EXTRATERRITORIAL ECONOMIC SANCTIONS AND THEIR FOUNDATION IN INTERNATIONAL LAW

Susan Emmenegger*

TABLE OF CONTENTS

I. INTRODUCTION 632

I. US PROSECUTION OF BNP PARIBAS 633
A. The Facts of the Case 634
B. European Reaction 635
C. The Relevance of International Law 636

II. WHAT IS "EXTRATERRITORIAL JURISDICTION"? 637
A. No Territorial Nexus 639
B. No Substantial Territorial Nexus 640
C. No Exclusive Territorial Nexus 642
D. Need for a Broad Concept of Extraterritoriality 643

III. WHEN IS EXTRATERRITORIAL JURISDICTION LEGAL? 644
A. Territoriality as the Starting Point 645
B. Extending the Territoriality Principle 646
C. The Personality Principle 649
D. The Protective Principle 651
E. The Universality Principle 653
F. Extraterritoriality Is Often Legal 654

IV. BNP PARIBAS REVISITED 654
A. Correspondent Account Jurisdiction 654
B. Effects Jurisdiction 656
C. Protective and Universal Jurisdiction 658

V. CONCLUSION 659

---

* Hauser Global Fellow 2015/2016, NYU School of Law; Director, Institute of Banking Law, Bern University, Switzerland. The author wishes to thank Eva Stokar von Neuforn and Leonie Luterbacher for their helpful research assistance. Also thank you to Geoffrey Miller, Kevin Davis, Un Kyung Park, Jennifer Hill, Fabio Morosini, Yoon Jin Shin, Jing Tao, Shreya Atrey, Frederick Wilmot-Smith, Asem Khalil, Machie Murata and the other participants of the Global Fellows Forum for their comments and observations.

I. INTRODUCTION

In November 2015, Germany's Deutsche Bank plead guilty to United States charges of conspiracy to violate the International Emergency Economic Powers Act (IEEPA)[1] and the Trading with the Enemy Act (TWEA).[2] Deutsche Bank processed US-dollar transactions on behalf of Iranian, Libyan, Syrian, Sudanese, and Burmese entities that are subject to US sanctions. The case settled for 258 million USD.[3] It was not the first of its kind: recent settlement payments by foreign banks in connection with US sanction laws include the French Crédit Agricole (787 million USD);[4] the Dutch ING Bank (619 million USD);[5] the UK Standard Chartered (227 million USD);[6] and HSBC (1.256 billion USD).[7] The largest settlement by far concerns BNP Paribas (BNPP); that bank agreed to pay 8.97 billion USD in forfeiture and fines.[8] The common denominator between these cases is the US assertion of domestic authority over conduct that occurred abroad: banks outside the US providing banking services to entities outside the US. This naturally raises the question of when and how a single country—in our

---

1 50 U.S.C. §§ 1701-06 (2011).

2 50 U.S.C. §§ 4301-41 (2009).

3 Press Release, New York State Department of Financial Services, NYDFS Announces Deutsche Bank to Pay $258 Million, Install Independent Monitor, Terminate Employees for Transactions on Behalf of Iran, Syria, Sudan, Other Sanctioned Entities (Nov. 4, 2015), http://www.dfs.ny.gov/about/press/pr1511041.htm.

4 *See* Press Release, Department of Justice, Office of Public Affairs, Crédit Agricole Corporate and Investment Bank Admits to Sanctions Violations, Agrees to Forfeit $312 Million (Oct. 20, 2015), http://www.justice.gov/opa/pr/cr-dit-agricole-corporate-and-investment-bank-admits-sanctions-violations-agrees-forfeit-312.

5 *See* Press Release, Department of Justice, Office of Public Affairs, ING Bank N.V. Agrees to Forfeit $619 Million for Illegal Transactions with Cuban and Iranian Entities (June 12, 2012), http://www.justice.gov/opa/pr/ing-bank-nv-agrees-forfeit-619-million-illegal-transactions-cuban-and-iranian-entities-0.

6 *See* Press Release, Department of Justice, Office of Public Affairs, Standard Chartered Bank Agrees to Forfeit $227 Million for Illegal Transactions with Iran, Sudan, Libya, and Burma (Dec. 10, 2012), http://www.justice.gov/opa/pr/standard-chartered-bank-agrees-forfeit-227-million-illegal-transactions-iran-sudan-libya-and.

7 *See* Press Release, Department of Justice, Office of Public Affairs, HSBC Holdings Plc. and HSBC Bank USA N.A. Admit to Anti-Money Laundering and Sanctions Violations, Forfeit $1.256 Billion in Deferred Prosecution Agreement (Dec. 11, 2012), http://www.justice.gov/opa/pr/hsbc-holdings-plc-and-hsbc-bank-usa-na-admit-anti-money-laundering-and-sanctions-violations.

8 *See* Press Release, Department of Justice, Office of Public Affairs, BNP Paribas Agrees to Plead Guilty and to Pay $8.9 Billion for Illegally Processing Financial Transactions for Countries Subject to U.S. Economic Sanctions (June 30, 2014), http://www.justice.gov/opa/pr/bnp-paribas-agrees-plead-guilty-and-pay-89-billion-illegally-processing-financial [hereinafter DOJ Release, BNP Paribas Agrees to Plead].

examples the US[9]—can legally claim such extraterritorial regulatory authority. This paper examines that question through the lens of international law. It finds that under international principles, extraterritorial jurisdiction is often legal, with one notable possible exception: unilateral sanctions.

I. US PROSECUTION OF BNP PARIBAS

One byproduct of the 2008 financial crisis and its unprecedented destruction of wealth was a shift in penalties for corporate wrongdoers – especially financial institutions.[10] Settlements of several hundred million dollars are simply no longer big news. Yet, when settlement amounts reach third-comma-status and move into the billions category, they still make the headlines. As noted above, BNP Paribas is such an example. The high fine there revived criticism about US extraterritorial overreach. Particularly, some European commentators decried the action as United States legal imperialism and accused the United States of having a misguided attitude of moral supremacy.[11] Some even argued that the United States violated international law.[12] Thus, BNP Paribas provides a

---

[9] The United States has been at the forefront of unilateral economic sanctions. In a study regarding sanctions imposed between World War I and 2000, the authors found that of the 174 cases, 73 were imposed by the United States alone, 37 were imposed by the US in cooperation with allies, 20 were imposed by the United Nations, 16 by the United Kingdom in cooperation with allies, 14 by the European Union, 13 by the Soviet Union (and later Russia), and 4 by the Arab League and its members. *See* GARY CLYDE HUFBAUER ET. AL., ECONOMIC SANCTIONS RECONSIDERED 17–38 (3rd ed. 2007).

[10] *See A Mammoth Guilt Trip*, ECONOMIST (Aug. 30, 2014), http://www.economist.com/news/briefing/21614101-corporate-america-finding-it-ever-harder-stay-right-side-law-mammoth-guilt.

[11] *See* Philippe Braillard, *Les Etats-Unis, le droit et la force dans les relations financières internationales*, LE TEMPS (July 3, 2014), https://www.letemps.ch/economie/2014/07/03/etats-unis-droit-force-relations-financieres-internationales ("Ils [les Etats-Unis] considèrent comme universels leurs critères et leur normes et pensent que leur force leur confère une suprématie morale." Translates to "They, [the United States] consider their criteria and standards to be universal and think that their power confers moral supremacy" (translation provided by author)).

[12] For a more detailed analysis of the argument *see infra* Part IV. *See generally* Thilo Rensmann, *Völkerrechtliche Grenzen extraterritorialer Wirtschaftssanktionen*, *in* RECHT DER EXPORTKONTROLLE: BESTANDSAUFNAHME UND PERSPECTIVEN 105 (Dirk Ehlers & Hans-Michael Wolffgang eds., 2015) (holding that there is no valid jurisdictional ground for the BNP Paribas jurisdiction); Mathias Audit, *Sanctions contre BNP Paribas: l'extraterritorialité du droit américain est-elle conforme au droit international?*, LES ECHOS (June 25, 2014), http://archives.lesechos.fr/archives/cercle/2014/06/25/cercle_101744.htm (holding that the United States application of sanctions law violates a 1959 treaty between France and the United States wherein both nations guarantee equitable treatment to each other's nationals and suggesting that France should bring a suit against the United States in front of the ICJ); Régis Bismuth, *BNP Paribas: derrière les 10 millards,*

useful example to assess the different approaches to extraterritoriality and its foundation in international law.

A. The Facts of the Case

Similar to the case of Deutsche Bank and the other examples mentioned previously, BNP Paribas pled guilty to US conspiracy charges after violating the IEEPA and the TWEA.[13] Its Paris headquarters and Swiss subsidiary in Geneva had processed US-dollar transactions on behalf of Sudanese, Iranian, and Cuban entities that were subject to US economic sanctions.[14] The banking services of BNPP Paris and BNPP Geneva included payment services, letters of credit, and bank accounts in US currency.[15] As a part of the settlement, BNPP agreed to pay

---

l'extraterritorialité américaine, LIBÉRATION (June 5, 2014), http://www.liberation.fr/futurs/2014/06/05/bnp-paribas-derriere-l-arbre-des-10-milliards-la-foret-de-l-extraterritorialite-americaine_1034086 ("[L]es Etats-Unis pourraient s'être placés en contravention aux règles du commerce international . . . . [I]l serait déraisonnable de considérer que son seul usage [usage du dollar] présente un élément de rattachement suffisant avec le territoire américain." Translates to "The United States may have placed itself in violation of international trade law . . . . It would be unreasonable to think that the mere use of the dollar provides a sufficient element of attachment to American territory." (translation provided by author)). *See also* Salim Lamrani, *The United States, BNP Paribas and French Sovereignty*, HUFFINGTON POST (July 7, 2014), http://www.huffingtonpost.com/salim-lamrani/the-united-states-bnp-par_b_5557288 ("[U]nder international law, it is strictly prohibited to apply national legislation extraterritorially . . . . Still, the U.S. legislation on economic sanctions against Cuba (and other embargoed countries) is applied worldwide."); *see also* Donald Hebert, *BNP Paribas: six questions sur une amende record*, LE TEMPS REEL (May 30, 2014), http://tempsreel.nouvelobs.com/economie/20140530.OBS9018/bnp-paribas-six-questions-sur-une-amende-record.html (quoting the former French Minister for International Trade, Pierre Lelloche, stating that sanctions such as embargoes are only justified if they are decided on a multilateral basis). *See* Marine Garido Martin, *La justice américaine au crible de l'affaire BNP paribas*, LE PETIT JURISTE (Dec. 14, 2014), http://www.lepetitjuriste.fr/droit-des-affaires/droit-bancaire-et-financier/la-justice-americaine-au-crible-de-laffaire-bnp-paribas/ (showing that the same argument is made by a number of commentators).

