makes no provision for international cooperation or consultation.
The regulation is unlikely to create regulatory conflicts for individuals or companies, or if so, has procedures in place to try to minimize and deal with such regulatory conflicts.	The regulation is likely to create regulatory conflicts for individuals or companies (e.g. by exposing parties to conflicting obligations under the laws of different states).
The regulation includes procedures for resolution, between states, of competing jurisdictional claims.	The regulation does not include procedures for resolution, between states, of competing jurisdictional claims.
The regulation is not likely to lead to barriers to trade, or to distort competition in favour of the regulating state.	The regulation could possibly lead to barriers to trade, or could result in a distortion of competition in favour of the regulating state.
The regulation is sensitive to the developmental needs and aspirations of other states, including developing states.	The regulation fails to take proper account of the developmental needs and aspirations of other states, including developing states.

Domestic measures with extraterritorial implications and the requirement of “reasonableness”

It is not always easy to see whether or how considerations of “reasonableness” have played a part in the design of domestic measures that have extraterritorial implications. It may be that states consider that, because they are based on territorial jurisdiction, there is no question of “interference” in the domestic affairs of another state and that reasonableness, therefore, need not come into the equation. Moreover, domestic measures with extraterritorial implications have the potential to reduce the negative impacts of the foreign activities of private actors based in the regulating state. But the level of international controversy generated by some domestic regimes - the US securities regime under the Sarbanes-Oxley Act, for example - suggests that it is worth exploring this issue a little further.

While much has been written about the “reasonableness” of assertions of direct extraterritorial jurisdiction by states, there is little guidance from international law sources about how the reasonableness requirement relates to domestic measures that do not classify as direct extraterritorial jurisdiction but nevertheless have extraterritorial implications. One exception is the *US Third Restatement on Foreign Relations Law* (the “US Third Restatement”) which appears to take for granted the idea that “parent-based” domestic measures, as well as direct assertions of extraterritorial jurisdiction, would generally be subject to constraints based on “reasonableness.” At § 414 it is proposed that:

“A state may not ordinarily regulate activities of corporations organised under the laws of a foreign state on the basis that they are owned or controlled by nationals of the regulating state. However ... it may not be unreasonable for a state to exercise jurisdiction for limited purposes with respect to activities of affiliated foreign entities:

- (a) by direction to the parent corporation in respect of such matters as uniform accounting, disclosure to investors, or preparation of consolidated tax returns of multinational enterprises; or
- (b) by direction to either the parent or the subsidiary in exceptional cases, depending on all relevant factors, including the extent to which
 - (i) the regulation is essential to implementation of a program to further a major national interest of the state exercising the jurisdiction;
 - (ii) the national program of which the regulation is a part can be carried out effectively only if it is applied also to foreign subsidiaries;
 - (iii) the regulation conflicts or is unlikely to conflict with the law or policy of the state where the subsidiary is established.
- (c) In the exceptional cases referred to in paragraph (b), the burden of establishing reasonableness is heavier when the direction is issued to the foreign subsidiary than when it is issued to the parent corporation.”¹²

¹² American Law Institute, ‘Restatement (Third) on Foreign Relations Law’, 1987 § 213, § 414.

The US Third Restatement seems to assume that regulation that imposes requirements on a parent company, which is aimed at regulating or influencing the behavior of foreign subsidiaries (i.e. “parent-based” regulation) may still be subject to an overriding “reasonableness” requirement. But it also suggests that in many cases parent-based regulation is more likely to be considered “reasonable” than direct assertions of extraterritorial jurisdiction over foreign subsidiaries. Group financial reporting and disclosure to investors are singled out as examples of parent-based measures that may not be unreasonable in the circumstances.

It is not possible to say whether or not this statement reflects current international law.¹³ As noted above, it is unclear what role international law has played to date in the design of domestic measures with extraterritorial implications, or in decisions of legislatures to favour them over assertions of direct extraterritorial jurisdiction in some circumstances. It is possible that a rule of “reasonableness” in relation to domestic measures with extraterritorial implications could emerge through custom.¹⁴ However, to establish this, two things are needed (a) consistent state practice and (b) evidence that this “reasonableness” is considered by states to be a binding legal requirement. Both appear to be lacking at present.

