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## PATHS OF INTERNATIONAL LAW

Stability and Change in the International Legal Order

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### Jurisdiction Unbound

Global Governance through Extraterritorial Business Regulation

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Nico Krisch



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# **Jurisdiction Unbound**

## ***Global Governance through Extraterritorial Business Regulation***

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*Work in progress, comments welcome*

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### **Abstract**

*The international law of jurisdiction is faced with far-reaching changes in the context of a globalizing world, but its general orientation, centred on territoriality as the guiding principle, has remained stable for a long time. This paper traces how, in contrast to the prevailing rhetoric of continuity, core categories of jurisdiction have been transformed in recent decades in such a way as to generate an ‘unbound’ jurisdiction, especially when it comes to the regulation of global business activities. The result is a jurisdictional assemblage – an assemblage in which a multiplicity of states have valid jurisdictional claims without clear principles governing the relationship between them, creating a situation in which, in practice, a few powerful countries wield the capacity to set and implement the rules. Jurisdiction is thus misunderstood if framed as an issue of horizontal relations among sovereign equals but should rather be regarded as a structure of global governance through which (some) states govern transboundary markets. Using a governance prism, this paper argues, can help us to gain a clearer view of the normative challenges raised by the exercise of unbound jurisdiction, and it shifts the focus to the accountability mechanisms required to protect not only the rights of targeted companies but also, and especially, the self-government of weaker countries.*

### **I. Introduction**

Jurisdiction is one of the classical categories of international law which, foundational but largely taken for granted, are not often subjected to sustained inquiry. Its starting point – “the presumption that jurisdiction (in all its forms) is territorial, and may not be exercised extraterritorially without some specific basis in international law”<sup>1</sup> – is relatively uncontroversial, and new developments, such as the rise of universal jurisdiction, are seen to affect the edges rather than the core of this area of the law.<sup>2</sup>

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<sup>1</sup> James Crawford, *Brownlie’s Principles of Public International Law* (OUP Oxford 2012) 456.

<sup>2</sup> See also Alex Mills, ‘Rethinking Jurisdiction in International Law’ (2014) 84 *British Yearbook of International Law* 187.

This aura of continuity in the law of jurisdiction is surprising, given that the environment in which it operates has undergone rapid and extensive change over the past decades. Its territorial orientation seems to stand in tension with the ever greater interdependence of a globalizing world in which actors, markets and problems straddle boundaries to a far greater extent than before. Legislators, regulators and courts face increasingly transboundary challenges which they find difficult to tackle if limited to their own state. Already more than half a century ago, one of the foremost scholars of jurisdiction, F.A. Mann, observed that the territorial focus led to results that were "no longer adequate". Interdependence has grown ever since, and while some of it has found responses through treaties and international organizations, the latter have stagnated over the past twenty years. This leaves an ever greater challenge to national actors, and we would expect growing pressures for change on traditional limitations on their jurisdiction in contexts of transboundary problems. Yet by most accounts, state practice continues on the traditional, territorial path<sup>3</sup>, and current law-making efforts – as, for example, on business and human rights – also largely operate in this frame.

The resulting puzzle is the object of the present article. It asks whether and how the the law of jurisdiction has dealt with these pressures and how it has changed in response. The article focuses on business regulation as an area in which globalizing tendencies are particularly acute and in which we should thus see an especially pronounced push for change. As visible from the findings in that area, the law of jurisdiction has indeed undergone a fundamental transformation, though one somewhat concealed by a persisting discourse centered on the territorial principle. In the shadow of this rhetoric, practice has redefined the meaning of territoriality in such a way as to largely 'unbind' it from its constraining aspects, opening the door to an exercise of jurisdiction on the basis of thin connections with the issue at hand. The result is a jurisdictional assemblage – an assemblage in which a multiplicity of states have valid jurisdictional claims, yet without clear principles governing the relationship between them. In practice, this leaves especially major economies with few constraints when it comes to extraterritorial economic regulation.

When it comes to regulating multinational companies and transnational economic activities, jurisdiction is thus misunderstood if framed as an issue of horizontal relations among sovereign equals – as an issue of delimiting their separate spheres. Instead, it appears as a structure of global governance through which states govern transboundary markets – an often oligarchical structure in which a few powerful countries wield the capacity to set and implement the rules. This arrangement may help to overcome certain collective action problems and provide important public goods in a decentralized international political system, but it also undermines the sovereignty-protecting function often attributed to the law of jurisdiction. Rebalancing the regime would require the introduction of new forms of accountability that respect self-government while providing effective tools to regulate multinational companies.

The article proceeds through four main steps. It begins by outlining the challenges for traditional jurisdictional categories and highlights different responses to them in scholarship as well as the persistence of established frames in legal discourse (part II). It then inquires into actual

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<sup>3</sup> See, e.g., Cedric Ryngaert, *Jurisdiction in International Law* (OUP Oxford 2015) 100; Anthony J Colangelo, 'Spatial Legality' (2012) 107 *Northwestern University Law Review* 69.

jurisdictional practices through five vignettes of contemporary cases – from financial crime in global football to delisting requirements for internet companies and legislation on business and human rights (part III). In part IV, the article draws the insights from these vignettes together with observations from the literature to develop a broader picture of the emerging ‘jurisdictional assemblage’ and its structuring principles. It finally seeks to shift the frame from a horizontal to a vertical one, in which extraterritorial exercises of jurisdiction appear as a form of global governance, with unequal roles and fresh needs for accountability mechanisms that respect self-government claims, especially of economically weaker host states (part V).

## II. Continuity under Challenge

One of the sites in which we can observe contemporary discussions about the extent of state jurisdiction is the *UN Working Group on Transnational Corporations and Other Business Enterprises with Respect to Human Rights* and its negotiations over a treaty – or, in the parlance of the Working Group, a ‘legally binding instrument’ – on business and human rights.<sup>4</sup> The first treaty drafts contain provisions on the procedural and substantive obligations and responsibilities of states and companies, but also clauses that determines which courts should have jurisdiction in disputes with companies over the violation of human rights, and which substantive law should apply.<sup>5</sup> In essence these clauses define which states are authorized to specify the extent of human rights obligations – left unaddressed in the draft itself – and thereby to set the substantive rules on the business and human rights nexus.<sup>6</sup>

The draft has sparked controversy<sup>7</sup>, but the jurisdictional frame it uses is largely consensual and very familiar. Jurisdiction is primarily defined *territorially*: the power to adjudicate (as well as to determine the applicable law) vests in the states in which the acts in question occurred, in which the victim is domiciled, or in which the defendant company is domiciled.<sup>8</sup> This dominance of the territorial principle is an expression of a striking continuity. Formulated quite similarly, it was already central more than three centuries ago, for example in the work of the influential Frisian scholar, Ulrik Huber, in 1684. And despite certain modifications over time, especially the

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<sup>4</sup> On the treaty project, see Olivier de Schutter, ‘Towards a New Treaty on Business and Human Rights’ (2016) 1 *Business and Human Rights Journal* 41.

<sup>5</sup> Articles 5 and 7 of the 2018 Zero Draft, Articles 7 and 9 of the 2019 Revised Draft, Articles 9 and 11 of the 2020 Second Revised Draft. The drafts and related documents can be found at: <https://www.ohchr.org/en/hrbodies/hrc/wgtranscorp/pages/igwgontnc.aspx>.

<sup>6</sup> In this context (as elsewhere), the distinction between the *jurisdiction to adjudicate* and the *jurisdiction to prescribe* becomes largely obsolete. See also Ryngaert, *Jurisdiction in International Law* (n 4) 10.

<sup>7</sup> See below section IX.2.

<sup>8</sup> Article 9(1) of the 2020 Draft reads: “Jurisdiction with respect to claims brought by victims, irrespectively of their nationality or place of domicile, arising from acts or omissions that result or may result in human rights abuses covered under this (Legally Binding Instrument), shall vest in the courts of the State where: a. the human rights abuse occurred; b. an act or omission contributing to the human rights abuse occurred; or c. the legal or natural persons alleged to have committed an act or omission causing or contributing to such human rights abuse in the context of business activities, including those of a transnational character, are domiciled.”

inclusion of nationality as a valid jurisdictional basis, the territorial principle still anchors most of today's accounts of the law of jurisdiction.<sup>9</sup>

This continuity was also at the heart of F.A. Mann's 1964 Hague Lecture, which is cited as fundamental in virtually every modern text on jurisdiction. Mann stressed at the time how much the territorial principle had shaped the thinking about jurisdictional boundaries for centuries, and how it continued to shape it. But he also had great doubts as to whether it was still appropriate for the present and the future. For him, the 'complications of modern life' were responsible for the ever more widespread reluctance to 'localise' facts, events or relationships; as already mentioned, the focus on territorial connections led for him to "results which in a shrinking world may no longer be adequate".<sup>10</sup> He therefore suggested even then to move away from territoriality as the guiding principle and focus instead on 'contacts'. According to this approach, a state could regulate certain facts if its contact with them "is so close, so substantial, so direct, so weighty, that legislation in respect of them is in harmony with international law".<sup>11</sup>

In the half-century since Mann's lecture, the 'complications of modern life' have only increased, and in some respects dramatically so, placing ever stronger pressure on the territorial foundations of the law of jurisdiction.<sup>12</sup> Processes of political internationalization and economic liberalization, privatization and globalization have further undermined the idea of separate states sitting alongside each other, distinguishable along territorial boundaries. The notion of territory itself has been problematized and re-imagined with alternative spatial visions, leaving the classical, legal territoriality behind.<sup>13</sup> For questions of jurisdiction, five concrete challenges stand out:

- *Unlocalizable acts.* If jurisdictional boundaries traditionally found their basis in the allocation of actions to a certain, physically delimited spaces, today many relevant actions can hardly be concretely located – most obviously in a 'cyberspace' whose very designation defies classical spatiality<sup>14</sup>, but also in economic contexts where transactions often straddle boundaries with ease.

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<sup>9</sup> See, e.g., the analysis in Ryngaert, *Jurisdiction in International Law* (n 4).

<sup>10</sup> FA Mann, 'The Doctrine of Jurisdiction in International Law' (1964) 111 *Recueil des Cours de l'Académie de Droit International* 9, 36–37.

<sup>11</sup> *ibid* 49.

<sup>12</sup> See Ralf Michaels, 'Territorial Jurisdiction after Territoriality', *Globalisation and Jurisdiction* (Kluwer Law International 2004); Hannah L Buxbaum, 'Territory, Territoriality, and the Resolution of Jurisdictional Conflict' (2009) 57 *The American Journal of Comparative Law* 631. Mann himself took up some of these changes twenty years later, see FA Mann, 'The Doctrine of Jurisdiction in International Law Revisited after Twenty Years' (1984) 186 *Recueil des Cours de l'Académie de Droit International*.

<sup>13</sup> See, e.g., Saskia Sassen, 'When Territory Deborders Territoriality' (2013) 1 *Territory, Politics, Governance* 21. See also below, section IV.2.

<sup>14</sup> On the tensions with territorially oriented jurisdiction, see Mireille Hildebrandt, 'Extraterritorial Jurisdiction to Enforce in Cyberspace: Bodin, Schmitt, Grotius in Cyberspace Focus - Criminal Jurisdiction: Comparison, History, Theory' (2013) 63 *University of Toronto Law Journal* 196; Jennifer Daskal, 'The Un-Territoriality of Data' (2015) 125 *Yale Law Journal* 326.