[13] *See* DOJ Release, BNP Paribas Agrees to Plead, *supra* note 8.

[14] BNPP Paris was mainly involved in transactions concerning Cuba and Iran. BNPP Geneva was at the forefront of the transactions on behalf of Sudanese entities. *See* Statement of Facts, ¶ 17, United States v. BNP Paribas, S.A., (S.D.N.Y. 2014), http://www.justice.gov/sites/default/files/opa/legacy/2014/06/30/statement-of-facts.pdf.

[15] *Id.* BNPP had longstanding business relationships with these countries and the great majority of the financing had been in US-dollars, necessitating the clearing of the payments on US soil. *Id.* To effectuate such payments, BNPP had removed information identifying sanctioned entities from US-dollar payment messages in order to conceal their involvement in the payment process. *Id.* It had also worked with other financial institutions to structure payments in such ways to conceal the involvement of sanctioned entities in

8.97 billion USD in forfeitures and fines.[16] At the US Department of Justice (DOJ) press conference, Assistant Attorney General Leslie L. Caldwell stated that "BNPP deliberately disregarded US law of which it was well aware, and placed its financial network at the services of rogue nations, all to improve its bottom line."[17]

A few months after that statement, the US and Cuba initiated their rapprochement.[18] On July 20, 2015, the two countries resumed diplomatic relations.[19] The secondary sanctions against Iran were lifted on January 16, 2015.[20]

B. European Reaction

In contrast to the DOJ's position, the French Autorité de contrôle prudentiel et de résolution (ACPR)[21] (the home country supervisor of BNP Paribas and responsible for the bank's worldwide operations) found no irregularities in the bank's conduct. France's highest ranking financial authority, ACPR chairman and

---

order to prevent the blockage of the payments when they were passing through the United States. *Id.*

[16] The fine was 140 million USD (pursuant to 18 U.S.C. § 3571 (2010), representing twice the amount of pecuniary gain to BNPP as a result of the offense conduct). *See* Plea Agreement at 1–2, United States v. BNP Paribas, S.A., (S.D.N.Y. 2014), https://www.justice.gov/sites/default/files/opa/legacy/2014/06/30/plea-agreement.pdf. The forfeiture was 8,833,600,000 USD (pursuant to 18 U.S.C. § 981 (2011) and 28 U.SC. § 2461 (2011), representing the amount of proceeds traceable to the violations). *Id.* The total forfeiture amount included payments in the form of monetary penalties to other authorities: Federal Reserve (508,000,000 USD), New York State Department of Financial Services (2,234,400,000 USD), and New York County District Attorney's Office (2,243,400,000 USD). *Id.*

[17] Leslie R. Caldwell, Assistant Attorney General, Dep't of Justice, Statement at BNP Paribas Press Conference (June 30, 2014), https://www.justice.gov/opa/speech/remarks-assistant-attorney-general-leslie-r-caldwell-bnp-paribas-press-conference.

[18] *See Fact Sheet: Charting a New Course on Cuba*, THE WHITE HOUSE (Dec. 17, 2014), https://www.whitehouse.gov/the-press-office/2014/12/17/fact-sheet-charting-new-course-cuba.

[19] *See Fact Sheet: Re-Establishment of Diplomatic Relations With Cuba,* U.S. DEP'T OF STATE, (July 6, 2015), http://www.state.gov/r/pa/prs/ps/2015/07/244623.htm; Azam Ahmed & Julie Hirschfeld Davis, *U.S. and Cuba Reopen Long-Closed Embassies*, N.Y. TIMES (July 20, 2015), http://www.nytimes.com/2015/07/21/world/americas/cuba-us-embassy-diplomatic-relations.html?_r=0.

[20] *See* Carol Morello & Karen DeYoung, *International Sanctions Against Iran Lifted*, WASH. POST (Jan. 16, 2015), https://www.washingtonpost.com/world/national-security/world-leaders-gathered-in-anticipation-of-iran-sanctions-being-lifted/2016/01/16/72b8295e-babf-11e5-99f3-184bc379b12d_story.html.

[21] The ACPR is an independent administrative authority attached to the Banque de France. Its chairman is the President of the Banque de France.

Banque de France president Christian Noyer, confirmed that all BNPP transactions subject to the US proceedings were in compliance with the rules, laws, and regulations at the French, European, and United Nation levels.[22]

Similarly, the Swiss Financial Markets Supervisory Authority (FINMA), which investigated BNPP's Geneva subsidiary with regard to transactions involving Sudan, found no breach of Swiss sanctions law. However, FINMA did find that, by violating US sanctions, BNPP Geneva "exposed itself to unduly high legal and reputational risks and violated requirements for adequate organization under Swiss supervisory law."[23] FINMA ordered additional capital requirements for operational risks and imposed a two-year ban on conducting business with companies and persons subject to European Union (EU) and US sanctions.

C. The Relevance of International Law

Who is right about the geographic extension of domestic legislation? The US authorities that argue that US sanctions apply whenever transactions are effected in US currency;[24] the French authorities that insist that no relevant laws were violated, thus rejecting the legitimacy of US jurisdiction; or the Swiss authorities that avoid a *de lege* recognition of US sanctions law on Swiss territory but do accept its *de facto* applicability?

Considering the divergent views taken under the various legal systems, the most promising way to analyze the question lies in international public law. Extraterritoriality means that one state claims jurisdiction over a situation linked to the territory of another state; relationships between states are a matter of international law. In fact, it is said that "the legitimacy of domestic jurisdiction

---

[22] *See* Véronique Chocron, *Les autorités françaises soutiennent BNP Paribas*, LES ECHOS (May 26, 2014), http://www.lesechos.fr/26/05/2014/LesEchos/21695-135-ECH_les-autorites-francaises-soutiennent-bnp-paribas.htm ("Nous avons vérifié que toutes les transactions incriminées étaient conformes aux règles, lois, réglementations, aux niveaux européen et français. [Il n'y avait] aucune contravention à ces règles, ni d'ailleurs aux règles édictées par les Nations unies." Translates to "We have verified that all incriminated transactions were in compliance with the rules, laws, and regulations at the European and French levels. There was no infringement of these rules, nor—as a matter of fact—was there an infringement of the rules enacted by the United Nations." (translation provided by author)). This is also reported by Ben Protess & Jessica Silver-Greenberg, *French Officials Twist U.S. Arms in Bank Inquiry*, N.Y. TIMES (June 2, 2014), http://dealbook.nytimes.com/2014/06/02/french-officials-twist-u-s-arms-in-bank-inquiry/.

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

[24] In the case of Iran, an exemption was in effect until November 2008, permitting US banks to act as an intermediary for US-dollar transactions related to Iran between two non-US, non-Iranian banks. *See* Statement of Facts, *supra* note 14, ¶ 8.

depends on international law's jurisdictional principles, which were established to foster cooperative foreign relations by avoiding and resolving conflicting assertions of domestic personal authority."[25] In other words, international law provides the framework for assessing the legality of (domestic) extraterritorial jurisdiction by reconciling one state's authoritative interest with another's.[26]

This does not mean that extraterritoriality is not also a matter of domestic law. In fact, the geographic reach of a statute is defined by the domestic legislator within the limits of the national constitution. Furthermore, a domestic legal system defines its own relationship within the international framework. In a number of states, courts are bound by the extraterritorial reach of domestic legislation even if the legislation is in violation of international law.[27] At the same time, states presumably want to be in compliance with international law.[28] This is another reason why this paper proposes to examine extraterritoriality from the perspective of international law. The BNPP case serves as a practical example that can be applied to the theory of international jurisdiction, thus highlighting the areas where there are commonly accepted legal answers and where there is controversy.

II. WHAT IS "EXTRATERRITORIAL JURISDICTION"?

Andreas Lowenfeld once noted that "[t]he search for a satisfactory definition of extraterritorial jurisdiction . . . is doomed to failure: 'extraterritorial jurisdiction,' like 'bureaucratic,' is a term that could never be rescued from its unattractive reputation."[29] Lowenfeld, like many other scholars, prefers to avoid the term "extraterritoriality" because of its negative connotation.[30] Arguably, extraterritoriality is often used to cast the taint of questionable legitimacy on a jurisdictional claim.[31] To complicate matters, jurisdiction is itself "a word of

---

[25] Kenneth C. Randall, *Universal Jurisdiction Under International Law*, 66 TEX. L. REV. 785, 786 (1988).

[26] *Id.*

[27] CEDRIC RYNGAERT, JURISDICTION IN INTERNATIONAL LAW 73 (2nd ed. 2015).

[28] In the United States, this approach has been anchored with the seminal *Charming Betsey* case, where the Supreme Court held that "an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains." *See* Murray v. The Charming Betsey, 6 U.S. 118 (1804). *See* also RYNGAERT, *supra* note 27, at 74.

[29] ANDREAS LOWENFELD, INTERNATIONAL LITIGATION AND THE QUEST FOR REASONABLENESS 16 (1996).

[30] *See also* RYNGAERT, *supra* note 27, at 8 (noting that "the term [extraterritorial] might best be avoided because it is tainted by the pejorative connotation it has acquired over the years.").