However, good policy sense suggests that all states, when implementing domestic measures with foreseeable extraterritorial implications, should take account of how and the extent to which their actions may impact, or be perceived to impact, upon other states’ interests and consider working with those states to minimize any adverse impacts. This process should include a proper consideration of potentially negative consequences for other stakeholders, and the steps needed to address these.

It is very possible that domestic measures will generally be assumed to be more reasonable than exercises of direct extraterritorial jurisdiction, and, as the SRSG has noted, the two concepts are distinct. But this does not mean the former are without controversy or that they should be pursued in a vacuum. Often, regulatory initiatives inspired by extraterritorial concerns will involve a mix of measures, involving both direct assertions of extraterritorial jurisdiction and domestic measures with extraterritorial implications. There are many examples in this report of this, particularly in the anti-bribery and securities areas. Ideally, therefore, such regulatory initiatives should not be dissected into their various parts, but evaluated in the round.

7.5 The importance of international cooperation

In each of the areas discussed in this report, the benefits of greater international cooperation emerges as a key theme. Not only is international cooperation key to overcoming some of the potential objections to direct extraterritorial jurisdiction, it is

¹³ Indeed, a number of commentators have expressed doubts as to whether the US Third Restatement, as a whole, actually reflects international law. See C. Ryngaert, *Jurisdiction in International Law* (Oxford University Press, 2008), pp. 178-79; W. Dodge ‘Extraterritoriality and Conflict-of-Laws Theory: An Argument for Judicial Unilateralism’, (1998) 39 *Harvard Journal of International Law* 101, 139 (1998); P. Trimble, ‘The Supreme Court and International Law: The Demise of Restatement Section 403’, (1995) 89 *American Journal of International Law* 53, 55; C. Olmstead, ‘Jurisdiction’, (1989) 14 *Yale Journal of International Law* 468, 472 .

¹⁴ “Custom” is a source of international law, along with treaties and international judicial decisions. See the Statute of the International Court of Justice, Article 38.

also frequently crucial to the effectiveness of extraterritorial regimes. This also applies to regimes based on domestic measures with extraterritorial implications. As earlier chapters of this report show, international cooperation takes many forms. States have developed numerous regimes on inter-state consultation and cooperation, ranging from international treaties (especially important in the environmental sphere) to many non-binding (or “soft law”) instruments, which have proved crucial as a way of galvanising national responses and developing greater consistency in both policy and regulatory approaches. At the enforcement level, states rely heavily on cooperation from foreign national law enforcement agencies for help with investigations, prosecution and extradition.

7.6 Extraterritorial jurisdiction, domestic measures with extraterritorial implications, and B&HR

The use of extraterritorial jurisdiction has been growing fast across different domains. And the different ways states use and respond to extraterritorial jurisdiction are changing too. Although still controversial in many areas, some forms of extraterritorial jurisdiction are increasingly recognised as legitimate and, in many cases, necessary responses to global threats and problems. In many of the areas discussed in this report, states are actively supporting cooperative solutions to international regulatory problems, and are showing a willingness to consider new and innovative ways of dealing with competing jurisdictional claims.

At first glance, some of the areas discussed in this report may not appear to have much in common with the B&HR sphere. But while there are indeed some important differences, all of the regulatory areas discussed above offer important insights about how the use of extraterritorial jurisdiction can work to advantage, and the pitfalls to avoid. Fundamentally, regimes involving direct extraterritorial jurisdiction must be reasonable, not just for their legality as a matter of international law but also because to achieve their full potential they must also be capable of attracting the support of other interested states and, ideally, some (if not most) of the other relevant stakeholders as well. A number of possible indicators of “reasonableness,” derived from the preceding chapters, are set out at Table 5 above.

The SRSG has indicated that he will continue to consult affected stakeholders on their views as to how to unpack the difficult issue of extraterritorial jurisdiction in the B&HR sphere. It is to be hoped that all of those stakeholders engage with the SRSG on this issue, and show a willingness to look beyond long-held assumptions while exploring the pros and cons of the range of options available.