- *Ubiquitous actors.* Unlike individuals with a physical presence, a company's location always has an element of fiction – and perhaps of 'transcendental nonsense', as in Felix Cohen's early diagnosis.<sup>15</sup> This has been exacerbated through global corporations and ever more complex, global value chains, often better captured as transboundary networks.
- *Unbound markets.* Indicators for the degree of trade openness of states have increased tenfold since the time of Ulrik Huber and more than doubled since the time of F.A. Mann.<sup>16</sup> The regulation of such globalized markets causes difficulties for territorially limited state regulators who always only have access to part of the market.
- *Borderless effects.* Even if acts can be localized, their impacts are often without clear limits. Economic activities often have effects across the whole of a market, just as greenhouse gas emissions affect the whole of the planet. Territorial jurisdiction in such cases tends to lead to under-regulation – regulation of an affected state will often be ineffective, while the state in which the act takes place will often lack interest in regulation.
- *Global values.* Territorial jurisdiction is challenged not only by factual developments, but also by changing moral horizons. This is most obvious for cosmopolitans for whom the need to act against grievances does not end at state boundaries; but it also holds for nationalists who nevertheless care about suffering in far-away places.<sup>17</sup>

This list could be expanded, but it should suffice to show how precarious the traditional jurisdictional regime has become. Under the territorial principle, states are bound to have difficulty coping with the challenges mentioned – at least insofar as there are no effective international mechanisms that could respond to them. In the second half of the 20th century, the rise of such international mechanisms – treaties and international organizations – has certainly taken some pressure of unilateral state action, but not equally for all issue areas. From antitrust to tax evasion, climate change, or labour rights violations abroad, the mechanisms provided by multilateral agreements have remained limited. Moreover, since the 1990s we observe a stagnation in the creation of new international organizations and the conclusion of new treaties, with a significant shift towards informal arrangements which carry fewer sovereignty costs but often also less promise for effective governance.<sup>18</sup>

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<sup>15</sup> Felix S Cohen, 'Transcendental Nonsense and the Functional Approach' (1935) 35 Columbia Law Review 809, 810–811.

<sup>16</sup> „Globalization over 5 centuries“, <https://ourworldindata.org/trade-and-globalization> (last accessed 12.04.2019).

<sup>17</sup> See only Charles R Beitz, *Political Theory and International Relations* (Cambridge Univ Press 1979); David Miller, *National Responsibility and Global Justice* (Oxford University Press 2007).

<sup>18</sup> See Joost Pauwelyn, Ramses A Wessel and Jan Wouters, 'When Structures Become Shackles: Stagnation and Dynamics in International Lawmaking' (2014) 25 European Journal of International Law 733; Nico Krisch, 'The Decay of Consent: International Law in an Age of Global Public Goods' (2014) 108 American Journal of International Law 1; Kenneth W Abbott and Benjamin Faude, 'Choosing Low-Cost Institutions in Global Governance' [undefined/ed] International Theory 1.

In light of these challenges, we would expect significant change in the law of jurisdiction – an expansion of jurisdictional boundaries in order to come to terms with the difficulty of localizing acts and regulating business actors operating on a global scale.<sup>19</sup> Yet at first glance, surprisingly little change is apparent in the international legal discourse around jurisdiction – the predominant conceptual framework and terminology move on familiar terrain. Most accounts operate with the traditional categories of jurisdiction: the territoriality principle as a starting point, coupled with personality (active and/or passive), the protective principle (somewhat unstable), and the principle of universality (expanding but nevertheless limited in our context).<sup>20</sup> Only the effects doctrine, originating in US competition law, developed relatively anew between territoriality and protective principle after World War II.<sup>21</sup>

This continuity is reflected, for example, in the standard work by Cedric Ryngaert, in the overview prepared by the Secretariat of the International Law Commission in 2006, or in the recent *Restatement (Fourth)* of US Foreign Relations Law.<sup>22</sup> However, one can also detect attempts to better substantiate the exceptions to the territorial principle in theory and to understand them as an expression of a common principle. The aforementioned report for the International Law Commission, for example, sees the "legitimate interest" of a state on the basis of a "connecting link" as a "common element" of the foundations of extraterritorial jurisdiction.<sup>23</sup> This principled reading has also found significant support in scholarship.<sup>24</sup>

The Restatement, however, goes one step further, thus breathing life into the approach proposed by Mann more than five decades earlier. In the Restatement, the various points of contact are seen not only as an expression of a broader principle, but this principle is also postulated as a new general rule. According to this new rule, the exercise of jurisdiction is permissible if there is a 'genuine connection' between the state and the object of regulation.<sup>25</sup> This is an important step, yet one that does not address the fact that the traditional grounds for jurisdiction have formed historically specific conditions and limits which cannot easily be subsumed under a general principle. Some of these grounds, such as the principle of protection, also remain controversial. The basis for this step in the Restatement is then rather thin. Much of the scholarly literature it references does not go as far, and the cited state practice is limited – it stems solely from statements by Australia, Great Britain and Canada in US court proceedings.<sup>26</sup>

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<sup>19</sup> See, e.g., Piet Jan Slot and Mielle Bulterman (eds), *Globalisation & Jurisdiction* (Kluwer Law International 2004).

<sup>20</sup> See, e.g., the account in Crawford (n 2) 456–464. See also Mills (n 3) 188., for a similar observation to that made here.

<sup>21</sup> See also Peter D Szigeti, 'The Illusion of Territorial Jurisdiction' (2017) 52 *Texas International Law Journal* 369., on the longer history of the effects doctrine.

<sup>22</sup> Ryngaert, *Jurisdiction in International Law* (n 4); International Law Commission, 'Extraterritorial Jurisdiction: Report Prepared by the Secretariat' (2006); *Restatement of The Law Fourth: The Foreign Relations Law of the United States* (American Law Institute 2018).

<sup>23</sup> International Law Commission (n 23) 231.

<sup>24</sup> See e.g. RY Jennings and Arthur Watts, *Oppenheim's International Law*, vol 1 (9th edn, Oxford University Press, Oxford 1992) 457–458; Crawford (n 2) 457.

<sup>25</sup> *Restatement of The Law Fourth: The Foreign Relations Law of the United States* (n 23) 187–195.

<sup>26</sup> *ibid* 191.

Nevertheless, this step towards ‘genuine connections’ may be the beginning of a response to the challenges outlined above, and it reflects calls for rethinking jurisdictional boundaries among scholars. While many scholars remain wedded to the traditional categories, a growing number have advanced alternatives to the territorial focus that is increasingly seen as too limited in current circumstances.<sup>27</sup> Two approaches stand out.

The first starts from the *community* with which jurisdiction is associated. This takes one of the modern pillars of territorial jurisdiction – the link with a specific polis – and translates it into a world of multiple affiliations. Paul Schiff Berman captures this cogently:

“We belong to many communities. Some may be local, some far away, and some may exist independently of spatial location. Jurisdiction is the way that law traces the topography of these multiple affiliations.”<sup>28</sup>

Berman’s own account is cosmopolitan and pluralist in outlook – based on communities and jurisdiction at different levels, including the global, which sit alongside each other and frequently interact. Other community-oriented approaches place greater emphasis on the national political community as the predominant frame.<sup>29</sup> Whatever the precise limits, the linkage between community and jurisdiction comes with an intuitive normative appeal and with the promise of reflecting changing (and potentially broadening) understandings of community. Yet it might be less suited to issues of economic regulation, especially because it has difficulty capturing the extra-community activities of corporations which often simply do not ‘belong’ to any community but themselves. This could be remedied, in part, by licencing (unilateral) action to protect an ‘international community’ and its values<sup>30</sup>, but with an abstract community of this kind, the risks of abuse are high.

A second alternative is *functional* in nature and understands the extent of jurisdiction as a function of the problems to be addressed. This sometimes begins from considerations of justice; more often it takes as a basis efficacy considerations in the context of (global) public goods, with the scope of jurisdiction following the need to respond to particular issues and problem constellations.<sup>31</sup> Ralf Michaels’ call for domestic courts to act as ‘global courts’ in order to tackle global problems is a good example for this approach. While acknowledging that properly global institutions (established through worldwide agreement) might be better situated in theory, their absence in many areas leads him, *faute de mieux*, to advocate for a broader jurisdictional reach of

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<sup>27</sup> See also Cedric Ryngaert, ‘Territory in the Law of Jurisdiction: Imagining Alternatives’ [2017] Netherlands Yearbook of International Law 49..

<sup>28</sup> Paul Schiff Berman, ‘The Globalization of Jurisdiction’ [2002] University of Pennsylvania Law Review 311, 530.

<sup>29</sup> Asha Kaushal, ‘The Politics of Jurisdiction’ (2015) 78 The Modern Law Review 759.

<sup>30</sup> See Ryngaert, *Jurisdiction in International Law* (n 4) 228–230.

<sup>31</sup> See, e.g., Daniel Bodansky, ‘What’s So Bad about Unilateral Action to Protect the Environment?’ (2000) 11 EJIL 339; Ralf Michaels, ‘Global Problems in Domestic Courts’, *The Law of the Future and the Future of Law* (Sam Muller et al. eds.) (2011) <[https://scholarship.law.duke.edu/faculty\\_scholarship/2450](https://scholarship.law.duke.edu/faculty_scholarship/2450)>; Cécile Fabre, ‘Secondary Economic Sanctions’ (2016) 69 Current Legal Problems 259; August Reinisch, ‘Human Rights Extraterritoriality: Controlling Companies Abroad’, *Community Interests Across International Law* (E. Benvenisti et al., eds.) (2018).



national courts when faced with globalized markets, transboundary human rights violations and other problems of a global character.<sup>32</sup>

While these two approaches seek to reconstruct existing practice and orient it in a principled and desirable direction, other accounts remain skeptical about this enterprise in general. Instead of seeing justifiable principles at work, they regard jurisdiction as a tool of control, exercised by powerful actors (or at their behest) over weaker ones. B.S. Chimni's recent attempt to read the history of jurisdiction in a Marxist light, with an emphasis on the protection of a (national or transnational) capitalist class, reflects this general strand well.<sup>33</sup> Yet others, too, have conceived of jurisdiction primarily as a technology of governance – some from a generally critical perspective<sup>34</sup>, others from a close engagement with practices in particular issue areas.<sup>35</sup> These voices inject a healthy dose of self-reflection and distance into a debate that otherwise often focuses on problem-solving, whether national or global.

### III. Practices of Jurisdiction

If we seek to understand how legal practice has responded to pressures for jurisdictional change, we need to be cautious in our expectations of a “practice”. The practice on jurisdictional issues is confusing, widely ramified and a conglomerate of specific partial practices – regimes in individual countries and subject areas that are often only loosely related to each other, also because the actor constellations are nationally shaped and factually heterogeneous.<sup>36</sup> The practice in competition law differs from that in environmental law, the practice in combating corruption differs from that in financial regulation, and all of these in turn differ from the practice in combating human rights violations abroad. It is therefore more a patchwork than a coherent system. The approach chosen here is to zoom in on contemporary jurisdictional practices through five vignettes of specific transboundary problem contexts. Selected for the degree of which can give us indications of connecting lines and wider developments.

#### 1. Football

The travails of regional and global football associations have been in the public eye for some time, and they are instructive not only for football enthusiasts but also for those interested in jurisdictional boundaries. Here we focus on the recent corruption scandal surrounding the Fédération Internationale de Football Association (FIFA) – the global footballing body, registered as a Swiss non-profit association. The scandal was provoked by the fact that some of FIFA's highest officials accepted significant rewards for their voting behaviour, especially when it came to decisions about the location of world cup competitions.<sup>37</sup>

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<sup>32</sup> Michaels (n 32).

<sup>33</sup> BS Chimni, 'International Law of Jurisdiction: A TWAIL Perspective' manuscript.

<sup>34</sup> See also the survey in McVeigh, 2019.

<sup>35</sup> Brummer, 525-526.

<sup>36</sup> See also Ryngaert, *Jurisdiction in International Law* (n 4) 1–2.

<sup>37</sup> See for example David Conn, *The Fall of the House of Fifa* (Random House 2017).

Jurisdictionally the case is of interest because it has not been pursued primarily by Swiss prosecutors, but instead by their US counterparts. This is initially surprising as the defendants are mostly citizens of Caribbean and Latin American countries – Brazil, Peru, Uruguay, Trinidad and Tobago, etc. – but not of the US. It is yet more surprising because the relevant arrangements did not take place in the US either, but in Switzerland and elsewhere. Thus neither territoriality nor nationality are *prima facie* available as jurisdictional grounds.

The US nevertheless applies its criminal law to these cases, motivated also by the suspicion that Swiss prosecutors may be too lax to generate convictions.<sup>38</sup> The technical argument relies on the fact that the crimes were partly committed within the US – that relevant payments were made via US banks, and that US subsidiaries benefited from marketing deals, and that participants travelled via New York airports with bribery cheques.<sup>39</sup> These territorial links become relevant because of the crimes chosen for prosecution – crimes such as wire fraud, for example, for which the defendants only needed to have made ‘more than minimal’ use of transfers to or from the US.<sup>40</sup> The extraterritorial reach of some of the offences in question may be in doubt under US law.<sup>41</sup> But on the international plane, neither Switzerland nor other countries seem to have protested against the US action in these cases, and many defendants have been extradited to the US.<sup>42</sup>

The case illustrates the scope of the territorial principle when it comes to global economic relations – relations that extend across large parts of the world, as here – and especially where transnational financial crime is concerned.<sup>43</sup> If they have the resources, states can bring these economic relations under their jurisdiction, even if only a limited aspect is linked to their territory. The result is a multiplication of potentially competent states – the indictment in the FIFA case mentions acts in far more than a dozen states.