[31] Hannah L. Buxbaum, *Territory, Territoriality, and the Resolution of Jurisdictional Conflict*, 57 AM. J. COMP. L. 631, 635 (2009) ("'Territoriality' and

many, too many meanings."[32] Yet, avoiding discussion of extraterritoriality or extraterritorial jurisdiction will not put the matter to rest. Extraterritorial jurisdiction is an unavoidable consequence of our ever-growing exposure to transnational activities. More discussion—not less—is necessary to advance a consensus on the criteria that delimit exorbitant extraterritoriality from legitimate extraterritoriality.[33]

Jurisdiction itself can be understood as a claim of authority.[34] Jurisdictional claims regard persons, things (property), conduct, or a combination of the three. Usually, jurisdiction is divided along the strands of prescriptive, adjudicative, and executive jurisdiction.[35] *Prescriptive* or legislative jurisdiction describes the authority of a state to apply its laws to certain persons, things, or conduct.[36] It relates to the geographical reach of a state's laws.[37] Extraterritorial prescriptive jurisdiction refers to the claim of a state to prescribe laws that govern situations that may be located outside its own territory, in whole or in part. *Adjudicative* jurisdiction describes a state's claim to subject parties to its judicial processes (the courts).[38] In extraterritorial jurisdiction, this means a state subjecting foreign parties to its judicial process.[39] *Executive* or enforcement jurisdiction describes a state's claim to enforce its domestic laws and

---

'extraterritoriality' . . . are claims of authority, or of resistance to authority, that are made by particular actors with particular substantive interests to promote.").

[32] United Phosphorus, Ltd. v. Angus Chemical Co., 322 F. 3d 942, 948 (7th Cir. 2003) (quoting United States v. Vanness, 85 F.3d 661, 663, n.2 (D.C. Cir. 1996)). *See* Ralf Michaels, *Two Paradigms of Jurisdiction*, 27 MICH. J. INT'L L. 1003 (2006) (describing the fundamentally different approaches in personal jurisdiction in Europe and in the United States).

[33] Some authors take yet another view. They argue that in our globalized world, the concepts of territoriality and extraterritoriality are obsolete. *See* Louis d'Avout, *L'extraterritorialité du droit dans les relations d'affaires,* 42 LA SEMAINE JURIDIQUE 1875, at 1883 (2015).

[34] *See Draft Convention on Jurisdiction with Respect to Crime,* 29 AM. J. INT'L L. 435, 439 (Supp. 1935) [hereinafter *Draft Convention*].

[35] For an overview *see* Randall, *supra* note 25, at 786.

[36] *See* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 401(a) (AM. LAW INST. 1987) (describing prescriptive jurisdiction as the "jurisdiction to prescribe, *i.e.,* to make its law applicable to the activities, relations, or status of persons, or the interests of persons in things, whether by legislation, by executive act or by order, by administrative rule or regulation, or by determination of a court.").

[37] RYNGAERT, *supra* note 27, at 9.

[38] *See* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 401(b) (describing adjudicative jurisdiction as the jurisdiction "to adjudicate, *i.e.,* to subject persons or things to the process of its courts or administrative tribunals, whether in civil or in criminal proceedings, whether or not the state is a party to the proceedings.").

[39] Sometimes, adjudicative jurisdiction is seen as a part of prescriptive jurisdiction. *See* INT'L BAR ASSOC., REPORT OF THE TASK FORCE ON EXTRATERRITORIAL JURISDICTION 8 (2009).

regulations.[40] Extraterritorial enforcement jurisdiction refers to a state's claim to enforce its laws outside its national territory.[41]

Beyond the common notion that there are different strands of jurisdiction extending to the question of extraterritoriality, there are multiple understandings of what exactly constitutes extraterritorial jurisdiction. In fact, there is debate as to whether extraterritorial prescriptive jurisdiction refers exclusively to the governance of situations that are wholly located abroad, or whether it includes the governance of situations that are partially located abroad. As to the latter, a follow-up inquiry is how substantial the "abroad portion" has to be to qualify as extraterritorial jurisdiction. This debate is mirrored in the three approaches to extraterritoriality discussed below. One approach defines extraterritoriality as jurisdiction in the absence of a territorial link. Another approach qualifies it as jurisdiction in the absence of a substantial territorial link. Yet another approach defines extraterritoriality as jurisdiction in the presence of a non-exclusive territorial link. Depending on the definition, extraterritoriality is either a highly exceptional or a very common occurrence within the context of jurisdictional claims.

A. No Territorial Nexus

In the narrowest sense, extraterritoriality is defined as jurisdiction that lacks a territorial nexus between the state and the regulated action.[42] The regulating state asserts jurisdiction over persons, property, and conduct exclusively on the basis of other jurisdictional principles. One example of this type of extraterritoriality is crimes against humanity. It is a settled principle that states can legislate, adjudicate, and enforce sanctions regarding such crimes even

---

[40] *See* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 401(c) (describing enforcement jurisdiction as a state's jurisdiction "to induce or compel compliance or to punish noncompliance with its laws or regulations, whether through the courts or by use of executive, administrative, police, or other non-judicial action.").

[41] Anthony J. Colangelo, *What is Extraterritorial Jurisdiction?*, 99 CORNELL L. REV. 1303, 1304–05 (2014).

[42] *See* d'Avout, *supra* note 33, at 1876 ("Au sens étroit (extra: 'en dehors'), l'extraterritorialité est caractérisée si les éléments essentiels du commandement juridique sont tous localisés hors le territoire de son auteur. L'intention spécifique . . . est d'appréhender des personnes, des biens, des relations non localisées sur le territoire." Translates to "In the narrow sense, extraterritoriality is characterized by the fact that the essential elements of a regulation are entirely located outside of the territory of their author. The specific intention is to make a jurisdictional claim on persons, property, and conduct not localized in the territory." (translation provided by author). D'Avout calls this notion the extraterritoriality "stricto sensu." He favors a broader approach). *See also* RYNGAERT, *supra* note 27, at 7 (Ryngaert himself does not endorse this approach).

if they were committed outside their territorial borders.[43] Another example is the taxation of nationals. It is generally admitted that a state has jurisdiction over its citizens even if they reside outside the domestic territory.

In spite of these examples, cases of extraterritoriality in this narrow sense are rare. As a rule, sovereign states do not have an interest in asserting jurisdiction when a territorial link is totally missing. On the other hand, cases of weak territorial connections abound. Take, for example, a transaction between a European and an Asian party where goods are transported by a flight carrier crossing US borders. Under the narrow definition of extraterritoriality, this element would be sufficient to make it a territorial issue from the US point of view. Recall the case of BNP Paribas: the sole fact that transactions between foreign parties were effected using US currency suffices to categorize the US claim of jurisdiction. It would not even be necessary to consider the additional fact that these transactions were processed in the United States and therefore had a virtual presence there.

B. No Substantial Territorial Nexus

A broader approach defines extraterritoriality as jurisdiction in the absence of a substantial territorial connection.[44] In this definition, extraterritorial jurisdiction is not limited to cases that completely lack territorial connections but rather extends to cases where the territorial connections are not substantial. However, as soon as an issue is deemed to have a substantial territorial connection, jurisdiction will be categorized as territorial regardless of whether foreign elements exist.[45]

---

[43] *But see* Colangelo, *supra* note 41, at 1332–33 (noting that this so-called principle of universality does not involve extraterritorial jurisdiction because US courts do not apply national law, but an international law which covers the globe. However, the legal basis will very often not be the international, but rather the national statute).

[44] *See* Joanne Scott, *Extraterritoriality and Territorial Extension in EU Law*, 62 AM. J. COMP. L. 87, 89–90 (2014) [hereinafter Scott, *Extraterritoriality*] ("[A] measure will be regarded as extraterritorial when it imposes obligations on persons who do not enjoy a relevant territorial connection with the regulating state."). *See also* Austen L. Parrish, *Evading Legislative Jurisdiction,* 87 NOTRE DAME L. REV. 1673, 1679 (2013) ("[E]xtraterritoriality is implicated whenever a state exercises jurisdiction on a basis other than territorial jurisdiction.").

[45] A recent US Supreme Court case on extraterritoriality developed a qualified version of the substantial nexus approach. In Morrison v. National Australia Bank, the Court held that if a statute has a domestic "focus," the issue does not involve extraterritoriality even if it concerns a foreign party or foreign conduct. Morrison v. Nat'l Australia Bank Ltd., 130 S. Ct. 2869, 2884 (2010); *see also* Lea Brilmayer, *The New Extraterritoriality:* Morrison v. National Australia Bank*, Legislative Supremacy, and the Presumption against Extraterritorial Application of American Law*, 40 SW. L. REV. 655 (2011) (discussing *Morrison* further); William S. Dodge, *Morrison's Effects Test,* 40 SW. L.

To return to the examples above, a sales transaction between a European and an Asian party where goods are transported by a flight carrier crossing US borders is a weak territorial connection from the US perspective. If jurisdiction is assumed, it is extraterritorial. The BNP Paribas case, however, is more complicated. The territorial connection through the US currency is more tenuous than in other examples; does it amount to a substantial territorial link? If the use of US-dollars amounts to a substantial territorial link, then territorial jurisdiction will be asserted. This territorial connection would be strengthened further if the transactions involved US-dollars passing through US territory. In other words: Under the substantial nexus approach, one could argue that the US authorities exercised territorial jurisdiction when sanctioning a French Bank for doing business with Iran, Libya, Sudan, and Cuba.

Under the substantial territorial nexus approach, two important categories of cases are included in the definition of territorial jurisdiction: first, the cases where conduct occurs, in substantial part, within the domestic territory.[46] Second, the cases where conduct outside territorial borders produces substantial effects within those borders.[47] For example, jurisdiction over a Swiss banker who dispenses financial advice to a US client by meeting in the United States will be deemed territorial even if the bank account is located in Switzerland because a substantial part of the banker's conduct occurred in US territory. If the Swiss banker meets the US client in Switzerland, no substantial conduct occurred in the United States; however, jurisdiction could still be considered territorial if the Swiss banker advises the US client on ways to hide assets from US tax authorities. This is because the conduct happening exclusively in Switzerland may be deemed to produce substantial negative effects in the United States.

Under the substantial territorial nexus approach, extraterritoriality is limited to the cases where the jurisdictional claim lacks a substantial territorial connection. This still puts a large number of cases in the category of territorial jurisdiction and a relatively small number of cases in the category of extraterritorial jurisdiction. The numbers will be even smaller if a low threshold is set for "substantial connection."

REV. 687 (2011); John H. Knox, *The Unpredictable Presumption Against Extraterritoriality,* 40 SW. L. REV. 635 (2011). Whether the Supreme Court will maintain this singular approach remains to be seen. As this article takes an international perspective, it will not dwell on *Morrison*.

[46] RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 402(1)(a) (AM. LAW INST. 1987); *see* Buxbaum, *supra* note 31, at 639.