Annex 1: Abbreviations used in this report

ALI	American Law Institute
ATS	Alien Tort Statute
AU	African Union
B&HR	Business and Human Rights
CBI	Confederation of British Industries
CDM	Clean Development Mechanism
CESR	Committee of European Securities Regulators
CERCLA	Comprehensive Response, Compensation and Liability Act (US)
CFCs	Chlorofluorocarbons
CITES	Convention on International Trade in Endangered Species
COE	Council of Europe
DOJ	Department of Justice (US)
DRC	Democratic Republic of the Congo
EC	European Community
ECA	Export Credit Agency
ECGD	Export Credits Guarantee Department (UK)
ECN	European Competition Network
ECOSOC	UN Economic and Social Council
ECPAT	End Child Prostitution, Child Pornography and the Trafficking of Children
EEZ	Exclusive Economic Zone
EFTA	European Free Trade Area
EU	European Union
FCPA	Foreign Corrupt Practices Act (US)
FATF	Financial Action Task Force
FSA	Financial Services Authority (UK)
GAAP	Generally Accepted Accounting Principles
GATT	General Agreement on Tariffs and Trade
GATS	General Agreement on Trade in Services
IBA	International Bar Association
ICC	International Chamber of Commerce
ICN	International Competition Network
ICSID	International Convention for the Settlement of Investment Disputes
IFRS	International Financial Reporting Standards
IMF	International Monetary Fund
IMO	International Maritime Organization
IOSCO	International Organization of Securities Commissions
LSE	London Stock Exchange
MARPOL	Marine Pollution Convention
MLCA	Money Laundering Control Act (US)
MOU	Memorandum of Understanding
NEPA	National Environmental Policy Act (US)
NGO	Non-Governmental Organisation
NYSE	New York Stock Exchange
OAS	Organization of American States
OECD	Organisation for Economic Cooperation and Development
OFT	Office of Fair Trading (UK)

OPIC	Overseas Private Investment Corporation
PIC	Prior Informed Consent
RCRA	Resources Conservation and Recovery Act (US)
RICO	Racketeer Influenced and Corrupt Organizations Act (US)
SEC	Securities and Exchange Commission (US)
SRSR	The Special Representative of the UN Secretary General on Business and Human Rights
TI	Transparency International
TRIPS	Agreement on Trade Related Aspects of Intellectual property Rights
UN	United Nations
UNCTAD	United Nations Commission for Trade and Development
UNEP	United Nations Environment Programme
WTO	World Trade Organisation
WWF	World Wildlife Fund

Annex 2: Study methodology

Template questionnaire

1. In what ways can the regulation be regarded as “extraterritorial”? For instance, does the regulation involve **direct assertions of extraterritorial jurisdiction** over foreign parties or activities? Or does it merely have **extraterritorial implications**?
2. Has the regulation been adopted unilaterally by states? Or in order to implement an international regime? Or both, and if so, which came first?
3. Is the jurisdiction claimed primarily “**prescriptive,**” “**adjudicative**” or “**enforcement**” **jurisdiction**? And what internationally recognised bases for jurisdiction are claimed (e.g. territory?, nationality?, “effects” doctrine?, “universality”? etc.). Whether the regime is unilateral, or multilateral, to what extent does its effectiveness *rely on* the ability of states to regulate extraterritorially?
4. What **legal objections** were raised at the international and national levels when the regime was being developed? Are those objections still being raised? Might these objections have any parallels with the B&HR sphere?
5. What were the key **policy drivers** (political, economic etc) underlying the development of the current regime and what were the **policy obstacles**? Are there still challenges to the regime along policy lines? If so, from where? To what extent might these objections also be relevant to the B&HR sphere?
6. Who were/are the main **stakeholders** driving (or opposing) the development of the regime? Are particular stakeholders associated with particular viewpoints or arguments? Again, do these viewpoints and arguments have any relevance to the B&HR sphere?
7. What are the obstacles to states **implementing** the regime - for example, the procedural challenges involved in information sharing and joint enforcement activities? What cooperative arrangements are in place (formal and informal) between states? How are jurisdictional conflicts resolved? To what extent might these problems (and solutions) be relevant to the B&HR sphere?
8. What considerations are taken into account by regulatory authorities in deciding whether or not to commence **enforcement action** in relation to extraterritorial activities? For instance, how serious or systemic must the offences be? And how great the connection with the regulating state?
9. Where attempts are made to regulate foreign parties or activities unilaterally, is the regime based on penalties; incentives; civil action; or transparency requirements? Or a combination of these?
10. If the regulation is done pursuant to an international regime, does the regime primarily rely on administrative, civil or criminal remedial mechanisms – and at the international, regional or national level? Are non-judicial mechanisms