## 2. Finance

Financial markets epitomize globalization’s latest phase, with financial flows zigzagging across borders in a matter of seconds and – as has been clear at least since the 2008 financial crisis – with severe implications for the stability of the broader economy.<sup>44</sup> Jurisdictional boundaries hardly fit

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<sup>38</sup> Mike Leary, ‘Where Should They Go: Why the United States Should Have Jurisdiction over Those Being Charged in the FIFA Corruption Scandal’ (2017) 40 *Loyola of Los Angeles International and Comparative Law Review* 51.

<sup>39</sup> United States District Court for the Eastern District of New York, Indictment of 20.5.2015, 15 CR 0252(RJD)(RML).

<sup>40</sup> United States District Court for the Eastern District of New York, Judgment of 22.6.2018, *U.S. v. Napout et al.*, 332 F.Supp.3d 533 (2018). For a detailed analysis, see Jake Elijah Struebing, ‘Federal Criminal Law and International Corruption: An Appraisal of the FIFA Prosecution’ (2018) 21 *New Criminal Law Review* 1.

<sup>41</sup> *ibid* 12–27.

<sup>42</sup> Most of the defendants have entered into agreements on criminal proceedings in the USA; others have been convicted. See *Das*, *New York Times*, 22.8.2018, p. B11.

<sup>43</sup> See Chat Le Nguyen, ‘National Criminal Jurisdiction over Transnational Financial Crimes’ (2020) ahead-of-print *Journal of Financial Crime* <<https://doi.org/10.1108/JFC-09-2019-0117>> accessed 24 July 2020.

<sup>44</sup> Gerald A Epstein, *Financialization and the World Economy* (Edward Elgar Publishing 2005).

such a globalized market, and especially for the US – counting by far the largest amount of transboundary financial flows worldwide – it has become common practice to also regulate various extraterritorial aspects of these markets.<sup>45</sup>

The jurisdictional nexus is mainly established through the fact that the regulated actors are also present on American markets. Companies trading shares on the New York Stock Exchange as well as banks offering products in the US are regarded as domestic and consequently subject to US law. In addition, many rules also apply to the parent companies of banks operating in the US, even if they are incorporated abroad. For example, banks whose subsidiaries are active on the US market must demonstrate to the Federal Reserve Bank that their *global* operations are sufficiently capitalised.<sup>46</sup> And as soon as (foreign) banks conduct transactions via US accounts – which is often difficult to avoid given the central position of the US dollar<sup>47</sup> – they expose themselves to the full application of US law, for example as regards sanctions against third countries.<sup>48</sup>

Yet the US is not alone with this approach. The European Union also requires, for example, that foreign hedge funds wishing to offer products within the Union comply with European rules on liquidity, capitalisation, conflicts of interest and risk management. This can be relaxed under certain circumstances, but only if ‘equivalent’ rules apply in the home state.<sup>49</sup>

With these far-reaching measures, the US and the EU are trying to get a grip on globally operating financial markets and thus seek to overcome the problems arising from the disjuncture between political fragmentation and market integration. As a result, their jurisdictional claims cover most relevant actors on the respective markets for most of their activities, wherever they physically take place. Despite certain reservations in detail<sup>50</sup>, this expansion of jurisdictional claims does not seem to be seriously questioned in principle – not even where it has led to enormous penalties for foreign banks.<sup>51</sup>

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<sup>45</sup> Chris Brummer, ‘Territoriality as a Regulatory Technique: Notes from the Financial Crisis’ (2010) 79 *University of Cincinnati Law Review* 499.

<sup>46</sup> *ibid* 504.

<sup>47</sup> Patrick Emmenegger, ‘The Long Arm of Justice: U.S. Structural Power and International Banking’ (2015) 17 *Business and Politics* 473.

<sup>48</sup> See for example Kristina Daugirdas and Julian Davis Mortenson, ‘Contemporary Practice of the United States Relating to International Law’ (2014) 108 *American Journal of International Law* 783, 826–831., on the penalties for European banks for the circumvention of US sanctions.

<sup>49</sup> Joanne Scott, ‘Extraterritoriality and Territorial Extension in EU Law’ (2014) 61 *American Journal of Comparative Law* 87, 104–105. In its regulation of derivatives, the EU goes one step further by regulating contracts between non-EU partners when necessary to prevent circumvention of European rules. In this case, the only remaining issue is the effect of an action.

<sup>50</sup> See e.g. *ibid* 122–123.

<sup>51</sup> Remarkably, the above-mentioned (fn. 48) punishment of European banks for circumventing US sanctions appears not to have led to protests by European governments against the exercise of jurisdiction as such since many of the transactions in question were conducted through US accounts.

### 3. Ports

Port cities have always been particularly globalized places, interfaces with the rest of the world.<sup>52</sup> Not only are their inhabitants exceptionally diverse, mobile and cosmopolitan, but these cities also offer access to market actors – ships – from all over the world. This access gives governments opportunities to enhance not only trade but also control, for example to enforce rules on global environmental protection or fisheries regulation.

Exercising this kind of control, however, is often difficult to square with the freedom of the high seas and the sole jurisdiction of the flag state there.<sup>53</sup> For example, according to the European Court of Justice, vessels from third countries are not subject to EU jurisdiction on the high seas, but once they call at an EU port, they can face punishment for illegal high-seas fishing (as well as confiscation of the catch).<sup>54</sup> And the US has long made the importation of fish caught illegally on the high seas a punishable offence. Some such action by port states has found a conventional legal basis in the 2009 FAO Agreement on Port State Measures, but only as between the contracting parties and short of criminal penalties or confiscation.<sup>55</sup> The Agreement's ambiguity on further-reaching measures – it explicitly does not affect a port state's right to take more stringent measures 'in accordance with international law'<sup>56</sup> – seems to reflect a continued hesitation by parts of the FAO membership to give broader practices formal sanction.<sup>57</sup>

Such hesitation notwithstanding, the EU regards those who enter its ports as subject to the regulation of their behaviour wherever it occurs, typically 'territorializing' activities abroad (or on the high seas) by construing links with behaviour in the port.<sup>58</sup> EU regulations have increasingly used this mechanism to broaden their extraterritorial reach, for example with regard to reporting obligations on global CO<sub>2</sub> emissions on journeys to or from the EU, or by forcing ships to comply with the rules of a shipping service even outside EU waters.<sup>59</sup> These regulations typically equate ships bound for an EU port with those flying the flag of a member state.

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<sup>52</sup> Carolyn Cartier, 'Cosmopolitics and the Maritime World City' (1999) 89 *Geographical Review* 278.

<sup>53</sup> See Sophia Kopela, 'Port-State Jurisdiction, Extraterritoriality, and the Protection of Global Commons' (2016) 47 *Ocean Development & International Law* 89; CMJ Ryngaert and Henrik Ringbom, 'Port State Jurisdiction: Challenges and Potential' (2016) 31 *The International Journal of Marine and Coastal Law* 379.

<sup>54</sup> CJEU, Judgment of 24.11.1992, *Poulsen und Diva Navigation Corp.*, C-286/90, 1990-I-6048, §28.

<sup>55</sup> Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing, <http://www.fao.org/3/i5469t/i5469t.pdf> (last accessed 13.4.2019). Art. 218 of the UN Convention on the Law of the Sea provides a basis for measures on the high seas.

<sup>56</sup> Article 4(1b) PSMA.

<sup>57</sup> See also Emma Witbooi, 'Illegal, Unreported and Unregulated Fishing on the High Seas: The Port State Measures Agreement in Context' (2014) 29 *The International Journal of Marine and Coastal Law* 290, 308–314.

<sup>58</sup> Ryngaert and Ringbom (n 54) 384.

<sup>59</sup> Art. 2 Regulation (EU) 2015/57, *ABIEU* 2015 L 123/55; Art. 8(b) Directive 2002/59, *ABIEU* 2002 L 208/10.

The extent of acceptance of this port-state nexus emerges from a dispute over the *Torres Strait* between Australia and Papua New Guinea.<sup>60</sup> In order to enhance protection of the marine environment, Australia began in 2006 to demand a mandatory pilot service for ships passing the strait but met with protests from various states, including Singapore and the US. In response, the Australian government agreed to limit the mandatory pilotage scheme (and its enforcement through penalties) to those vessels entering one of its ports, and to operate a merely voluntary scheme for all other ships. Here again, even though the regulation of shipping as such may be barred in this area, it becomes possible when a territorial nexus is established, even if that nexus – entering a port – has nothing to do with the regulated activity itself.

#### 4. Rights

When it comes to the protection of human rights against corporate activities abroad, all eyes were long on the *Alien Tort Claims Act* which served as a basis for US courts hearing claims over rights violations by private actors around the world.<sup>61</sup> With the decision of the Supreme Court in *Kiobel* in 2013, this discussion has lost much of its interest as acts outside the US that do not ‘touch or concern’ the US sufficiently are now excluded from the scope of the ATCA<sup>62</sup>; later decisions have further limited the application of ATCA to foreign corporations.<sup>63</sup> The earlier practice had engendered significant debate over jurisdictional boundaries and led some to diagnose an ‘emerging universal civil jurisdiction’.<sup>64</sup> The Supreme Court did not enter, let alone resolve, this debate – it eventually restricted ATCA’s reach solely on the basis of the presumption against extraterritoriality in domestic law.<sup>65</sup>

The focus of human rights activists has thus shifted to other fora and mechanisms.<sup>66</sup> One such forum is UN Human Rights Council, with the treaty negotiations mentioned above as well as the further development of the *Guiding Principles on Business and Human Rights*. Other sites of

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<sup>60</sup> Kopela (n 54) 101–102; Donald R Rothwell, ‘Compulsory Pilotage and the Law of the Sea: Lessons Learned from the Torres Strait’ (Social Science Research Network 2012) ANU College of Law Research Paper 12–06 <<https://papers.ssrn.com/abstract=2020781>> accessed 28 July 2020.

<sup>61</sup> See e.g. Tonya L Putnam, *Courts without Borders: Law, Politics, and US Extraterritoriality* (Cambridge University Press 2016) ch 6; Inga Meyer, *Der Alien Tort Claims Act: Zwischen Völkerrecht und amerikanischer Außenpolitik* (Mohr Siebeck 2018).

<sup>62</sup> *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108 (2013).

<sup>63</sup> See, e.g., *Jesner v. Arab Bank*, 584 U.S. \_\_ (2018); also William S Dodge, ‘Jesner v. Arab Bank: The Supreme Court Preserves the Possibility of Human Rights Suits Against U.S. Corporations’ (*Just Security*, 26 April 2018) <<https://www.justsecurity.org/55404/jesner-v-arab-bank-supreme-court-preserves-possibility-human-rights-suits-u-s-corporations/>>.

<sup>64</sup> Donald Francis Donovan and Anthea Roberts, ‘The Emerging Recognition of Universal Civil Jurisdiction’ (2006) 100 *American Journal of International Law* 142.

<sup>65</sup> This stipulates that laws - in all fields of law - are to be interpreted as territorially limited unless they explicitly or implicitly suggest a broader scope of application.; see Hannah L Buxbaum, ‘The Scope and Limitations of the Presumption against Extraterritoriality’ (2016) 110 *AJIL Unbound* 62. The Supreme Court then further closed the door to the application of the ACTA on foreign companies in 2018 in *Jesner v Arab Bank*, No. 16-499, 584 U.S. \_\_ (2018).