[47] RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, § 402(1)(a) (AM. LAW INST. 1987); *see* Buxbaum, *supra* note 31, at 639; Brigitte Stern, *Can the United States Set Rules for the World? A French View*, 31 J. WORLD TRADE 5, 12 (1997).

C. No Exclusive Territorial Nexus

The broadest approach on extraterritoriality is to define it as jurisdiction on a non-exclusively territorial basis.[48] The focus is not on a possible substantial territorial nexus or the lack of such a nexus making it extraterritorial. Rather, the focus is on the foreign elements of cases—the "foreign element approach." If there are relevant foreign elements in a particular case, the jurisdictional claim is extraterritorial regardless of whether there is also a substantial territorial nexus. Relevant foreign elements would be that the person, the property, or the conduct that is subject to the jurisdictional claim is situated outside the national territory.

To take up the examples above: a sales transaction between a European and an Asian party that includes air transportation going over US territory is an example of extraterritorial jurisdiction if the US claims jurisdictional authority. The same is true for the BNP Paribas case; the claim that US sanctions law applies to a bank domiciled in France is extraterritorial under the foreign element approach. This is because the person—i.e. the French bank—is a relevant jurisdictional element and it is located outside of the US territory.

Similarly, jurisdictional claims under the substantial conduct or the substantial effects doctrine will be qualified as extraterritorial. This is because "substantial conduct" as an exclusive basis for jurisdiction within the territory presupposes that the person engaging in this conduct is domiciled outside of the territory. This adds a relevant foreign element. The same is true with regard to the "substantial territorial effect" of conduct that, by definition, is taking place outside the territorial border.

---

[48] *See* RYNGAERT, *supra* note 27, at 6–7; Lea Brilmayer & Charles Norchi, *Federal Extraterritoriality and Fifth Amendment Due Process,* 105 HARV. L. REV. 1217, 1218 & n.3 (1992) ("a case involves extraterritoriality when at least one relevant event occurs in another nation"). *See also* d'Avout, *supra* note 33, at 1876 ("En un sens plus large, le commandement dit extraterritorial est caractérisé par tout contact générique avec l'étranger: l'une quelconque des conditions d'application est localisée hors du territoire." Translates to "In a larger sense, a commandment is said to be extraterritorial in the presence of any type of foreign contact: any one of the conditions for the application of the territorial law is located outside of the territory." (translation provided by author)); MATTHIAS HERDEGEN, PRINCIPLES OF INTERNATIONAL ECONOMIC LAW 78 (2013) ("This extraterritorial reach of national law refers to its application to activities partly or entirely carried out abroad or to the status of persons or things domicilied or located in foreign territory."). *See also* Jennifer Zerk, *Extraterritorial Jurisdiction: Lessons for the Business and Human Rights Sphere from Six Regulatory Areas* 15 (Harvard Corp. Soc. Responsibility Initiative, Working Paper No. 59, 2010) (explaining that where conduct spans more than one state, it will be territorial only in relation to those elements of conduct taking place within the territory of the regulating state).

D. Need for a Broad Concept of Extraterritoriality

There is no established definition of extraterritorial jurisdiction. Out of the three approaches described above, the most narrow (no territorial connection) is mentioned in scholarship and has occasionally surfaced in the context of unilateral economic sanctions.[49] However, it lacks doctrinal support and it fails to capture the realities of international relations. Moreover, sovereign states are unlikely to accept another state's claims of territorial jurisdiction over situations that have no link whatsoever with their territory.

This leaves the substantial territorial nexus approach and the foreign element approach. The foreign element approach is more convincing. It clearly distinguishes between extraterritoriality and its justification. First, the identification of a relevant foreign element (person, property, conduct) establishes the category of extraterritorial jurisdiction. Then follows the analysis of whether extraterritoriality is permissible. One of the accepted justifications for extraterritoriality is the existence of a substantial territorial nexus. This two-step approach follows the methodology that has been used successfully within the field of conflicts of law.

Under the substantial territorial nexus approach, the line between extraterritoriality and territoriality remains blurry, as everything depends on the material question of whether a territorial connection is substantial (territoriality) or not substantial (extraterritoriality). If the connection is deemed substantial, the issue is territorial and it follows that jurisdiction is justified because the territoriality principle is the most basic and undisputed ground for the exercise of jurisdiction in international customary law. In effect, the substantial territorial nexus approach defines territoriality and extraterritoriality along the lines of the main justification for jurisdiction in international law. If the territorial connection is substantial, jurisdiction is territorial and territorial jurisdiction is always justified. This creates a risk that territoriality is expanded to satisfy the domestic claims for jurisdiction. Instead of having to justify extraterritorial jurisdiction, the issue is simply defined as territorial.[50]

---

[49] When controversies arose between the United States and its trading partners with regard to the US sanctions regime, the United States claimed that its measures were not extraterritorial as they did not directly regulate foreign persons or wholly foreign conduct. *See* Meredith Rathbone et al., *Sanctions, Sanctions Everywhere: Forging a Path Through Complex Transnational Sanctions Law,* 44 GEO. J. INT'L L. 1055, 1071 (2013) ("These measures were not extraterritorial in the strict sense of imposing penalties on foreign persons for actions taken wholly outside U.S. jurisdiction. While their effect may be aimed at foreign companies, the sanctions only impose legal duties on U.S. entities.").

[50] *See* Parrish, *supra* note 44, at 1691–99 (looking at analysis of US cases, and describing how courts have avoided to search for jurisdictional grounds in extraterritorial cases by extending territoriality).

III. WHEN IS EXTRATERRITORIAL JURISDICTION LEGAL?

Extraterritoriality carries the taint of questionable legitimacy.[51] The frequent reproaches in the United States of extraterritorial overreach and, in contrast, the criticism of the EU's "unilateral regulatory globalization" (known more colloquially as the "Brussels Effect") are good examples.[52] Yet, if we remove the layer of rhetoric and political disenchantment with certain extraterritorial measures (like the US enforcement actions against French BNP Paribas for violating US domestic sanctions law), the question is simply whether there are *legal* objections to extraterritoriality under public international law.

In the absence of treaty law, the law of jurisdiction is primarily rooted in customary international law.[53] In the seminal *Lotus* case (1927), the Permanent Court of International Justice (PCIJ) held that states are allowed to exercise jurisdiction as they see fit, unless there is a prohibitive rule to the contrary (*Lotus* approach).[54] Today's conventional view is more restrictive: states are required to justify their jurisdictional assertion under generally accepted rules or principles of international law (permissive principles approach).[55]

---

51 *See* LOWENFELD, *supra* note 29; RYNGAERT, *supra* note 27, at 21.

52 *See* Anu Bradford, *The Brussels Effect,* 107 NW. U. L. REV. 1, 3 (2012) (explaining that "unilateral regulatory globalization occurs when a single state is able to externalize its laws and regulations outside its borders through market mechanisms, resulting in the globalization of standards"). The relevant market mechanism used by the EU is market access. Multinational corporations have an incentive to standardize their production, so they will adhere to the EU rule (de facto Brussels Effect) and then lobby their domestic regulator to adjust domestic regulation in order to create a level-playing field against their domestic competitors (de jure Brussels Effect). *Id.* at 6. According to Bradford, the EU has been setting the tone globally in a number of fields, including antitrust regulation, privacy regulation, regulation of chemicals, environmental protection regulation, and food safety. *Id.* at 19.

53 RYNGAERT, *supra* note 27, at 44; *See* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102(2) (AM. LAW INST. 1987) ("Customary international law results from a general and consistent practice of states followed by them from a sense of legal obligation.").

54 *See* SS Lotus (Fr. v. Turk.), Judgement, 1927 P.C.I.J. (ser. A) No. 10, at 19 (Sept. 7). In Lotus, a French mail steamer (Lotus) had collided with a Turkish collier on the high seas, resulting in the death of nine Turkish sailors. The question submitted to the PCIJ was whether Turkey had a right to prosecute the French officer on watch of the Lotus. The PCIJ ruled in favor of Turkey. It held that states are permitted to exercise extraterritorial prescriptive jurisdiction, as long as there is no prohibitive rule to the contrary. For an account of the Lotus case *see* RYNGAERT, *supra* note 27, at 30–34.

55 *See* Curtis A. Bradley, *Universal Jurisdiction and U.S. Law,* 2001 U. CHI. LEGAL F. 323, 323 ("The conventional wisdom among international law scholars is that customary international law—that is, the law that results from the customary practices and beliefs of nations—places limitations on the authority of nations to apply their laws extraterritorially. Unless a nation's extraterritorial law falls within one of five categories—territoriality, nationality, protective principle, passive personality, or universality—it is said, the nation

A. Territoriality as the Starting Point

As mentioned above, the territoriality principle is the primary basis for jurisdiction in international law. The primacy of territorial jurisdiction is usually premised on the principle of sovereign equality of states.[56] Sovereignty implies the right to exercise the function of a state within a certain territory[57] and jurisdiction is a core element in the exercise of state power.[58] The conclusion is that "the territoriality base of jurisdiction is universally recognized. It is the most pervasive and basic principle underlying the exercise by nations of prescriptive regulatory power."[59]

The predominance of territoriality as the primary principle of the international jurisdictional order has come under increased scrutiny in the past decades, as the "internet of things" and economic globalization seem to strip physical geography of its meaning.[60] Yet, as some scholars emphasize the artificiality of territoriality,[61] others point out that persuasive alternatives are lacking.[62]

---

violates international law rules governing 'prescriptive jurisdiction.'"). *See also* Randall, *supra* note 25, at 786–88; HERDEGEN, *supra* note 48, at 86 (noting that the reasoning in the Lotus case is not valid anymore and that in the absence of a legitimizing link, extraterritorial jurisdiction violates the principle of non-intervention in the internal affairs of other States).

[56] JAMES CRAWFORD, BROWNLIE'S PRINCIPLES OF PUBLIC INTERNATIONAL LAW 456 (8th ed. 2012).