relevant? To what extent are states able to choose enforcement methods? What are the consequences for states of non-compliance?

11. Are the targets of the regulation *corporations* or *individuals* or both?
12. Where a regime (unilateral or multinational) applies to *corporations*, how do states regulate corporate entities *abroad*? For instance, how is the problem of “corporate nationality” dealt with? Does this regulation involve direct assertions of jurisdiction over foreign subsidiaries? Or are regulatory obligations imposed primarily on the parent company? If the latter, in what circumstances, under what theories and by what means are parent companies held responsible for the activities of their foreign subsidiaries or other business contacts? Are there patterns of state action in this respect?
13. Where regulation of foreign corporate entities by states is authorised or required under an international regime, does the regime directly address what states are required or encouraged to do in regulating the activities of corporate entities abroad? Or do states have flexibility in this regard? If the latter, are there any patterns in the way states have implemented their obligations vis-à-vis regulation of foreign companies? Are any direct obligations placed onto corporations?
14. Are there any other lessons regarding the establishment and current operation of the regime which might be helpful to draw on for the B&HR sphere?

Annex 3: List of case studies referred to in this report

Chapter 1: Anti-corruption

Case study 1: Kellogg Brown & Root in Nigeria, pp. 38-39.

Case study 2: International cooperation in action: the case of BAE, pp. 44-45.

Case study 3: Competing jurisdictional claims: the Statoil case, p. 46.

Case study 4: Regulating foreign corporate entities: the Siemens case, p. 54.

Chapter 2: Securities regulation

Case study 5: The Sarbanes-Oxley Act of 2002, pp. 67-68

Case study 6: *Morrison v National Australia Bank*, pp. 72-73.

Case study 7: The US's SEC: An enforcement led approach, p. 80.

Case study 8: The UK's FSA: A "risk-based" "preventative" approach, pp. 81-82.

Case study 9: Extraterritorial criminal vs administrative enforcement: a brief comparison of UK and US practice, p. 84.

Chapter 3: Antitrust

Case study 10: The *Marine Hose* case, p. 103.

Case study 11: Westinghouse and the Australian uranium producers, pp. 104-105.

Chapter 4: Criminal jurisdiction generally

Case study 12: Assertions of "universal" jurisdiction by Belgium and Spain, p. 120.

Chapter 5: Civil jurisdiction generally

Case study 13, *Khulumani et al v Barclays Bank et al*, pp. 153-154.

Case study 14: Union Carbide and the disaster at Bhopal, p. 167.

Case study 15: Liability in the context of contractual relations: The case of *Trafigura*, pp. 168-169.

Chapter 6: Environmental regulation

Case study 16: Pollution of the sea by ships: the special case of "flag state jurisdiction," p. 181.

Case study 17: Domestic enforcement of the Basel regime: the *Probo Koala* prosecutions in the Netherlands, pp. 182-183.

Case study 18: The Tuna-Dolphin case: *Mexico v US*, p. 187.

Case study 19: The 1985 Vienna Convention for the Protection of the Ozone Layer and the 1987 Montreal Protocol, pp. 190-191.

Case study 20: The "Copenhagen Accord", p. 192.

Case study 21: Allocating regulatory responsibilities: "flag states," "coastal states" and "port states" under the MARPOL regime, p. 194-195.

Case study 22: European ECAs and the Ilisu Dam Project, p. 196.