<sup>66</sup> See generally Rachel Chambers, ‘An Evaluation of Two Key Extraterritorial Techniques to Bring Human Rights Standards to Bear on Corporate Misconduct’ (2018) 14 *Utrecht Law Review* 22; Reinisch (n 32).

engagement are to be found around national legislation such as the British and Australian *Modern Slavery Act*, the French *Loi sur le devoir de diligence*, or the Californian *Transparency in Supply Chains Act*. In Switzerland, a popular initiative with a similar orientation is pending, and in Germany, too, there is political movement towards a *Lieferkettengesetz*.<sup>67</sup>

While the Guiding Principles only recommend that states set out an expectation that businesses domiciled in their territory respect human rights ‘throughout their operations’, the national statutes contain firmer requirements and geographically extend the scope of certain national standards of human rights protection. The substantive and procedural obligations they create typically apply to the entire supply chain, regardless of where in the world suppliers are located. And the circle of obligated companies often goes far beyond those incorporated in the country; instead, it includes all companies – typically large corporations – doing business there. In the UK case, for example, the disclosure requirements under the Modern Slavery Act apply to any company above a certain size that ‘carries on a business, or part of a business’ in the UK.<sup>68</sup> The companies concerned thus do not have to have an exclusive, or even a particular link with the country – in practice, the UK legislation covers any globally-operating company of a certain size, regardless of where it is incorporated or has its business focus.

The UK Act foresees only disclosure requirements, not substantive obligations, across the supply chain, but such disclosure can have significant effects if it leads shareholders (and the broader public) to push for a mitigation of existing risks. In other contexts, the obligations go further. The French law, for example, provides for the civil responsibility of companies for damages resulting from the failure to draw up a ‘plan de vigilance’.<sup>69</sup> And the draft UN treaty contains an obligation for contracting states to require human rights due diligence obligations and to impose liability on companies not only for harm they have caused themselves but also for harm caused by other businesses if they control the latter or should have foreseen risks of human rights abuses, regardless of where these are committed.<sup>70</sup>

The scope and strength of extraterritorial human rights protection still vary heavily, in part as a result of complex negotiations and political compromises. Yet in their different ways, all these initiatives push global corporations to assume human rights responsibilities – in most cases regardless of where they are incorporated or where potential human rights violations are committed. Even in those cases in which the circle of targeted companies is more narrowly

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<sup>67</sup> On the legislation see. UK Modern Slavery Act 2015 c. 30, [http://www.legislation.gov.uk/ukpga/2015/30/pdfs/ukpga\\_20150030\\_en.pdf](http://www.legislation.gov.uk/ukpga/2015/30/pdfs/ukpga_20150030_en.pdf); Australian Modern Slavery Act No. 153, 2018, <https://www.legislation.gov.au/Details/C2018A00153>; Loi no 2017-399, JORF n°0074 du 28 mars 2017, <https://www.legifrance.gouv.fr/eli/loi/2017/3/27/2017-399/lo/texte>; California Senate Bill 657, 30.09.2010, [https://oag.ca.gov/sites/all/files/agweb/pdfs/cybersafety/sb\\_657\\_bill\\_ch556.pdf](https://oag.ca.gov/sites/all/files/agweb/pdfs/cybersafety/sb_657_bill_ch556.pdf). On the Swiss Konzernverantwortungsinitiative see <https://www.bj.admin.ch/bj/de/home/wirtschaft/gesetzgebung/konzernverantwortungsinitiative.html>. On the German draft see <https://www.sueddeutsche.de/politik/menschenrechte-merkel-fuer-lieferkettengesetz-1.4968583>.

<sup>68</sup> Art. 54 § 12 (a) UK Modern Slavery Act, supra note 67.

<sup>69</sup> Article 2 of the loi no 2017-399, supra note 67.

<sup>70</sup> Articles 6 and 8(7) of the Second Revised Draft Treaty, supra note 5.

defined, the obligations themselves also relate to the monitoring of subsidiaries located abroad, or to entire global value chains. A number of recent court cases point in a similar direction<sup>71</sup>, thus loosening the jurisdictional cuts established by in modern law through political borders and corporate organization.<sup>72</sup> Boundaries do not disappear entirely here: resistance continues against ‘suits by foreign plaintiffs against foreign corporate defendants for conduct that took place entirely within the territory of a foreign sovereign’.<sup>73</sup> But in most cases in which some – however remote – nexus is present, the limitations of territoriality (and jurisdiction based on personality) are gradually untied.<sup>74</sup>

## 5. Data

Traditional, territorially-oriented models of jurisdiction are nowhere nearly as much under pressure as in the context of the internet. With data moving across borders incessantly, often composed of elements distributed across servers in different geographical locations, its fleeting character stands in contrast to the spatial fixity associated with territory. Whether ‘data is different or not’<sup>75</sup>, it certainly forces us to reappraise what jurisdiction means in the space it constitutes.<sup>76</sup>

One area in which such reappraisals have become particularly visible in recent years is that of delisting requirements, especially around the ‘right to be forgotten’. Soon after this right had been acknowledged by the Court of Justice of the European Union, questions arose as to its boundaries. While Google took the view that the need to remove links to certain pages at a user’s request was limited to its country-domain search engine, many regulators sought a broader scope. The French Commission Nationale de l’Informatique et des Libertés, notably, wanted Google to pursue delisting on a global scale to make the protection for the individual effective.<sup>77</sup> In the resulting fresh round of litigation, the CJEU found in favour of Google, but only as a matter of interpretation of the EU directive in question. Its view on jurisdiction in general was not so limited:

“In a globalised world, internet users’ access — including those outside the Union — to the referencing of a link referring to information regarding a person whose centre of interests is situated in the Union is thus likely to have immediate and substantial effects on that person

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<sup>71</sup> See, e.g., UK Supreme Court, *Vedanta Resources PLC et al. v Lungowe et al.*, (2019) UKSC 20; Supreme Court of Canada, *Nevsun Resources Ltd v Araya*, 2020 SCC 5. On a similar case in the Netherlands, see Ryngaert, ‘Territory in the Law of Jurisdiction’ (n 28) 76.

<sup>72</sup> See Julia Eckert, ‘Entangled Hopes: Towards Relational Coherence’, *Entangled Legalities Beyond the State* (N. Krisch, ed.) (Cambridge University Press forthcoming).

<sup>73</sup> See, e.g., the position of Germany in the US Kiobel litigation: [in Liste, 228-229].

<sup>74</sup> See also Philip Liste, ‘Geographical Knowledge at Work: Human Rights Litigation and Transnational Territoriality’ (2016) 22 *European Journal of International Relations* 217.

<sup>75</sup> See the contrasting positions in Daskal (n 15); Andrew Keane Woods, ‘Against Data Exceptionalism’ (2016) 68 *Stanford Law Review* 729.

<sup>76</sup> See, e.g., Fleur Johns, ‘Data Territories: Changing Architectures of Association in International Law’ [2016] *Netherlands Yearbook of International Law* 107.

<sup>77</sup> See Andrew Keane Woods, ‘Litigating Data Sovereignty’ (2018) 128 *Yale Law Journal* 328, 341-345.

within the Union itself. ... Such considerations are such as to justify the existence of a competence on the part of the EU legislature to lay down the obligation, for a search engine operator, to carry out ... a de-referencing on all the versions of its search engine.”<sup>78</sup>

A similarly effects-based argument prevailed in a recent Canadian case concerning the protection of intellectual property. Rejecting Google’s challenge of an injunction to delist worldwide, the Canadian Supreme Court emphasized that “[t]he Internet has no borders — its natural habitat is global” and that in order for the injunction to become effective it had to “apply where Google operates — globally”.<sup>79</sup>

Despite recent attempts by governments (especially the Chinese) to reterritorialize the internet<sup>80</sup>, Canadian and European courts here portray it as a borderless space that requires a new and more expansive position on jurisdictional questions – at least one that stretches the notion of effects jurisdiction yet further. A similar approach seems to underlie recent developments regarding access to data in law enforcement where an initial, more territorially-oriented stance has given way to an understanding of cloud data as ubiquitous rather than localized on the server on which it finds itself at a given moment.<sup>81</sup> Even if contestation continues in this field, a shift towards a more ‘globalized jurisdiction’<sup>82</sup> will be hard to avoid.

#### IV. Towards a Jurisdictional Assemblage

The picture that emerges from these five vignettes is not entirely clearcut. Practices differ significantly from one field to another, a small group of states is at the centre of the action, and contestation is typically muted but persists in some contexts. Not in all aspects have changing practices thus led to new, consolidated understandings of international legal limits. Nevertheless, it is a picture that stands in quite some contrast with the idea of territorial jurisdiction as typically conceived – of countries with separate spheres of action and (more or less) fixed boundaries between them. Instead we observe widespread assertions of practically ‘unbound’ jurisdiction, and as a result a complex assemblage of jurisdictional spheres. In this assemblage, overlap and interaction rather than separation are dominant characteristics – and some countries’ spheres are much larger than others’.

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<sup>78</sup> CJEU, Judgment of 24 September 2019, C-507/17, *Google v. CNIL*, paras. 57-58.

<sup>79</sup> Supreme Court of Canada, Judgment of 28 June 2017, *Google Inc. v. Equustek Solutions Inc.*, 2017 SCC 34, [2017] 1 S.C.R. 824, at 826.

<sup>80</sup> See Daniel Lambach, ‘The Territorialization of Cyberspace’ [2019] *International Studies Review* 13–17.

<sup>81</sup> Jennifer Daskal, ‘Borders and Bits’ (2018) 71 *Vanderbilt Law Review* 179, 186–209; Woods (n 78) 345–347; Roxana Vatanparast, ‘Data and the Elasticity of Sovereignty’ (2020) *ESIL Conference Paper* 25/2019 <<https://papers.ssrn.com/abstract=3609579>> accessed 29 July 2020. See also Kristen E Eichensehr, ‘Data Extraterritoriality’ 95 *Texas Law Review* 145. on the approach taken in the Tallinn Manual.

<sup>82</sup> Berman (n 29).



### 1. Territorial Extensions

The discursive frames through which this assemblage is construed are notably traditional. In the examples we have surveyed, claims are formulated almost exclusively on the basis of territoriality and active personality – jurisdiction is exercised over acts that take place at least in part on one’s own territory, or over persons who have the nationality or their domicile there. There are hardly any traces of the more controversial categories, such as the principle of protection, passive personality or universal jurisdiction. Even the effects doctrine is not as prominent as one might have expected – it may still be important in areas such as competition, financial markets and partly also in environmental protection<sup>83</sup>, but in our vignettes it only makes a (limited) appearance in the internet context.

The fact that the classic categories play such a central role is primarily due to their elasticity.<sup>84</sup> It is the very challenges for the jurisdictional regime mentioned above – unlocalizable acts, ubiquitous actors and unbound markets – that have led to a redefinition of what is understood as ‘territory’. While the traditional model of jurisdiction centres on individual acts and their concrete location, we are today faced increasingly with conglomerates of actions, temporally and geographically extensive, which take place everywhere and nowhere in particular. In globalized economic and communicative relations, ‘territorial’ connections can be established by almost every state, but they are always only partial and coexist in parallel.<sup>85</sup> Yet such partial links appear to be widely accepted to ground jurisdictional claims.

The same applies to actors. The jurisdictional imagery focuses first and foremost on natural persons with a clear link to a state, primarily based on nationality. For legal persons, the situation was always more complex, but the rise of multinational corporations has made the attempt to create a link with one state even more artificial. The evolution of the active personality principle compensates for this by creating a nexus mainly through presence: if a company is active on a country’s market (in however virtual a way), it is deemed to be subject to that country’s jurisdiction, including with respect to activities taking place elsewhere. Here again, most larger companies are active on many markets, thus becoming subject to a number of jurisdictions for their worldwide operations. Jurisdiction then turns ‘ubiquitous’.<sup>86</sup>

Joanne Scott has described aspects of this expansion as ‘territorial extensions’, sitting between classic territoriality and extraterritoriality as such.<sup>87</sup> These extensions are characterized by the fact that the exercise of jurisdiction rests on a territorial connection (however thin) but the measures applied require the consideration of behaviour or circumstances beyond territorial boundaries. In the most typical case, regulators require companies seeking market access to comply with certain standards – for environmental protection, financial market stability, etc – even in their activities abroad. The consequences are far-reaching, because weak territorial links

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<sup>83</sup> See e.g. Austen Parrish, ‘The Effects Test: Extraterritoriality’s Fifth Business’ (2008) 61 *Vanderbilt Law Review* 1455. for a critical account.

<sup>84</sup> See also Vatanparast (n 82).

<sup>85</sup> See also Ryngaert, ‘Territory in the Law of Jurisdiction’ (n 28) 65–68; Szigeti (n 22) 394–398.