[57] *See* Island of Palmas (U.S. v. Neth.), 2 RIAA 829, 838 (Perm. Ct. Arb. 1928). There, the arbitrator Max Huber (a famous Swiss scholar and statesman) held that: "Sovereignty in the relations between States signifies independence. Independence in regard to a portion of the globe is the right to exercise therein, to the exclusion of any other State, the function of a State. The development . . . of international law [has] established this principle of the exclusive competence of the State in regard to its own territory in such a way as to make it the point of departure in settling most questions that concern international relations." *Id.*

[58] F.A. MANN, THE DOCTRINE OF JURISDICTION IN INTERNATIONAL LAW 111 R.C.A.D.I. 1, 30 (1964) ("Jurisdiction is an aspect of sovereignty, it is coextensive with and, indeed, incidental to, but also limited by, the State's sovereignty.").

[59] Laker Airways Ltd. v. Sabena, Belgian World Airlines, 731 F. 2d 909, 921 (D.C. Cir. 1984). Another example for this is the holding of the US Supreme Court in The Antelope case. *The Antelope*, 23 U.S. 66, 122 (1825) ("No principle of general law is more universally acknowledged, than the perfect equality of nations . . . it results from this equality, that no one can rightfully impose a rule on another.").

[60] The "internet of things" refers to the phenomenon of ubiquitous and interconnected computing which dominates much of our modern-day infrastructure. *See* Kevin Ashton, *That 'Internet of Things' Thing*, RFID JOURNAL (June 22, 2009), http://www.rfidjournal.com/articles/view?4986 (claiming authorship of the phrase "the internet of things").

[61] *See* Paul Schiff Berman, *Globalization of Jurisdiction,* 151 U. PA. L. REV. 311 (2002) (advocating that jurisdiction should be conceptualized in terms of social interactions

B. Extending the Territoriality Principle

In its function as a legitimizing link for jurisdiction, the territoriality principle is construed broadly.[63] It extends to conduct that partly occurs within domestic territory, as long as this part is substantial. This extension of the territoriality principle is called the "subjective territoriality principle."[64] Another extension regards conduct that, although carried out abroad, produces substantial and immediate effects within the territory. Here, domestic jurisdiction is based on the "objective territoriality principle," or its more modern version, the so-called "effects doctrine."[65] The extensions operate on different levels. Subjective

---

rather than territorial contacts); David S. Koller, *The End of Geography: The Changing Nature of the International System and the Challenge to International Law. A Reply to Daniel Bethlehem,* 25 EUR. J. INT'L L. 25 (2005); Kal Raustiala, *The Geography of Justice,* 73 FORDHAM L. REV. 2501 (2005).

[62] RYNGAERT, *supra* note 27, at 100−01. *See also* Buxbaum, *supra* note 31, at 635–36, 674–75.

[63] The concept of "territorial extension" developed in scholarly writing is another example for the attempt to reach this objective. *See, e.g.,* Scott, *Extraterritoriality, supra* note 44. *See also* Joanne Scott, *The New EU "Extraterritoriality"*, 51 COMMON MKT. L. REV. 1343 (2014) [hereinafter Scott, *The New EU*] (giving further development on "territorial extension").

[64] *See* CRAWFORD, *supra* note 56, at 458 ("[T]he territorial principle has been given an extensive application. In the first place, there is *subjective territoriality,* which creates jurisdiction over crimes commenced within the state even if completed or consummated abroad."). *See also Draft Convention*, *supra* note 34, at 484 (noting that the subjective territorial principle "establishes the jurisdiction of the State to prosecute and punish for crime commenced within the State but completed or consumed abroad.").

[65] For some authors, the two terms have come to mean the same thing. *See* Randall, *supra* note 25, at 787 n.8 ("The 'effects doctrine' or the 'objective territorial principle' refers to jurisdiction arising when the offender intentionally has caused negative consequences within the state, although the offense itself occurs outside of the prosecuting state's territory."); Richard G. Alexander, *Iran and Libya Sanctions Act of 1996: Congress Exceeds Its Jurisdiction to Prescribe Law*, 54 WASH. & LEE L. REV. 1601, 1611 ("This jurisdictional basis is commonly known as the 'effects' principle or the 'objective territoriality' principle."). Others reserve the term,"effects doctrine" for cases where all constituent elements take place abroad. *See* Roger O'Keefe, *Universal Jurisdiction: Clarifying the Basic Concept,* 2 J. INT'L CRIM. JUST. 735, 739 (2004) ("The effects doctrine proper is to be distinguished from prescriptive jurisdiction on the bases of the so called 'objective' territoriality, out of which it seems to have grown: we speak of the former rather than the latter when no constituent element of the offence takes place within the territory of the prescribing state."); *see also* CRAWFORD, *supra* note 56, at 458, 462. *See* Parrish, *supra* note 44, at 1678–83 (covering an account of the original narrow design of the objective territoriality principle and its extension into the effects doctrine). Two things seem clear: The effects doctrine has its origins in the objective territoriality principle, and the modern effects doctrine has little in common with the traditional understanding of the objective territoriality principle, where courts virtually imagined that A travelled with the bullet that

territoriality follows the line of the classic territoriality principle; it is essentially based on domestic elements. The same can be said—albeit with some qualifications—about the objective territoriality principle: when A shoots a gun across a border and kills B, the effects of his action in state B are so much part of the act that classic territoriality still governs.[66] The effects doctrine stretches the territorial concept *in extremis* by letting it suffice that foreign conduct produces direct and substantial effects in the domestic territory. In fact, this adds a new dimension to the territoriality principle, and there is some controversy as to whether effects-based jurisdiction is territorial or extraterritorial.[67]

This debate mirrors the discussion about the exact meaning of extraterritoriality. Under the substantial nexus approach, effects-based jurisdiction is territorial, as the domestic effects are deemed to create substantial territorial connection.[68] Under the foreign element approach, however, effects jurisdiction is extraterritorial. This leaves two possibilities to justify jurisdiction: either qualify the effects doctrine as a separate jurisdictional category,[69] or accept that

---

he shot across the border to hit B, which then legitimized jurisdiction by State B over State A. *See, e.g.,* Dodge, *supra* note 45, at 691.

[66] *See* Parrish, *supra* note 44, at 1681–82 (pointing out that this reasoning simply follows the principle set out); *see, e.g., Draft Convention*, *supra* note 34 ("[A] crime is committed wherever an essential element of the crime is accomplished.").

[67] *See* HERDEGEN, *supra* note 48, at 86 ("Jurisdiction based merely on the effects of actions on a State's territory carried out abroad ('effects doctrine') is a most important factor in the extraterritorial application of laws."); Parrish, *supra* note 44, at 1682–83; Zerk, *supra* note 48, at 7–8, 19; Scott, *The New EU*, *supra* note 63, at 1356; Scott, *Extraterritoriality*, *supra* note 44, at 92; Bankovic and Others v. Belgium and Others, 2001-XII, Eur. Ct. H.R., 335, § 59 (mentioning "effect" as an extra-territorial base of jurisdiction). *See also* Colangelo, *supra* note 41, at 1322 (providing a neutral view and noting that regulating activity abroad that produces effects in the United States "may be conceptualized as an assertion of territorial jurisdiction"). *But see* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 401 (1)(c) (AM. LAW INST.1987) (treating effects-based jurisdiction as territorial). *See* Parrish, *supra* note 44, at 1691–97 (providing the practice of the US courts and noting that, originally, US courts treated effects-based jurisdiction as extraterritorial, but that the courts' attitudes have changed and that such jurisdiction is now treated as territorial).

[68] The underlying rationale is that the exercise of jurisdiction and its permissive principle under international law must be aligned: if the legitimizing link is the territoriality principle, then jurisdiction is territorial. Conversely, by treating an issue as territorial, the legitimizing jurisdictional link is automatically assumed.

[69] *See* Jason Coppel, *A Hard Look at the Effects Doctrine of Jurisdiction in Public International Law*, 6 LEIDEN J. INT'L L. 73, 74 (1993) (referring to the debate "between those who accept the effects doctrine as a valid basis of jurisdiction and those . . . [who] prefer instead to base jurisdiction on interpretations, of varying broadness, of the territorial principle"). *See also* CRAWFORD, *supra* note 56, at 462 ("In addition, it has been suggested that there exists a further head of prescriptive jurisdiction, the so-called 'effects doctrine.'").

territoriality is a permissive principle that includes situations of extraterritorial jurisdiction.[70]

In spite of the disagreement about its jurisdictional salience, the effects doctrine has been practiced largely by the United States,[71] and is increasingly used in the EU.[72] In certain areas of law, effects-based jurisdiction has come to be a fairly accepted head of jurisdiction.[73] However, as a general principle, it remains controversial.[74] Furthermore, in an increasingly integrated world, the effects of

---

[70] For this view *see* HERDEGEN, *supra* note 48, at 86, 90 ("Jurisdiction based merely on the effects of actions on a State's territory carried out abroad ('effects doctrine') is a most important factor in the extraterritorial application of laws."); *id.*. at 90 ("The effects doctrine establishes no jurisdictional category of its own, but is an expansive version of the territoriality principle.").

[71] *See Developments in the Law - Extraterritoriality,* 124 HARV. L. REV. 1226, 1251 (2011); Najeeb Samie, *The Doctrine of "Effects" and the Extraterritorial Application of Antitrust Laws*, 14 L. AMERICAS 23 (1982). *See, e.g.,* Hartford Fire Ins. Co. v. California, 509 U.S. 764, 796 (1993) ("[I]t is well established by now that the Sherman Act applies to foreign conduct that was meant to produce and did in fact produce some substantial effect in the United States."). The impact of *Morrison* on the effects test is not yet clear. Morrison v. Nat'l Austl. Bank Ltd., 130 S. Ct. 2869, 2884 (2010). Some authors opine that the effects test has been narrowed. *See* Dodge, *supra* note 45, at 695. However, if the narrowing means that jurisdiction is asserted when the focus of the statute is to prevent harmful domestic effects, *id.* at 696, its result is a wide extraterritorial reach of all US laws. *See also* Parrish, *supra* note 44, at 1699 (discussing how *Morrison* created an unintended loophole to extend the reach of U.S. law).

[72] *See, e.g.,* Scott, *The New EU, supra* note 63, at 1356–59. Notably, the ECJ has applied the effects doctrine in Case T-102/96, Glencore Ltd. v. Comm'n, 1999 E.C.R. II-753. Also, recent EU legislation (EMIR, MiFIR) extends jurisdiction to parties outside the EU when their conduct has a direct, substantial, and foreseeable effect within the EU.