<sup>86</sup> Michaels 2011.

<sup>87</sup> Scott (n 50) 90.

can give rise to far-reaching jurisdictional claims, as we have observed in the port state example where a ship's arrival in port was seen to allow the port state to exercise jurisdiction over parts of the ship's voyage lying outside its territorial waters.<sup>88</sup> The EU Court of Justice has used the same argument in the case of aviation emissions, finding that an aircraft landing at an EU airport submits to the 'unlimited' jurisdiction of the EU, thus permitting the Union to establish rules also for emissions produced during the parts of a flight that take place outside EU airspace.<sup>89</sup> This decision met with considerable resistance<sup>90</sup>, but in many contexts territorial extensions are widely accepted. The price to be paid for access – to a territory or market – is acceptance of jurisdiction of a much wider scope.

## 2. Territory in Flux

The conceptual fluidity evoked by these extensions reminds us that 'territory' is not a fixed entity, but itself a historical and social construct – an insight that has found increasing attention in recent years, especially among historians, political philosophers, and critical geographers. Stuart Elden's *Birth of Territory* has made this point perhaps most prominently, noting that territory is a historically contingent notion and not necessarily associated with the idea of a delimited, definable space.<sup>91</sup> For Elden, territory instead represents a 'political technology' – or rather a bundle of technologies – that relate state and space, relying on the measuring of land and control of terrain.<sup>92</sup> 'Territory' then is not a natural feature but an outcome of political attempts at demarcating and dominating.<sup>93</sup>

In this sense, we can understand the expansive tendencies of the jurisdictional regime as a reorientation of this political technology, one that transcends the classical, physical demarcation through an attempt to control a broader space. This space – functionally rather than physically connected to the state, yet geographically, sociologically and economically already 'measured' – is not subjected to exclusive control. The aim is instead, similar to the early modern empires, one of enabling access in case of need. This creates a subsidiary, non-primary territoriality, and also one that can coexist with other (primary or subsidiary) territorialities. The extensions of jurisdiction would then be a step towards a reconfiguration of territory, territoriality and jurisdiction in the conditions of a globalized world.<sup>94</sup>

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<sup>88</sup> See above section III.3.

<sup>89</sup> CJEU, *Air Transport Association of America*, C-366/10, Judgment of 21.12.2011, para. 125.

<sup>90</sup> See below section IV.3.

<sup>91</sup> Stuart Elden, *The Birth of Territory* (University of Chicago Press 2013). See also Robert David Sack, *Human Territoriality: Its Theory and History* (CUP Archive 1986); John Agnew, 'The Territorial Trap: The Geographical Assumptions of International Relations Theory' (1994) 1 *Review of International Political Economy* 53; Joe Painter, 'Rethinking Territory' (2010) 42 *Antipode* 1090; Sassen (n 14).

<sup>92</sup> Stuart Elden, 'Land, Terrain, Territory' (2010) 34 *Progress in Human Geography* 799; Elden (n 92).

<sup>93</sup> For uptakes of this understanding in law, see, e.g., Richard T Ford, 'Law's Territory (A History of Jurisdiction)' (1998) 97 *Michigan Law Review* 843; Kaushal (n 30); Ryngaert, 'Territory in the Law of Jurisdiction' (n 28).

<sup>94</sup> See also Martin Kuijer and Wouter Werner, 'The Paradoxical Place of Territory in International Law' [2016] *Netherlands Yearbook of International Law* 3.. See also Buxbaum, 'Territory, Territoriality, and the Resolution of Jurisdictional Conflict' (n 13).

This raises the question whether jurisdictional limits are defined by reference to territory, or whether territory is indeed defined by jurisdictional limits. Elden expresses this ambiguity nicely when he points out that the modern idea of territory not only shapes the state but is also produced by it. Territory then expresses the spatial dimension of the state – it designates ‘the extent of state power’.<sup>95</sup> Understood in this way, a territorially-focused jurisdiction would no longer have much of a limiting function; it would largely *follow* the extent of state power.

The adaptation of norms and their meanings through practice (and the violation of old rules) is, of course, not new to an international legal order which often merely traces what is possible for and desired by states. In terms of jurisdiction, the equation of the extent of the territorial sea with the range of a cannon shot through the three-mile rule is the most prominent historical example.<sup>96</sup> The assertion of jurisdiction today seems to follow similar principles. In our vignettes, jurisdictional claims seem to depend to a large extent on whether a state is factually in a position to control an actor: a ship, an aircraft, a hedge fund, or a social media company; in its own port or on its own market. Rules can be effectively enforced against a bank that operates on the domestic market or a company that wants to sell products on this market, not least by threatening to exclude this actor from the market in the event of non-compliance.<sup>97</sup>

The transformation of the jurisdictional regime might not be complete – as we have seen above, inconsistencies and instances of contestation remain. Yet the reconstruction of territory and territoriality we have observed leads to a relatively ‘unbound’ jurisdiction – states hardly face other limits than those of factual control. This provokes a multiplication of jurisdictional claims in most cross-border situations with which many countries have some nexus. Discursively, the practice may continue to follow traditional categories, but it has redefined them in such a way as to practically deprive them of their limiting and orienting effect. Whether we uphold the classical regime, with its delimited jurisdictional grounds, or instead focus on ‘genuine connections’ as the main criterion, as suggested in the US Restatement, becomes largely irrelevant – both approaches have become almost congruent.

### 3. Remaining Limits

If the territorial nexus has little constraining effect, the focus shifts to other potential jurisdictional limits. This also because, especially in the case of the United States, a more restrictive practice has taken hold over the past fifteen years. I have already mentioned the Supreme Court's turn in interpreting the scope of the Alien Tort Claims Act since the *Kiobel* case.<sup>98</sup> This reorientation follows a broader tendency in US jurisprudence also in other fields. In the 2004 *Empagran*

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<sup>95</sup> Elden (n 92) 322. Liste formulates this cogently: states “they *make* territory while, at the same time, are *made* through territory”: Liste (n 75) 224.

<sup>96</sup> On the history (and contested origins) of the rule, see Wyndham L Walker, ‘Territorial Waters: The Cannon Shot Rule’ (1945) 22 *British Year Book of International Law* 210.

<sup>97</sup> On the effects and limits of such strategies, see Suzanne Katzenstein, ‘Dollar Unilateralism: The New Frontline of National Security’ (2015) 90 *Indiana Law Journal* 293; Nikhil Kalyanpur and Abraham L Newman, ‘Mobilizing Market Power: Jurisdictional Expansion as Economic Statecraft’ (2019) 73 *International Organization* 1.

<sup>98</sup> See above section IV.4.

decision, the Supreme Court put an end to competition law cases for which the concrete effect on the American market could not be proven.<sup>99</sup> The Court continued this line in 2010 with the decision in *Morrison v. Australian Bank*, excluding securities cases with only a secondary connection to the US.<sup>100</sup> This more restrictive approach to extraterritoriality is now a consolidated, cross-cutting jurisprudence.<sup>101</sup>

Broader conclusions on international jurisdictional boundaries, however, can hardly be drawn from this case law. The Supreme Court bases its decisions mainly on domestic US law, namely the general presumption against extraterritoriality, while rules of international law play only a marginal role.<sup>102</sup> The principle of comity, which the Court mentions, also appears less as a legal limit than as a (political) inspiration for American legislation.<sup>103</sup> Moreover, unlike in the private lawsuits that are at the root of these cases, US executive practice continues to be more liberal when it comes to extraterritorial reach.<sup>104</sup>

Quite apart from their value as US state practice, the Supreme Court cases also provide a glimpse into other states' positions. In *Empagran*, for example, Germany, Canada, and Japan intervened to argue that an extensive interpretation of US law would undermine their ability to establish and enforce their own competition rules.<sup>105</sup> In *Morrison*, Australia, France and the UK pointed out that US law should not go so far as to counteract their own political decisions in corporate and financial law.<sup>106</sup> These criticisms mainly concerned the manner in which US courts approached the issues – especially the extent to which they took the interests of other states into account – rather than the question of whether there was any basis for jurisdiction at all.

The latter point was addressed more directly in interventions in the *Kiobel* litigation. Especially the United Kingdom and the Netherlands (home countries of the respondent, Shell) and Germany saw the exercise of jurisdiction as unjustified in cases that lacked “sufficient nexus” or had “little, or no, connection to the United States”. Argentina took the contrary position, depicting the use of the ATCA as an “important contribution by the United States to the cause of international human rights”.<sup>107</sup> This mirrors interventions in earlier cases under the Act. Most of these were critical, some regarding the manner in which other countries' concerns were taken up, some in a more general way. Contestation was strongest for ‘f-cubed’ cases – cases with a foreign plaintiff and a foreign respondent concerning foreign activity – except, in the view of some

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<sup>99</sup> US Supreme Court, *Hoffmann-La Roche, Ltd. v. Empagran*, 542 U.S. 155 (2004).

<sup>100</sup> US Supreme Court, *Morrison v. National Australia Bank Ltd.*, 561 U.S. 247 (2010)

<sup>101</sup> See Austen L Parrish, ‘Fading Extraterritoriality and Isolationism: Developments in the United States’ (2017) 24 *Indiana Journal of Global Legal Studies* 207.

<sup>102</sup> See for example US Supreme Court, *Hoffmann-La Roche, Ltd. v. Empagran*, 542 U.S. 155 (2004), 164.

<sup>103</sup> US Supreme Court, *Hoffmann-La Roche, Ltd. v. Empagran*, 542 U.S. 155 (2004), 169.

<sup>104</sup> Hannah L Buxbaum, ‘Extraterritoriality in the Public and Private Enforcement of U.S. Regulatory Law’, *Private International Law: Contemporary Challenges and Continuing Relevance* (F. Ferrari & Diego P. Fernandez Arroyo eds., Elgar) (Edward Elgar 2019) <<https://papers.ssrn.com/abstract=3369847>> accessed 10 May 2019.

<sup>105</sup> US Supreme Court, *Hoffmann-La Roche, Ltd. v. Empagran*, 542 U.S. 155 (2004), 167-168.

<sup>106</sup> US Supreme Court, *Morrison v. National Australia Bank Ltd.*, 561 U.S. 247 (2010), 269-270.

<sup>107</sup> Quotes from Liste (n 75) 228–229.

countries, if particularly serious human rights violations were at stake, especially violations that might give rise to universal criminal jurisdiction (and by analogy to universal civil jurisdiction). A minority of voices was more broadly positive.<sup>108</sup>

Not many clear and fixed jurisdictional boundaries emerge from these positions, and they are also difficult to identify otherwise. Extensive protests against the exercise of jurisdiction as such are rare, and the principles they follow often remain underspecified. This becomes clear in the two perhaps most prominent cases of such protests in recent years.

One of these cases is the protest against the inclusion of flights from third countries in the European Emissions Trading Scheme. As already mentioned, the EU Court of Justice endorsed this inclusion based on the argument that an aircraft, after landing in the EU, is “subject on that basis to the unlimited jurisdiction of the European Union”.<sup>109</sup> The Court’s Advocate-General had come to the same conclusion, albeit emphasizing the effects of aviation emissions on all countries.<sup>110</sup> Even though both lines of argument are not uncommon, the decision provoked a vehement reaction from other countries.<sup>111</sup> More than twenty states, among them Russia, China, India and the US, expressed their protest through joint declarations<sup>112</sup> and the US went so far as to enact a blocking statute.<sup>113</sup> But the principles on which the protest rested remained vague. The US complained about the violation of its sovereignty by the extraterritorial measures of the EU, but mainly referred to contractual obligations.<sup>114</sup> Most of the protest declarations do not contain clear legal arguments but instead underscore the importance of multilateral action within the framework of ICAO. One declaration emphasizes that the EU measures “are not in accordance with applicable international law” yet without specifying which law is referred to.<sup>115</sup> The EU eventually suspended the contested measures, driving for a solution within ICAO, but on pragmatic grounds alone.

The best-known case of protests against extraterritorial action concerns US secondary sanctions. The EU and other countries have been protesting for decades against US rules that prohibit companies from third countries from trading with sanctioned countries such as Cuba or

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<sup>108</sup> See United Nations Office of the High Commissioner for Human Rights, ‘State Positions on the Use of Extraterritorial Jurisdiction in Cases of Allegations of Business Involvement in Severe Human Rights Abuses: A Survey of Amicus Curiae Briefs Filed by States and State Agencies in ATS Cases (2000-2015)’ (2015) <<https://www.ohchr.org/Documents/Issues/Business/DomesticLawRemedies/StateamicusATS-cases.pdf>> accessed 31 July 2020.

<sup>109</sup> CJEU, *Air Transport Association of America*, C-366/10, Judgment of 21 December 2011, para. 125.

<sup>110</sup> CJEU, *Air Transport Association of America*, C-366/10, Opinion of the Advocate General, 6 October 2011, para. 154.

<sup>111</sup> Joanne Scott and Lavanya Rajamani, ‘EU Climate Change Unilateralism’ (2012) 23 *European Journal of International Law* 469, 473.

<sup>112</sup> See the Joint declaration of the Moscow meeting on inclusion of international civil aviation in the EU-ETS, 22.02.2012, <https://www.ruaviation.com/docs/1/2012/2/22/50?h> (last accessed on 10.05.2019).

<sup>113</sup> Public Law 112-200, 27 November 2011, 126 Stat. 1477.

<sup>114</sup> See the report of the responsible committee in the US House of Representatives, Rept. 112-232, <https://www.congress.gov/congressional-report/112th-congress/house-report/232/1?overview=closed> (last accessed on 10.5.2019).

<sup>115</sup> *Ibid.*

Iran.<sup>116</sup> The EU has issued its own blockade regulation, protesting against the violation of international law through the regulation by the US of “activities of natural and legal persons under the jurisdiction of the [EU] Member States”.<sup>117</sup> Many other countries – including Russia, China and India – have likewise protested against sanctions imposed by the US.<sup>118</sup>

Not many conclusions can be drawn from these debates and controversies for jurisdictional boundaries more broadly, and only few firm limits can be identified.<sup>119</sup> First, there is very little acceptance of a regulation of actors and situations that have no concrete connection to the regulating state (except for universal jurisdiction situations); the protective principle does not seem to help here either.<sup>120</sup> Secondly, the discourse suggests that jurisdictional claims lie on a spectrum of acceptability<sup>121</sup> – the weaker the link with the actors or facts of a case, the more other factors come into play to determine other states’ responses. Measures will then be more contested if important policy decisions of other states are counteracted by extraterritorial action. They may be more widely accepted if measures are linked to international standards or consultations with affected states<sup>122</sup>, or if they are of limited intensity – reporting obligations are easier to justify than criminal sanctions. At the same time, there appear to be specific principles of exclusion from jurisdiction that are difficult to touch; the freedom of the high seas would be an example, as seen above in the *Torres Strait* case.

The weight of the various factors and the precise reasons for exclusion can hardly be determined without considerably more extensive empirical work across different issue areas and situations. We might expect that the picture will differ significantly from one issue areas to another and that we would need a more fine-grained, context-dependent re-specification in order to do justice to the multiplicity of jurisdictional practices. Yet the basic structure can be depicted schematically as follows:

Jurisdiction	Contestable Jurisdiction	No Jurisdiction
Clear territorial or personal nexus	Weak territorial or personal nexus (including territorial extension)	No territorial or personal nexus
	Less acceptable when - interference is intense or - if central political decisions are challenged	Existence of reasons for exclusion: high seas etc.
	More acceptable if - link to international standards - consultations with affected countries	

<sup>116</sup> See, e.g., A Vaughan Lowe, ‘US Extraterritorial Jurisdiction: The Helms-Burton and D’Amato Acts’ (1997) 46 *The International and Comparative Law Quarterly* 378.

<sup>117</sup> Regulation (EC) No. 2271/96 of the Council, 22. november 1996, ABIEU L 309,1; Delegated Regulation (EU) 2018/1100 of the Commission, 6.6.2018, ABIEU L 199 I/1.

<sup>118</sup> See Ryngaert, *Jurisdiction in International Law* (n 4) 118–119.

<sup>119</sup> For a similar picture, see, e.g., Crawford (n 2) 486; Szigeti (n 22) 396–398.

<sup>120</sup> See also Jeffrey A Meyer, ‘Second Thoughts on Secondary Sanctions’ (2008) 30 *University of Pennsylvania Journal of International Law* 905; Szigeti (n 22) 397.

<sup>121</sup> See also United Nations Office of the High Commissioner for Human Rights (n 109) 16.

<sup>122</sup> See e.g. Cedric Ryngaert, *Unilateral Jurisdiction and Global Values* (Eleven International Publishing 2015) 122–137. Or for example the notion of a ‘contingent unilateralism’ in Scott and Rajamani (n 112).

#### 4. An Assemblage

Unbound territoriality, coupled with few clear limitations, tends to produce a multiplicity of competing claims, especially when it comes to corporations. Claims of the country (or countries) in which a company's activities take place stand next to those of the country in which the company is incorporated or has its headquarters, and of other countries in which the company has a relevant presence or in which corporate actions have significant effects.

The result is a jurisdictional assemblage – it is not a regime of demarcated spheres, but one of overlaps and interaction. The contours of this assemblage vary according to subject area and problem – in some contexts, especially in highly integrated markets, a multitude of states may be entitled to regulate; in others, there may be only two or three. The jurisdictional spheres of different states are also not equally extensive. In some areas, one country's market may be so dominant that all relevant participants are present and many essential transactions are performed there – US financial markets have long held such a position, allowing US authorities to establish effective rules worldwide.<sup>123</sup> Other areas may be less unipolar, and the current changes in the global economy are likely to lead to a greater variety of key sites over time. Yet most contexts are characterized by differences between countries – between strong and weak and more or less integrated ones – and as a result characterized by wider and narrower jurisdictional spheres overlapping with one another.

Using 'assemblage' to describe this situation draws on the work of Saskia Sassen who uses it to point out how territory, authority and rights are brought into new relations, and how these new relations characterize the political structure of the contemporary world.<sup>124</sup> Sassen is particularly interested in the emergence of a variety of new authorities and their complex interactions with the state.<sup>125</sup> For our purposes, the concept of assemblage is helpful because it not only points to a multitude of interacting spheres, but also suggests that these spheres stand in relatively undefined relations as there are practically no legal rules on how competing jurisdictional spheres relate to one another.

In the past, jurisdictional 'conflict rules' were an issue for debate, with different authors postulating a hierarchy of different jurisdictional claims, typically with a superiority for (traditional) territorial jurisdiction, or with a priority for the relatively closest connection to the respective issue.<sup>126</sup> Today, however, most observers find that, as a matter of practice, there is little

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<sup>123</sup> See only Brummer (n 46).

<sup>124</sup> Saskia Sassen, *Territory, Authority, Rights: From Medieval to Global Assemblages* (Cambridge University Press 2006). The term 'jurisdictional assemblage' is also used by Mariana Valverde, but to her appears to connote more stable constellations of practices with exclusive attributions of powers; see Mariana Valverde, 'Jurisdiction and Scale: Legal Technicalities as Resources for Theory' (2009) 18 *Social & Legal Studies* 139.

<sup>125</sup> For these other authorities, the concept of jurisdiction might also be employed fruitfully; see Szigeti (n 22) 394.

<sup>126</sup> See e.g. RY Jennings, 'Extraterritorial Jurisdiction and the United States Antitrust Laws' (1957) 33 *British Year Book of International Law* 146, 151; Mann (n 11) 90.

indication of such (or other) rules to resolve conflicts. Different grounds of jurisdiction are instead portrayed as equal.<sup>127</sup>

Even the principle that for a long time seemed to hold the greatest promise for resolving conflicts of jurisdictional claims has recently been called into further question. ‘Reasonableness’ had been developed by US courts in competition law and led to a balancing of interests, in which it was decisive “whether the interests of, and links to, the United States – including the magnitude of the effect on American foreign commerce – are sufficiently strong, vis-a-vis those of other nations, to justify an assertion of extraterritorial authority”.<sup>128</sup> The principle, interpreted as a rule of international law and formulated relatively precisely, was included in the Third Restatement in 1987.<sup>129</sup> But subsequent jurisprudence in the US has been inconsistent in the weight and form it has given to reasonableness<sup>130</sup>, and the Fourth Restatement has distanced itself from its predecessor by portraying the principle as an aspect of comity, not as an obligation under international law.<sup>131</sup> This is certainly plausible, given that the practice of other states varies considerably and that many courts seem to see no reason for restraint once they have found a basis for a claim to jurisdiction.<sup>132</sup> Yet the shift away from reasonableness has left the jurisdictional assemblage with yet less structure.

## V. Jurisdiction as Governance

In international law, jurisdiction is usually presented as one of the tools to regulate the coexistence of equal sovereigns, as a horizontal device employed to delimit spheres between states, balancing their respective interests to draw lines and define overlaps. A typical example is James Crawford’s discussion in *Brownlie’s Public International Law*, in which jurisdiction appears as a ‘corollary’ of the sovereignty and equality of states, and the starting point is the *prima facie* exclusive control of a state over its territory and population.<sup>133</sup>

We have already seen how this idea of exclusive control has become unhelpful to characterize the jurisdictional regime, especially as regards corporations. With the decline of exclusivity and the emergence of the jurisdictional assemblage depicted above, it is time to also interrogate the continued use of horizontality as the key imagery for jurisdictional relations between states, in particular in the economic realm. States’ jurisdictional spheres are no longer placed next to each other, but are instead increasingly overlapping and interacting, thus making the image of lines

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<sup>127</sup> See only Ryngaert, *Jurisdiction in International Law* (n 4) 143–144., with further references.

<sup>128</sup> US Court of Appeals, *Timberlane Lumber Co v Bank of America*, 549 F 2d 597 (9th Cir 1976).

<sup>129</sup> *Restatement of the Law, Third: Foreign Relations Law of the United States* (American Law Institute 1987) 244–254.

<sup>130</sup> See also Buxbaum, ‘Territory, Territoriality, and the Resolution of Jurisdictional Conflict’ (n 13) 649.

<sup>131</sup> *Restatement of The Law Fourth: The Foreign Relations Law of the United States* (n 23) 151–153, 181–185..

<sup>132</sup> See also for example the position of the CJEU, *Wood Pulp*, 89/85 et al., [1988] ECR 5244. Ryngaert, *Jurisdiction in International Law* (n 4) 182–184. understands *reasonableness*, in spite of inconsistent practice, as a general principle of international law.

<sup>133</sup> Crawford (n 2) 447.



drawn between states and their territories inadequate. Jurisdiction is better understood as a matter of scope and scale<sup>134</sup>, but then it is decoupled from the notion of a relation of equals and may well take on a different, possibly hierarchical character.

### 1. From Horizontality to Oligarchy

As an aspect of jurisdiction, hierarchy is most obviously at play in the relation with individual legal subjects. An authority holds jurisdiction ‘over’ a range of actors, with an implication that the latter have to obey her or his orders or judgments. In that sense, jurisdiction is closely linked to the very notion of government (and internal sovereignty) – it establishes the legal preconditions for the validity of laws, rules and decisions vis-à-vis their addressees, and it provides the ‘governance of legal governance’ in keeping authorities from clashing.<sup>135</sup>

If jurisdiction is intimately bound up with hierarchy over subjects, these hierarchical relations are pushed into the transinternational sphere through the broader jurisdictional practices traced above. As we have seen in our vignettes, states use their regulatory and judicial institutions very effectively to govern activities of companies abroad, and this establishes hierarchies not only over those companies but also over other states whose ability to define their own policy is thereby curtailed. As previously noted, governments intervened in US court proceedings – from competition and securities law to transnational human rights litigation – to assert their own legislative and regulatory space. Canada, for example, emphasized that the treble damages awarded in US antitrust litigation “would supersede [Canada’s] national policy decision”.<sup>136</sup> The concern was expressed yet more vividly by South Africa:

“[W]e consider it completely unacceptable that matters that are central to the future of our country should be adjudicated in foreign courts which 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. ... It remains the right of the government to define and finalise issues of reparations, both nationally and internationally.”<sup>137</sup>

The hierarchical character of extraterritoriality comes into clearer view from a historical perspective. Especially the system of capitulations, which granted European powers exclusive consular jurisdiction over affairs concerning their citizens abroad, has long been regarded as a form of ‘legal imperialism’.<sup>138</sup> In the mid-1880s, for example, there were forty-four Western extraterritorial courts operating in Japan’s ports, essentially governing Japanese trade and establishing Western legal rules and practices as the governing ones.<sup>139</sup> It is unsurprising then

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<sup>134</sup> See Valverde (n 125).