[73] This is the case in antitrust law. *See Developments in the Law - Extraterritoriality*, *supra* note 71, at 1254–56. *See also* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 402(1)(c) (AM. LAW INST. 1987) (showing a broader, but not uncontroversial scale). Other courts and writers agree that effects-based jurisdiction is a valid ground, but they use "effects" somewhat differently. *See e.g.,* CHARLES CHENEY HYDE, INTERNATIONAL LAW 798-800 (2nd ed. 1947) (discussing the traditional criminal setting); SS Lotus (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 10, at 19 (Sept. 7); Arrest Warrant (Dem. Rep. Congo v. Belg.), Judgment, 2002 I.C.J. Rep. 3, 27 (Apr. 11).

[74] R. Jennings, *Extraterritorial Jurisdiction and the US Antitrust Laws*, 33 BRIT. Y.B. INT'L L. 146, 159–61, 175 (1957) (noting that the acceptance of the effects doctrine will lead to a limitless state jurisdiction); Michael Akehurst, *Jurisdiction in International Law*, 46 BRIT. Y.B. INT'L L. 145, 154 (1972/73) (noting that the effects principle is "a slippery slope which leads away from the territorial principle towards universal jurisdiction."); MANN, *supra* note 58, at 102–06; Peter L. Fitzgerald, *Pierre Goes Online: Blacklisting and Secondary Boycotts in U.S. Trade Policy,* 31 VAND. J. TRANSNAT'L L. 1, 91 (1998) (noting that the effects doctrine is problematic because of disagreements as to how substantial the effects have to be in order to suffice as a basis for jurisdiction); Cedric

any action in any state may be felt anywhere else.[75] This highlights the importance of the prerequisites of effects-based jurisdiction. Courts and statutes draw the line where foreign conduct has a "direct, substantial and reasonably foreseeable effect" in the state asserting jurisdiction.[76] Of course, this does not answer all the questions; there is no accepted measure of what constitutes as "substantial" effect in terms of the effects doctrine.

Additionally, the influential Restatement (Third)[77] and a number of authors rightly note that once jurisdiction can be based on a permissive principle, its exercise should be conditioned on passing the reasonableness test.[78] This is of particular importance in the context of the effects doctrine, where the limits are fuzzy.

C. The Personality Principle

Among recognized principles for extraterritorial jurisdiction under public international law is the "active personality principle," also called the nationality principle. This principle says that a state has jurisdiction over its nationals even if they are abroad.[79] States have claimed jurisdiction based on nationality mainly in criminal law,[80] but also in family law[81] and tax law.[82] One example for the latter

---

Ryngaert, *Controls (Secondary Boycotts),* 7 CHI. J. INT'L L. 625, 643 (2008) (referring to the effects doctrine as controversial in the context of secondary boycotts).

[75] Paul Schiff Berman, *Global Legal Pluralism,* 80 S. CAL. L. REV. 1155, 1182 (2007) ("In an electronically connected world the effects of any given action may immediately be felt elsewhere with no relationship to physical geography at all.").

[76] *See e.g.* Foreign Trade Antitrust Improvements Act of 1982, 15 U.S.C. § 6a(I)(A); Council Regulation 648/2012 of July 27, 2012, OTC Derivatives, Central Counterparties and Trade Repositories (EMIR), 2012 O.J. (L 201/1), 17.; Council Regulation 600/2014, Markets in Financial Instruments (MiFIR), 2014 O.J. (L 173/84), 117.

[77] RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES (AM. LAW INST.1987). The drafting of a new Restatement (Fourth) was proposed to the American Law Institute in 2012. A tentative draft on jurisdiction was approved at the annual meeting of the ALI in 2016. The official text has not yet been published.

[78] RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES §403 (AM. LAW INST.1987); RYNGAERT, *supra* note 27, at 185–87.

[79] Akehurst, *supra* note 74, at 156; *see also* Geoffrey R. Watson, *The Passive Personality Principle*, 28 TEX. INT'L L.J. 1, 8 (1993); RYNGAERT, *supra* note 27, at 104; *see, e.g.,* Brief of the European Commission as Amicus Curiae Supporting Neither Party at 11, Kiobel v. Royal Dutch Petroleum Co., No. 10-1491 (June 12, 2012) ("The United States may . . . exercise jurisdiction over ATS claims involving conduct committed by its own nationals within the territory of another sovereign, consistent with international law.").

[80] For an early discussion *see Draft Convention*, *supra* note 34, at 440.

[81] GIDEON BOAS, PUBLIC INTERNATIONAL LAW: CONTEMPORARY PRINCIPLES AND PERSPECTIVES 256 (2012); RYNGAERT, *supra* note 27, at 100.

is section 61 of the US tax code, which provides that US citizens and corporations are taxed on their worldwide income.[83]

States have invoked nationality-based jurisdiction with regard to individuals and corporations. The International Court of Justice (ICJ) confirmed that corporations can be considered as nationals of a state and that the nationality of a corporation is determined either by its country of incorporation or its principal place of business.[84] There are limitations in international law with regard to the extension of the active personality principle. For instance, it is insufficient that a company does business within a state's territory to invoke the personality principle.[85] Moreover, a state cannot premise nationality jurisdiction on control of a foreign corporation by its citizens. The US practice of exercising jurisdiction over companies that are incorporated outside the United States but are owned by a US parent corporation is not legal under international law.[86]

The passive-personality principle allows a state to exercise jurisdiction over an alien for acts committed abroad if one of the state's nationals is offended.[87] However, this principle is strongly contested.[88] In certain cases, though, it is emerging as an accepted basis for jurisdiction, especially in the context of international terrorism. [89]

---

[82] *See generally* Kern Alexander, *The Efficacy of Extra-territorial Jurisdiction and US and EU Tax Regulation*, 6 SZW/RSDA 463 (2009) (discussing tax and extraterritoriality).

[83] This has led to another extraterritorial measure of the United States requiring banks outside of US territory to actively notify the US Internal Revenue Service about account holders who are US persons under the Foreign Account Tax Compliance Act (FATCA). Whether the United States would effectively have jurisdiction over the foreign banks is a moot question, as the banks have entered into FATCA agreements with the US in order to maintain US market access.

[84] Barcelona Traction, Light and Power Co., Ltd. (Belg. v. Sp.), Judgment, 1970 I.C.J. Rep. 3 (Feb. 5); *see* Council Regulation 1215/2012 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters 2012 O.J. (L 351/1) *See also* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 213 (AM. LAW INST. 1987) ("For purposes of international law, a corporation has the nationality of the state under the laws of which the corporation is organized.").

[85] Even in the US where, traditionally, an expansive view of jurisdiction is held, the United States Supreme Court has ruled that a company must be "essentially at home" in the state claiming jurisdiction. *See* Goodyear Dunlop Tires Operations SA v. Brown, 564 U.S. 915, 919 (2011).

[86] Alexander, *supra* note 82, at 469, 471; Akehurst, *supra* note 74, at 169. *See* RYNGAERT, *supra* note 27, at 110 (discussing also the question of economic sanctions). *See also* John N. Drobak, *Personal Jurisdiction in a Global World: The Impact of the Supreme Court's Decisions in* Goodyear Dunlop Tires *and* Nicastro, 90 WASH. U. L. REV. 1707, 1719 (2013); Ryngaert, *supra* note 74, at 628.

[87] Watson, *supra* note 79, at 2.

[88] K. Alexander, *supra* note 82, at 470; Watson, *supra* note 79, at 2; MANN, *supra* note 58, "[passive personality jurisdiction] should be treated as an excess of jurisdiction." See *also Draft Convention*, *supra* note 34, at 579 (stating that the principle of passive

D. The Protective Principle

The protective principle is among the generally accepted principles allowing for the exercise of extraterritorial jurisdiction.[90] A state can lawfully assert jurisdiction when its vital interests—primarily regarding sovereignty or right to political independence—are concerned.[91]

Among the reasons why the protective principle is less controversial is that it generally concerns acts that are neither condoned nor supported in the state where they took place. Examples include plotting to overthrow the foreign state claiming jurisdiction, forging or counterfeiting of foreign currency, making false statements to consular officials in order to obtain a visa, or drug smuggling.[92]

More controversial is how the protective principle affects sanctions law, especially in cases of unilateral secondary embargoes or boycotts. In these cases, the regulating state extends its laws to foreign actors who engage in dealings with a boycotted state, thus universalizing its own sanctions regime at the cost of the foreign policy approaches of other states;[93] the BNP Paribas case is an example for such an extraterritorial regulation. Some authors regard unilateral secondary boycotts to be impermissible under international law.[94] Others take a more

---

personality has been "more strongly contested than any other type of competence," and stating further that it is "the most difficult [principle] to justify in theory"). *See also* Jürgen Meyer, *The Vicarious Administration of Justice: An Overlooked Basis for Jurisdiction,* 31 HARV. INT'L L. J. 108, 114 (1990).

[89] *See* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 402 cmt. g (stating that the passive personality principle is "increasingly accepted as applied to terrorist and other organized attacks on a state's nationals by reason of their nationality, or to assassination of a state's diplomatic representative or other officials"). There are also a number of international conventions dealing with international terrorism and which authorize jurisdiction based on the passive territoriality principle. *See* RYNGAERT, *supra* note 27, at 111 (discussing two different conventions: Convention on Offenses and Certain Other Acts Committed on Board Aircraft, art. 4(b), Sept. 14, 1963, 20 U.S.T. 2941, 704 U.N.T.S. 219, and the United Nations Convention against Torture art. 5 (1)(c), Dec. 10, 1984, 1465 U.N.T.S. 85).

[90] *See* RYNGAERT, *supra* note 27, at 114–19; *Draft Convention*, *supra* note 34, at 556. *But see* Manuel R. Garcia-Mora, *Criminal Jurisdiction Over Foreigners for Treason and Offences Against the Safety of the State Committed Upon Foreign Territory,* 19 U. PITT. L. REV. 567, 568 (1958).

[91] INT'L BAR ASSOC., *supra* note 39, at 14. *See also* RYNGAERT, *supra* note 27, at 114 (noting that no actual harm needs to have resulted from the foreign acts and that this distinguishes the protective principle from the effects doctrine).

[92] *See* RYNGAERT, *supra* note 27, at 116–17.