<sup>135</sup> *ibid* 141.

<sup>136</sup> *Hoffmann-La Roche v Empagran*, p. 168.

<sup>137</sup> <http://www.nftc.org/default/ussabc/Maduna%20Declaration.pdf>, pp. 3, 6.

<sup>138</sup> See Turan Kayaoglu, *Legal Imperialism: Sovereignty and Extraterritoriality in Japan, the Ottoman Empire, and China* (Cambridge University Press 2010); Szigeti (n 22) 393–394; Daniel S Margolies and others (eds), *The Extraterritoriality of Law: History, Theory, Politics* (Routledge 2019) chs 4–7. Also Chimni (n 34).

<sup>139</sup> Kayaoglu (n 139) 1.

that, especially for developing countries, broad jurisdictional claims appear as attempts to govern not only individuals or companies, but the countries themselves.<sup>140</sup>

Seen in light of these different aspects of hierarchy, the broad practice of jurisdiction in the economic realm thus easily appears as a form of (global) governance – regulating global markets in lieu of the decentralized state system and (often weak or inexistent) multilateral organizations.<sup>141</sup> The capacity to exercise this form of global governance is very unevenly distributed – the US and the EU are by far the most active users of regulation with extraterritorial reach.<sup>142</sup> Russia and China employ it in some cases, but within much narrower limits.<sup>143</sup> Consequently, as already mentioned, the extended jurisdictional spheres in the emerging assemblage are not the same for all states – extraterritoriality is a viable path only for those states that possess sufficient market power and regulatory and monitoring capacities.<sup>144</sup> This is a small circle, and so unbound jurisdiction easily turns into a new form of oligarchical governance in the international order.<sup>145</sup>

## 2. Accountability Concerns

Governance requires accountability to be legitimate, especially when it is exercised in such an unequal way. Accountability deficits in global governance has been widely discussed over the past two decades, mostly in relation to international organizations or other global regulatory institutions, such as international courts, transgovernmental networks or global private regulators.<sup>146</sup> The particular accountability challenges of states' extraterritorial action have been noted early on, including in the global administrative law context<sup>147</sup>, but they have long found less structured attention. This has changed with Eyal Benvenisti's proposal to reframe sovereigns as

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<sup>140</sup> Sara L Seck, 'Unilateral Home State Regulation: Imperialism or Tool for Subaltern Resistance?' (2008) 46 *Osgoode Hall Law Journal* 565.

<sup>141</sup> See Krisch (n 19). See also Benedict Kingsbury, Nico Krisch and Richard B Stewart, 'The Emergence of Global Administrative Law' (2005) 68 *Law & Contemporary Problems* 15, 21–22. on extraterritorial jurisdiction as part of the global administrative space.

<sup>142</sup> See also Putnam (n 62); Marise Cremona and Joanne Scott, *EU Law Beyond EU Borders: The Extraterritorial Reach of EU Law* (Oxford University Press 2019).

<sup>143</sup> On the extraterritorial application of Chinese competition law, see e.g. Michael Faure and Xingzhu Zhang, 'Towards an Extraterritorial Application of the Chinese Anti-Monopoly Law That Avoids Trade Conflicts' (2013) 45 *Geo. Wash. Int'l L. Rev.* 501. On the Chinese reterritorialization of the internet as a regulatory alternative, see Vatanparast (n 82).

<sup>144</sup> See e.g. Anu Bradford, 'The Brussels Effect' (2012) 107 *Nw. UL Rev.* 1, 10–14; Kalyanpur and Newman (n 98).

<sup>145</sup> See also Krisch (n 19). On different forms of hierarchy in the international order, see David A Lake, *Hierarchy in International Relations* (Cornell University Press 2009).

<sup>146</sup> See, e.g., Ruth W Grant and Robert O Keohane, 'Accountability and Abuses of Power in World Politics' (2005) 99 *American political science review* 29.

<sup>147</sup> *ibid* 39–40; Kingsbury, Krisch and Stewart (n 142) 21–22.. See also Sabino Cassese, 'Global Standards for National Administrative Procedure' (2004) 68 *Law & Contemp. Probs.* 109..

trustees of humanity, with consequential obligations to take the views of other states and foreign populations into account when making decisions with a transboundary impact.<sup>148</sup>

How stringent the requirements for accountability in this relationship are depends to a large extent on the normative framework in which it is embedded. Adherents of a statist moral outlook will demand less engagement than cosmopolitans, for example.<sup>149</sup> Yet employing a governance perspective helps to establish a baseline of normative expectations – it triggers demands for a public accountability that involves a direct accountability to citizens, rather than narrower forms of stakeholder participation.<sup>150</sup> The exercise of unbound jurisdiction to tackle transboundary problems does not merely affect other countries incidentally – it seeks to supersede their own policies and thus engages self-government claims directly.

This frame puts into starker relief the limitations of tools often suggested to moderate extraterritorial regulation.<sup>151</sup> Especially the reasonableness principle, or comity considerations more generally, appear as highly deficient – they weigh other countries' interest in regulating a given issue in the abstract and from afar. While this might befit a horizontal relationship of equals, it easily turns paternalistic when inscribed into a hierarchical setting. Similar concerns arise with respect to suggestions to introduce a subsidiarity principle – a principle according to which the state that has the closest relationship to the situation should take precedence, and only if this state is unwilling or unable to address the problem will extraterritorial action by another state be considered.<sup>152</sup> Such an approach runs into difficulties when the states involved have different policy preferences, for example when the primarily affected state sees no need to tackle environmental pollution by a company and another state seeks to act in its stead. Subsidiarity hardly helps in situations in which political aims diverge.<sup>153</sup> And its application can also remain abstract and paternalistic if a foreign government assesses whether another country's response is sufficient.

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<sup>148</sup> Eyal Benvenisti, 'Sovereigns as Trustees of Humanity: On the Accountability of States to Foreign Stakeholders' (2013) 107 *American Journal of International Law* 295.

<sup>149</sup> See *ibid* 301–313.

<sup>150</sup> See Jens Steffek, 'Public Accountability and the Public Sphere of International Governance' (2010) 24 *Ethics & International Affairs* 45.. On different types of accountability relationships see Grant and Keohane (n 147).

<sup>151</sup> On such tools see, e.g., Ryngaert, *Jurisdiction in International Law* (n 4) ch 6; Benvenisti (n 149) 313–325. On the human rights field, see also Chambers (n 67) 36–38.; UN Special Representative on Business and Human Rights (SRSG), 'Exploring extraterritoriality in business and human rights: Summary note of expert meeting', , <https://www.business-humanrights.org/sites/default/files/media/documents/ruggie-extraterritoriality-14-sep-2010.pdf> (last accessed on 29.05.2019).

<sup>152</sup> Ryngaert, *Jurisdiction in International Law* (n 4) 215–230; Reinisch (n 32) 411.

<sup>153</sup> See also Markus Jachtenfuchs and Nico Krisch, 'Subsidiarity in Global Governance' (2016) 79 *Law & Contemporary Problems* 1, 11–14.

In contrast, procedural participation requirements – such as consultation mechanisms in competition law or environmental law<sup>154</sup> – give affected countries or populations a direct voice.<sup>155</sup> Yet they fall short of giving them an actual say: often linked with a commitment to take the position of the other state “fully and benevolently” into account, they provide no guarantee that the participatory input will influence the decisions of the regulating country. This might be mitigated when regulation with transboundary effects is conditioned upon the implementation of common standards – standards the countries concerned have subscribed to.<sup>156</sup> This point has been raised by intervenors – including the EU – in the context of proceedings under the Alien Tort Claims Act<sup>157</sup>, and it is highlighted in the commentary on the UN Guiding Principles for Business and Human Rights.<sup>158</sup> This might reduce the risk of an imposition of policies and preferences.<sup>159</sup> It does not, however, eliminate this risk as long as the interpretation of such common rules (and of their relationship with other, potentially conflicting norms) is left to the acting state.<sup>160</sup>

Most suggestions for improving accountability leave the state exercising extraterritorial jurisdiction wide discretion and raise doubts as to their prospects in ensuring the self-government of those (citizens and states) subject to it. Even proposals from a critical perspective often do not go much further than to ‘inculcate ideals of tolerance, dialogue, and mutual accommodation in our adjudicatory and regulatory institutions’ – an important aim, but one that is unlikely to keep power differentials and competing interests in check.<sup>161</sup> Proper public accountability would require firmer institutional mechanisms of inclusion – of co-decision and –interpretation – which, in the current climate, are unlikely to prosper.

### 3. Capacity and Accountability

Understanding jurisdiction as governance helps to appreciate not only the accountability challenges but also the beneficial effects it may have, especially as regards the capacity to provide (global) public goods in a politically fragmented world.<sup>162</sup> The institutions that could contribute

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<sup>154</sup> On competition law, see OECD, Recommendation of the OECD Council concerning International Co-operation on Competition Investigations and Proceedings, 16 September 2014, Doc. C(2014)108 - C/M(2014)10; OECD, *Competition Co-operation and Enforcement - Inventory of Co-Operation Agreements: Provisions on Positive Comity*, 2015, <https://www.oecd.org/daf/competition/competition-inventory-provisions-positive-comity.pdf>. On environmental law, see, e.g., Aarhus Convention.

<sup>155</sup> See also Benvenisti (n 149) 318–320.

<sup>156</sup> See Ryngaert, *Jurisdiction in International Law* (n 4) 228–230.

<sup>157</sup> See United Nations Office of the High Commissioner for Human Rights, ‘State positions on the use of extraterritorial jurisdiction in cases of allegations of business involvement in severe human rights abuses: a survey of amicus curiae briefs filed by States and State agencies in ATS cases (2000-2015)’ (April 2015), <https://www.ohchr.org/Documents/Issues/Business/DomesticLawRemedies/StateamicusATS-cases.pdf> (last accessed on 27.05.2019).

<sup>158</sup> UN Document A/HRC/17/31 v. 21.03.2011, p. 7.

<sup>159</sup> See Reinisch (n 32) 408–412.

<sup>160</sup> This would “put the fox in charge of the chickens”: Chimni (n 34).

<sup>161</sup> See also *ibid*; Paul Schiff Berman, ‘Global Legal Pluralism’ (2007) 80 Southern California Law Review 1155, 1237.

<sup>162</sup> See only Michaels (n 32); Fabre (n 32); Reinisch (n 32).

to solving public goods problems – especially international organisations and states in their territory (narrowly understood) – are often too weak or have limited room for manoeuvre. The expansion of jurisdictional spheres can help here by removing legal boundaries that stand in the way of unilateral attempts to provide public goods not only for individual countries but also for the broader international community.<sup>163</sup>

A more permissive jurisdictional regime might indeed contribute to solving certain collective action problems that are otherwise difficult to overcome in a world of many states without a common government. In particular, it can help to overcome cooperation problems in rule-making because rules can be set by one actor, not by many through burdensome attempts at creating consensus. It can also counter implementation difficulties if it eliminates the race to the bottom among states and enforces rules for all relevant addressees equally, thus also capturing free riders who may otherwise choose to avoid the costs of public-good provision. Eventually, unilateral action can change the playing field in such a way as to facilitate formal international agreement at a later stage.<sup>164</sup> And even in contexts in which no single country is capable of enforcing its rules worldwide, wider jurisdictional boundaries can allow smaller groups of key players to implement their ‘minilateral’ agreements themselves.<sup>165</sup>

Increased capacity may be essential for tackling global problems, but the skewed, oligarchical nature of decentralized governance through unbound jurisdiction is bound to generate friction among countries. Countries will often make use of wide jurisdictional claims only when they see direct benefits for themselves. And even if they act to further a broader public interest, such a governance mode requires strong forms of public accountability.<sup>166</sup>

Weaker states are most strongly affected by extraterritorial jurisdiction, and they typically raise the most principled objections against its use by more powerful countries. Yet this does not hold equally true in all contexts – an important exception is the protection of human rights against multinational companies.