[93] *See* Rathbone et al., *supra* note 49, at 1056 (describing the history of the US sanctions regime).

[94] *See* Andreas F. Lowenfeld, *Agora: The Cuban Liberty and Democratic Solidarity (Libertad) Act*, 90 AM. J. INT'L L. 419, 430 (1996) (noting that the exercise of jurisdiction to impose secondary boycotts are contrary to international law because they seek "unreasonably to coerce conduct that takes place wholly outside of the state purporting to

differentiated view and regard secondary boycotts to be legal under international law under certain conditions, namely if there is sufficient evidence of a direct threat to the national or international security of the regulating state, or in times of war.[95]

---

exercise its jurisdiction to prescribe"); American Bar Association (ABA), Export Controls and Economic Sanctions Committee, *Recommendation* (1998), heading VI, 8 ("Outside the United States, all forms of extraterritorial transaction controls almost universally are regarded as an illegitimate interference in the affairs of other countries."); Alexander, *supra* note 65, at 1603 (1997) (noting that the Iran and Libya Sanctions Act is illegal under international law). *But see* Brice M. Clagett, *The Controversy Over Title III of the Helms-Burton Act: Who is Breaking International Law – The United States, or the States that Have Made Themselves Co-Conspirators with Cuba in its Unlawful Confiscations?,* 30 GEO. WASH. J. INT'L L. & ECON., 271, 278−83 (1996/97).

[95] RYNGAERT, *supra* note 27, at 118; Ryngaert, *Secondary Boycotts, supra* note 74, at 625; Jeffrey A. Meyer, *Second Thoughts on Secondary Sanctions*, 30 U. PA. J. INT'L L. 905 (2009); Sarah H. Cleveland, *Norm Internalization and U.S. Economic Sanctions*, 26 YALE J. INT'L L. 1, 49, 62–63 (2001) (noting that unilateral economic sanctions can conform with international rules. An example would be the selective purchasing laws where the sanctioning state declines to do business with entities who do not comply with the sanctions. An example to the contrary would be the Helms-Burton Act, whose legality is "dubious."); Fitzgerald, *supra* note 74, at 91 ("It is perhaps too early in the process to assume that international secondary boycotts are recognized as per se illegal, but it is certainly too late to claim that they are not problematic under international law."); Compagnie Européenne des Pétroles SA/Sensor Nederland BV, Den Haag District Court, translated in 22 I.L.M. 66, 72–73 (1983) (holding that neither the territoriality nor the nationality nor the protective principle provides a sufficient basis for the application of US export control regulations regarding the Soviet Union to a Dutch subsidiary of a US corporation).

E. The Universality Principle

The universality principle assumes that certain serious crimes against international law are prohibited everywhere and can therefore be regulated by any state.[96] Thus, under this principle, a state can exercise jurisdiction even if there is no connection between the crime and the regulating state—but only if the act is one of a specified international crime.[97] The theory behind this principle is that all states have an interest in punishing and preventing such crimes because these are violations of *jus cogens* and thus a threat to the global community.[98] The universality principle covers offenses against international humanitarian law such as slave trade, genocide, war crimes, and torture.[99] The principle of universal jurisdiction was applied, for instance, in the Nuremberg Trials and several other war crimes trials following World War II. More recently, universal jurisdiction was applied in Spain's trial of Chile's dictator, Augusto Pinochet, for human rights abuses committed in Chile.[100] Currently, several national criminal systems have provisions which provide for universal jurisdiction over certain offenses.[101] The principle is also recognized in most scholarships as a ground for jurisdiction,[102] but it is not wholly uncontested.[103] The ICJ has yet to discuss the lawfulness of

---

[96] *See* Randall, *supra* note 25, at 788; *see also* Colangelo, *supra* note 41, at 1327.

[97] *See* Int'l Law Assoc., Comm. On Int'l Human Rights Law and Practice, *Final Report on the Exercise of Universal Jurisdiction in Respect of Gross Human Rights Offences,* 2 (2000) ("Under the principle of universal jurisdiction a state is entitled or even required to bring proceedings in respect to certain serious crimes, irrespective of the location or the crime, and irrespective of the nationality of the perpetrator or the victim."). *See also* Randall, *supra* note 25, at 788.

[98] *See* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 404 (AM. LAW INST. 1987); Curtis A. Bradley & Jack L. Goldsmith, *Pinochet and International Human Rights Litigation,* 97 MICH. L. REV. 2129, 2133–34 (1999); Cleveland, *supra* note 95, at 24–29.

[99] *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 404; Randall, *supra* note 25, at 788; *see also* INT'L BAR ASSOC., *supra* note 39, at 14–16 (regarding the differentiations between criminal and civil law). *See also* Bradley, *supra* note 55, at 324; D. Dimitrakos, *The Principle of Universal Jurisdiction & the International Criminal Court* 12 (2014), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2383587.

[100] *See* Bradley & Goldsmith, *supra* note 98, at 2133–34; *see also* Diane F. Orentlicher, *Whose Justice? Reconciling Universal Jurisdiction with Democratic Principles,* 92 GEO. L.J. 1057, 1070 (2004); Dimitrakos, *supra* note 99, at 174–76.

[101] *See* Dimitrakos, *supra* note 99, at 13; *see also* RYNGAERT, *supra* note 27, at 129 n.181.

[102] Bradley, *supra* note 55, at 324. *See also* RYNGAERT, *supra* note 27, at 129 n.181.

[103] Bradley, *supra* note 55, at 324–25, 325 n.12; Alfred P. Rubin, *Is International Criminal Law "Universal"?,* 2001 U. CHI. LEGAL F. 351, 370–72 (2001); *see also* Dimitrakos, *supra* note 99, at 22.

universal jurisdiction.[104] However, the European Court of Human Rights has held that universal jurisdiction does not violate the principle of legality.[105]

F. Extraterritoriality Is Often Legal

Under customary international law, jurisdiction over people, things, or conduct must rely on one of the following permissive principles: the territoriality principle (including subjective and objective territoriality), the personality principle, the protective principle, and the universality principle. Although there is controversy to the exact content of these principles, the overall conclusion is that they offer a broad range of justifications for extraterritoriality. This is also true with regard to unilateral economic sanctions. Thus, such sanctions do not *per se* conflict with international law. However, they do have to be tailored to stay within the limits of the permissive principles. Therefore, BNP Paribas reenters.

IV. BNP PARIBAS REVISITED

The BNP Paribas settlement does not explicitly mention the jurisdictional grounds on which the case is based. However, the DOJ does identify a number of jurisdictional pointers: US national security interests, international public safety, and processing dollar transactions through the US financial system.[106]

A. Correspondent Account Jurisdiction

The jurisdictional claim based on the use of the US financial system comprises two different arguments; one argument is that the US dollar payments "passed" through US territory because they were made possible by the use of a US correspondent bank account. The other argument is that, by processing the payments within the US, BNP Paribas caused the US correspondent banks to violate US law, even if the banks did so unknowingly.[107] Both arguments are rooted in the territoriality principle.

---

[104] Ryngaert, *supra* note 27, at 129.

[105] Ould Dah v. France, 2009-I Eur. Ct. H.R. 415.

[106] *See* DOJ Release, BNP Paribas Agrees to Plead, *supra* note 8.

[107] This extension goes back to a 2007 amendment of the IEEPA, which now holds that it is an unlawful act for any person to engage in conduct, including conduct abroad, that causes others to violate US sanctions. *See* Int'l Emergency Econ. Powers Enhancement Act, Pub. L. No. 110-96, § 2(a), 121 Stat. 1011 (2007) (amending 50 U.S.C. § 1705(a)).

Correspondent account-based jurisdiction has been increasingly invoked by US authorities[108] but has not yet been tested in US courts.[109] In US and international law scholarship, the validity of such an expansive reading of the territoriality principle is questioned.[110] Indeed, it would not satisfy the conditions set by the subjective territoriality principle, as this principle requires that a *substantial* part of the conduct takes place within the territory. Here, two entities outside of the United States contract for banking services that include payment services. The fact that the dollar portion of such payments (*e.g.* from an Iranian entity to a Swedish entity) passes through US territory via the clearing system does not meet the "substantial part" threshold.[111] One might imagine what would result from a contrary view: the US-dollar is the world's primary currency, and virtually all dollar transactions "pass" the United States for clearing.[112] To accept

[108] In the anti-bribery context, the US authorities have espoused the correspondent account liability under the FCPA for many years, starting with the Siemens action (2008) and the Halliburton/KBR action (2009). *See The Other FCPA Shoe Drops: Expanded Jurisdiction over Non-U.S. Companies, Foreign Monitors, and Extending Compliance Controls to Non-U.S. Companies,* SHEARMAN & STERLING LLP (July 19, 2010), http://www.shearman.com/~/media/Files/NewsInsights/Publications/2010/07/The-Other-FCPA-Shoe-Drops--Expanded-Jurisdiction__/Files/View-full-memo-The-Other-FCPA-Shoe-Drops--Expand__/FileAttachment/LT071910TheOtherFCPAShoeDrops.pdf.

[109] There have been some limits set by courts regarding extensive territoriality claims by the DOJ. In the so-called SHOT Show trial, the district court judge rejected the DOJ's FCPA jurisdictional assertion over a UK citizen who had mailed a package containing an allegedly corrupt purchase agreement from the United Kingdom to the United States. *See* U.S. v. Patel, Docket No. 09-CR-338-RJL (D.D.C. 2009). *See* Sean Hecker & Margot Laporte, *Should FCPA "Territorial" Jurisdiction Reach Extraterritorial* Proportions, 42 INT'L LAW NEWS 1 (2013), http://www.americanbar.org/publications/international_law_news/2013/winter/should_fcpa_territorial_jurisdiction_reach_extraterritorial_proportions.html; *see also* Heather Diefenbach, *FCPA Enforcement Against Foreign Companies: Does America Know Best?*, 2 CORNELL INT'L L.J. ONLINE 47 (2014). For another limit *see* U.S. v. Lawrence Hoskins, No. 3:12cr238, 2016 WL 1069645 (D. Conn. Mar. 16, 2016) (denying the government's claim of FCPA jurisdiction over non-resident foreign nationals who conspire with or aid and abet an entity otherwise subject to the FCPA. In the case at hand, the jurisdictional claim regarded the Senior Vice President for the Asia Region by Alstom Power UK for his alleged participation in a bribery scheme involving Alstom Power U.S. and the Indonesian government).