The complex relation between regulatory (and adjudicatory) capacity and concerns about self-government comes to the fore, for example, in the debates about the draft Legally Binding Instrument on business and human rights already touched upon above. The jurisdictional clause

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<sup>163</sup> See e.g. Bodansky (n 32). On global public goods, see. Inge Kaul, Isabelle Grunberg and Marc A Stern (eds), *Global Public Goods* (Oxford University Press 1999); Scott Barrett, *Why Cooperate?: The Incentive to Supply Global Public Goods* (Oxford University Press 2007). On public goods in international law, see Daniel Bodansky, ‘What’s in a Concept? Global Public Goods, International Law, and Legitimacy’ (2012) 23 *European Journal of International Law* 651.

<sup>164</sup> See e.g. Bodansky (n 32) 344–345; Putnam (n 62) 189–197 on the making of TRIPS; Scott and Rajamani (n 112) on the regulation of aviation emissions.

<sup>165</sup> On the minilateralism in the provision of public goods see e.g. Moisés Naím, ‘Minilateralism: The Magic Number to Get Real International Action’ (2009) 173 *Foreign Policy* 135; David G Victor, *Global Warming Gridlock: Creating More Effective Strategies for Protecting the Planet* (Cambridge University Press 2011); Robyn Eckersley, ‘Moving Forward in the Climate Negotiations: Multilateralism or Minilateralism?’ (2012) 12 *Global Environmental Politics* 24; Chris Brummer, *Minilateralism: How Trade Alliances, Soft Law and Financial Engineering Are Redefining Economic Statecraft* (Cambridge University Press 2014). See also Krisch (n 19).

<sup>166</sup> See the discussion of output legitimacy in Jens Steffek, ‘The Output Legitimacy of International Organizations and the Global Public Interest’ (2015) 7 *International Theory* 263.

in the first two drafts – later modified in the second revised draft – was relatively wide in that states were meant to allow in their courts lawsuits against companies ‘domiciled’ there, for which it was sufficient to have a ‘substantial business interest’ in the country.<sup>167</sup> As we have already seen, this approach is not very different from other recent legislation, for example the British Modern Slavery Act<sup>168</sup>, yet it has led to considerable criticism in the UN Working Group.<sup>169</sup> This criticism did not, however, stem from weaker states – almost all countries from the Global South issued rather positive comments, as did human-rights NGOs.<sup>170</sup> Strong objections to the broader approach to adjudicative jurisdiction were instead raised by the business community. The joint business response to the Zero Draft, for example, stressed that the form of extraterritorial jurisdiction envisaged in the draft did “not respect national sovereignty and the principle of non-intervention in the domestic affairs of other States”.<sup>171</sup>

This constellation is not as surprising as it might seem considering the politics of jurisdiction in other areas. Western multinationals may not usually care much about the sovereignty of developing countries, but they do, of course, have an interest in preventing strict accountability in their home countries; and human rights activists tend to have the opposite aim. The state positions are more interesting, and they reflect similar interventions in court proceedings under the Alien Tort Claims Act. In these proceedings, some developing countries predictably voiced criticism that US court rulings could undermine important policy decisions of other countries – I already mentioned the strong objection by South Africa in 2002.<sup>172</sup> Yet South Africa later dropped its opposition<sup>173</sup>, and other countries, such as Argentina, emphasized the positive effects on human rights protection.<sup>174</sup> Similar positions can be observed in other contexts, for example the Indian model investment treaty which obliges home states to provide effective legal protection against their companies through their own courts.<sup>175</sup>

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<sup>167</sup> Art 5 of the Zero Draft of the treaty. In the Second Revised Draft, Article 9 requires a country to be the “principal place of business”, but it also introduces a forum necessitatis claus in Article 9(5). For the text of the drafts, see above fn. 5.

<sup>168</sup> See above section IV 4.

<sup>169</sup> See the documents at:

<https://www.ohchr.org/EN/HRBodies/HRC/WGTransCorp/Session4/Pages/Session4.aspx> (accessed on 17.05.2019).

<sup>170</sup> See only the position adopted by Amnesty International, who wanted to further strengthen the provision:

<https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session4/AmnestyInternationalArticle5.docx>. See also the comparable positions of companies and NGOs in US courts in Liste (n 75) 230–233.

<sup>171</sup> <https://media.business-humanrights.org/media/documents/92d3ed14500b62498a894c8fa613075be051e5d1.pdf>.

<sup>172</sup> See above section IV.3.

<sup>173</sup> United Nations Office of the High Commissioner for Human Rights (n 109) 15.

<sup>174</sup> See above fn. **Error! Bookmark not defined..**

<sup>175</sup>

[https://www.mygov.in/sites/default/files/master\\_image/Model%20Text%20for%20the%20Indian%20Bilateral%20Investment%20Treaty.pdf](https://www.mygov.in/sites/default/files/master_image/Model%20Text%20for%20the%20Indian%20Bilateral%20Investment%20Treaty.pdf)

This position certainly has to do with the fact that the human rights in question are considered to be universally accepted and that the risk of powerful countries projecting their law abroad is therefore more limited.<sup>176</sup> But it is also due to the fact that many countries from the Global South simply do not have the capacity to enforce human rights norms against the companies in question. After all, many weaker states suffer not only from the dominance of other states, but also (and perhaps even more) from the dominance of multinational companies. A recent account of the 100 economically strongest institutions in the world includes 69 companies and only 31 states<sup>177</sup>, and many of the remaining states are hardly in a position to effectively regulate multinational companies.<sup>178</sup> For them, extraterritoriality can help to close this governance gap and subject large companies to a certain discipline, albeit not always in the way that the country itself considers best, as the interpretation and application of the rules lies in the hands of other countries' courts.

Many developing countries are therefore trapped between Scylla and Charybdis, between surrendering to powerful corporations or to powerful states – largely as a result of a degree of global inequality which stands in clear contrast with any not merely formal conception of equality between states.<sup>179</sup> For most of these countries, neither one nor the other surrender follows a 'free' decision in a meaningful sense.

Wide jurisdictional boundaries in the area of human rights do not simply 'strengthen the sovereignty' of the host state, as some commentators have argued.<sup>180</sup> They might increase overall governance capacity over companies, but they also intensify the governance of weaker states by stronger ones and thus generate stronger accountability concerns. Home states should indeed be obliged to prevent human rights violations by companies domiciled in them, even if these violations take place elsewhere, as has also been held recently by the UN Committee on Economic, Social and Cultural Rights.<sup>181</sup> However, as the Committee also emphasises, this must not lead to a violation of the sovereignty of the host state.

To foster public accountability, host states must have the space to democratically define for themselves how human rights are to be protected and how the balance between rights and other public interests is struck. They must be able to impose these choices not only on companies, but must also be in a position to bring them to bear vis-à-vis other states. For regulators and courts in other states, this means that they should take guidance from the rules in force in the host state,

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<sup>176</sup> See, e.g., the position of Argentina in the *Kiobel* case, in United Nations Office of the High Commissioner for Human Rights (n 109) 11.

<sup>177</sup> See <https://www.globaljustice.org.uk/news/2018/oct/17/69-richest-100-entities-planet-are-corporations-not-governments-figures-show> (last accessed 17.05.2019).

<sup>178</sup> On the power of these corporations, see John Gerard Ruggie, 'Multinationals as Global Institution: Power, Authority and Relative Autonomy' (2018) 12 *Regulation & Governance* 317.

<sup>179</sup> On different conceptions of sovereign equality, see Nico Krisch, 'More Equal than the Rest? Hierarchy, Equality and US Predominance in International Law', *United States Hegemony and the Foundations of International Law* (Cambridge University Press 2003).

<sup>180</sup> See e.g. Olivier De Schutter, 'Sovereignty-plus in the Era of Interdependence : Towards an International Convention on Combating Human Rights Violations by Transnational Corporations' CRIDHO Working Paper 2010/5 5.

<sup>181</sup> General Comment No 24 (2017), para. 26.

for example through choice-of-law rules<sup>182</sup>, and practice deference to that country's views if there is a risk of foreign proceedings undermining its policy choices. Ideally, potential divergences would be addressed through cooperative, inclusive procedures involving both home and host state, rather than in a unilateral way.

## VI. Conclusion

Law tends towards stasis; it often lags behind the challenges of its time. This is particularly true for international law, which does not have legislative mechanisms that would allow for smooth revision. The law of jurisdiction seems to fit this pattern – despite the challenges of a globalizing world, its main elements have remained largely stable over time. Yet as we have seen, this continuity at the level of discourse conceals a far-reaching process of change and adaptation. Traditional categories are still in use, but the constraints imposed by their focus on territory and boundaries have been increasingly diluted in practice. When it comes to the regulation of companies operating on increasingly borderless markets, states face few limitations today – jurisdiction operates less as a principle of demarcation than as “a diverse array of strategies used by national regulators to exert regulatory authority over often mobile market participants”.<sup>183</sup>

Jurisdiction has thus come ‘unbound’, resulting in a jurisdictional assemblage with overlapping claims of many different states. The exercise of jurisdiction in this assemblage depends above all on states’ political, institutional and economic weight – unbound jurisdiction exacerbates power inequalities and further erodes the protections the principles of sovereignty and non-interference once appeared to erect.<sup>184</sup> Business regulation beyond a state’s own borders is, in fact, the preserve of a few states (or groups of states), and the ensuing picture has little resemblance with the typical imagery of jurisdiction as separate spheres of sovereign equals in a horizontal setting. Instead, it is one of hierarchy and governance, with a small number of states governing global markets – and not only companies on those markets but also other states whose own policies are relegated to the background.

Taking the governance aspect seriously can help us to understand jurisdiction better – rather than as a natural result of territorial boundaries, jurisdiction appears more as a flexible technology through which actors pursue their goals.<sup>185</sup> This insight reorients the perennial debate about the extent and limits of jurisdiction – it shifts the focus away from the delineation of boundaries between states’ spheres of action towards an inquiry into forms and mechanisms that can channel governance activities so as to further common goods and preserve self-government claims of

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<sup>182</sup> See also Marc-Philippe Weller and Chris Thomale, ‘Menschenrechtsklagen Gegen Deutsche Unternehmen’ (2017) 46 *Zeitschrift für Unternehmens- und Gesellschaftsrecht* 509. But see also Chambers (n 67) 34–35; Fabre (n 32); Reinisch (n 32). who want to set stronger limits to the definitional sovereignty of the host state. .

<sup>183</sup> Brummer (n 46) 525–526.

<sup>184</sup> They never actually provided the protection they promised. See only Robert H Jackson, *Quasi-States: Sovereignty, International Relations and the Third World* (Cambridge University Press 1993); Antony Anghie, *Imperialism, Sovereignty and the Making of International Law*, vol 37 (Cambridge University Press 2007) ch 4.

<sup>185</sup> See also Ford (n 94).



citizens and addressees. In this article, I have begun to explore how to make debates about accountability and governance capacity – typically employed to assess intergovernmental organizations and regulatory bodies – fruitful in the jurisdictional context. A host of other important questions – regarding the normative demands on unilateral governance, its effectiveness, or the politics of participation mechanisms – are waiting to be addressed but lie outside the scope of the present article.

This reorientation is not meant to detract from the necessary critique of biases and unequal power structures in the use of wide jurisdictional claims – instead it aims at highlighting them by stressing the vertical, hierarchical relations thus created. The governance frame should sensitize scholars and commentators better to the heterarchical aspects of jurisdiction than the traditional, horizontal frame tends to do. Yet the new focus should also help to address the real-world challenges of a form of global governance which, for better or worse, is likely to grow further in importance. As multilateral forms of cooperation – through international organizations, courts and treaties – stagnate because of a shifting geopolitical context, other forms of tackling challenges of interdependence, among them informal government networks and private and hybrid governance structures, have expanded. In the emerging, more diverse and complex landscape of contemporary global governance, unilateral tools are likely to prosper where agreement on more cooperative forms cannot be found (or is seen as too costly).

Unilateral global governance, resting on wide jurisdictional claims, is bound to carry imperial overtones and raise serious problems from a perspective of democracy or self-determination. Its legitimacy deficit will not be remedied even if it produces beneficial ‘outputs’, and most of the accountability mechanisms discussed above will at best mitigate normative concerns. Yet the same holds true for other forms of global governance, albeit perhaps to a lesser degree for some. While these legitimacy deficits cannot be eliminated, it might be best to keep them visible and work towards reducing them as far as possible in the non-ideal context in which international politics operates.

Unbound jurisdiction will always be normatively inferior to properly inclusive governance structures. Yet recognizing its governance character can help to place a spotlight on its problems, and it can be a first step to tackling them.