[110] Rensmann, *supra* note 12, at 105; Natasha N. Wilson, *Pushing the Limits of Jurisdiction Over Foreign Actors Under the Foreign Corrupt Practices Act,* 91 WASH U. L. REV. 1063, 1077–79 (2014) (with regard to the FCPA, and noting that the *clear* jurisdictional nexus is missing); *Developments in the Law - Extraterritoriality*, *supra* note 71, at 1251 (regarding correspondent account liability of several U.S. sanctions laws and pointing to their "dubious permissibility under international law").

[111] *See also* Wilson, *supra* note 110, at 1073 n.49 (noting that "[T]here is a strong argument that the mere fact that money clears through a correspondent account on its way between two foreign accounts is insufficient to meet this ['in substantial part'] threshold").

[112] *See* Michael Gruson, *The U.S. Jurisdiction over Transfers of U.S. Dollars Between Foreigners and over Ownership of U.S. Dollar Accounts in Foreign Banks*, 2004

the correspondent account nexus as sufficient basis for jurisdiction is tantamount to accepting a limitless US jurisdiction.[113] There is no basis in international law for such a far-reaching assumption.

B. Effects Jurisdiction

The other territorial aspect of the transaction process is that BNP Paribas caused the US correspondent banks to violate US law, again, even if unknowingly.[114] This involves jurisdiction based on the effects doctrine, which holds that if foreign conduct produces *direct, substantial, and foreseeable* effects within the territory, then the territorial state may claim jurisdiction. It is true that BNPP's conduct has an effect in the United States if, as a consequence of a payment order, US banks violate domestic laws. However, the effects doctrine does not offer a sufficient basis for US jurisdiction in this case.

First, one should recall that the effects doctrine is a controversial principle of jurisdiction.[115] Specifically, there is no agreement that the effects-based jurisdiction is justified when the regulated conduct complies with the laws of the state where it was carried out.[116] According to the French and the Swiss authorities, the conduct of BNPP Paris and BNPP Geneva did not violate French, EU, or Swiss sanctions laws.[117] This is a central point because it marks a difference to other cases where the effects doctrine has gained some ground, notably in the field of antitrust regulation. In Europe and the United States, it is an accepted premise that market distortions should not be allowed. It is, therefore, conceivable to accept a jurisdictional claim regarding foreign conduct which results in domestic market distortions. But in the case of the US sanctions against

---

COLUM. BUS. L. REV. 721, 725–31 (2004); COLIN BAMFORD, PRINCIPLES OF INTERNATIONAL FINANCIAL LAW 61–64 (2011).

[113] As an example: A German restaurant owner could be convicted in the US for selling a glass of Argentinian wine to an 18 year-old US customer in his Munich establishment. This is legal in Germany where the drinking age is 16. However, it is illegal in the United States where the drinking age is 21. Under the correspondent account nexus, US jurisdiction would be established if the payment for the wine delivery was made in US-dollars and cleared in the United States—*and* if the United States legislator actually intended to prescribe United States standards for the drinking age. So far, this has not been the case. But if one accepts the correspondent account-based jurisdiction, worldwide US prescriptive jurisdiction is the result.

[114] This extension goes back to a 2007 amendment of the IEEPA, which now holds that it is an unlawful act for any person to engage in conduct, including conduct abroad, that causes others to violate US sanctions. *See* Int'l Emergency Econ. Powers Enhancement Act, Pub. L. No. 110-96, § 2(a), 121 Stat. 1011 (2007) (amending 50 U.S.C. § 1705(a)).

[115] *See generally supra* note 74.

[116] R. Alexander, *supra* note 65, at 1612. *See also* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 402 rep.n.2 (AM. LAW INST. 1987).

[117] *See supra* notes 21–23 and accompanying text.

Libya, Iran, Sudan and Cuba, such a shared premise was missing, because BNPP's conduct was legal within the EU, French, and Swiss jurisdictions.

Yet even if one were to apply the effects doctrine in sanctions law, the argument for a domestic jurisdictional claim is difficult.[118] The effects doctrine requires that the foreign conduct has a *direct, substantial, and foreseeable* effect in the domestic territory. If BNPP causes US banks to violate domestic law, its conduct has an indirect territorial effect. And even more difficult is the argument that BNPP's conduct has a territorial effect which is substantial. The domestic payment market is not casually affected by the transactions; they do not disrupt the US payment system or make it less reliable or more expensive for its users. Nor do they affect the domestic authority of the sanctions; within the US, they are the law, and US firms are bound by it. What is affected is the sanctions' global effectiveness, because firms outside the US can engage in the conduct prohibited by US law. But this is not a domestic effect. Besides, to point to the lack of global effectiveness is a circular argument in a case where the very question is whether the global scope of a national law is justified.

[118] Rensmann, *supra* note 12, at 106 (arguing that the causality between the conduct of a foreign bank and the violations committed by US correspondent banks does not amount to a substantial, direct, and foreseeable territorial effect).

C. Protective and Universal Jurisdiction

As to the argument that BNPP's conduct is a threat to national security interests, the underlying jurisdictional basis is the protective principle. The protective jurisdiction principle requires a direct threat to national security.[119] With regard to Cuba, it is difficult to sustain that such a threat existed and—above all—continued to exist after the fall of the Berlin Wall in 1989.[120] Iran's nuclear weapons program, on the other hand, reasonably qualifies as a direct threat to US national security. Sanctions against actors that support Iran's weapons program would therefore be covered by the protective principle.[121] The same reasoning also applies in the case of Sudan. However, it is much less evident why the validity of the jurisdictional claim should extend to ordinary business dealings which have no direct link to these issues. For activities not directly linked to the cause of the national security threat, the protective principle does not provide a sufficient basis for jurisdiction.[122] An expansive interpretation of the national threat concept is not widely accepted in the international community, as evidenced by the retaliatory legislative reactions in Canada and Europe to the US use of the concept regarding Iran.[123]

Finally, the threat to international security suggests an application of the universality principle. This is problematic because this principle has not yet been accepted in the economic context.[124] Even if the principle was deemed applicable in the economic context, the hurdle remains high. General assertions regarding

---

[119] *See supra* Part III. D.

[120] In 2014, the General Assembly of the United Nations adopted the twenty-third resolution to end the U.S. embargo against Cuba by 188 votes against two votes (U.S., Israel) and three abstentions (Marshall Islands, Federated States of Micronesia and Palau). G.A. Res. 70/5 (Nov. 3, 2015). The European Union formally protested against the sanctions in 1995. *See European Union: Demarches Protesting the Cuban Liberty and Democratic Solidarity Act*, 35 I.L.M. 397 (1995). *See also* Ryngaert, *supra* note 74, at 642 (noting that it is "difficult to sustain that a vaguely defined threat to the political independence or territorial integrity of the United States falls within the scope of the protective principle").

[121] Meyer, *supra* note95, at 940.

[122] Gregory W. Bowman, *A Prescription for Curing U.S. Export Controls*, 97 MARQ. L. REV. 599, 663 (2014) (noting that "protective jurisdiction only justifies jurisdiction over items abroad when national security-levels are at stake. It does not justify blanket item origin-based jurisdiction."). *See also* Ryngaert, *supra* note 74, at 643 (casting doubts about validity of the Iran sanctions); Rensmann, *supra* note 12, at 110; Meyer, *supra* note 95, at 941.

[123] For the Canadian and European reaction to the Helms-Burton Act and to the Iran and Libya Sanctions Act (the reaction included a EU law suit against the United States with the WTO) *see* Ryngaert, *supra* note 74, at 645–48; HERDEGEN, *supra* note 48, at 79–80; Meyer, *supra* note 95, at 909. For the shift in the EU position regarding Iran *see Developments in the Law - Extraterritoriality*, *supra* note 72, at 1250–57.

[124] Rensmann, *supra* note 12, at 110.

nuclear proliferation, human rights violations, and support of terrorism would not be sufficient to legitimize jurisdiction.[125]

In conclusion, if the extraterritorial application of economic sanctions law is to be justified under international law, it will likely be under the protective principle. However, the threshold to be met is high. Scholars have rightly pointed out that the protective principle lacks the potential to serve as a justification for much of the extraterritorial application of export controls.[126] In the exemplary case of BNP Paribas, it is questionable whether this threshold has actually been met.

V. CONCLUSION

Not only do we live in a globalized world; we live in a globalized world which is heavily regulated. In such a world, claims of extraterritorial jurisdiction are bound to arise with increasing frequency. To avoid speaking about extraterritoriality because of its negative connotation is not an option. Making extraterritoriality disappear by broadening the concept of territorial jurisdiction is not helpful because it blurs the distinction between the fact (extraterritoriality) and its justification (substantial territorial link). This paper has argued in favor of a broad understanding of extraterritoriality: extraterritoriality encompasses all jurisdictional claims which are not exclusively territorial because they include a relevant foreign element (person, thing, conduct). Extraterritorial jurisdiction encroaches on another state's classic territorial jurisdiction. The appropriate framework to examine the legality of such encroachments is provided by international law and notably customary international law. The customary permissive principles are construed broadly and offer a wide range of jurisdictional grounds for extraterritoriality: states have jurisdiction over their own nationals, even if they are abroad; their jurisdiction extends to foreign nationals abroad if these nationals commit serious crimes against international law, if their conduct threatens the state's vital interests, or if it has direct, substantial, and foreseeable effects in the domestic territory. Even unilateral economic sanctions with extraterritorial reach can be legal under the broad scope of the permissive principles. However, recent examples in US sanctions law show a troubling tendency to overstretch the traditional jurisdictional principles and even to assert new jurisdictional heads such as the correspondent account jurisdiction. In order to reconcile its sanctions regime with international law, the United States should exercise more restraint with regard to the traditional jurisdictional principles and abandon the concept of correspondent account jurisdiction.

---

[125] Bowman, *supra* note 122, at 666 ("universal jurisdiction . . . is not a viable basis for extraterritorial prescriptive export control jurisdiction."). *See also* Rensmann, *supra* note 12, at 110; Ryngaert, *supra* note 74, at 644.

[126] Bowman, *supra* note 122, at 662.