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**Sailing in All Winds:
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Regulatory Practices in Shipping Industry**

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Sailing in All Winds: Extraterritorial Regulation as a Trigger for Self- Regulatory Practices in Shipping Industry

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Abstract

The regulation of private activities that take place overseas has received significant attention in the legal scholarship. The traditional discussion of the topic observes such regulation from the perspectives of public international law principles of jurisdiction or private international law conflict of laws rules. The present article contributes to the discussion from the perspective of private parties engaged in shipping activities, who face an increasing need of compliance with different regulatory acts of extraterritorial application. It argues that the proliferation of such acts incentivizes private parties to include regulatory interests in their business activities.

The article further suggests that extraterritorial regulation can serve as a trigger for transfer and intrinsic adoption of state's regulatory interest by private parties. It observes the examples of such 'privatization of extraterritoriality' in corporate compliance policies and contractual CSR clauses used by shipping companies, noting their spillover effects over other parties. It further notes that the proliferation of extraterritorial regulation sometimes results in the universalization of responses from private parties, as acquisition of regulatory interest untied from its nation-state origins. The concluding section puts the observed phenomenon into a broader picture, discussing the contribution of extraterritorial regulation to the mechanisms of private governance.

Setting the scene: extraterritorial regulation in the shipping context

The process of globalization brings inevitable regulatory challenges, as businesses and networks can escape from the oversight of any particular state. Historically, international law recognized the state as a primary regulator of private activities, which in certain cases may lead to state's international responsibility before other

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states and the international community.¹ However, globalization identified numerous shortcomings of the state-centric model, as private actors often benefit from different legal regimes and the absence of effective regulation to the common benefit. Examples abound and belong to many fields of business activity, including the use of open ship registries, the establishment of production facilities in the areas with weak regulatory governance, the use of ‘tax heavens’ and zones with low tax transparency, among others. States respond with different strategies, such as bilateral and multilateral cooperation, and proactive interest of certain states in regulating the behavior of private parties abroad.²

Questions relating to the exercise of regulatory powers by states beyond their territorial borders (meaning, with extraterritorial effect) have been traditionally popular in international law scholarship.³ Seeking to accommodate the interests of different states, the discussion usually concerns the limitations of such powers, known as the limitations of state’s jurisdiction. However, the international law dimension is not the only one dealing with the extraterritorial application of state’s regulatory interest. One can add other less apparent examples, such as transnational crimes and torts litigation, and conflict of laws rules, all including elements of extraterritorial regulation. Understanding extraterritoriality requires a comprehensive assessment of several legal disciplines, which in turn suggests narrowing down the scope of inquiry.

The article looks into the reception and adaptation of extraterritorial regulation by private actors engaged in the shipping industry. Commercial shipping remains a prime example of transnational business activity, subject to a variety of regulatory regimes. The governing regime of public international law finds further supplement in public laws of different states, depending on the flag of the vessel, her territorial disposition, type of the activity, nationality of the shipowner, crew and other actors. The abundance of regulatory regimes and the international character of activity leads to a conclusion that potential liability of a shipowner may come from many different directions.

Adopting the shipowners perspective, one can observe considerable freedom to allocate rights, duties and risks accompanying shipping activities. Extraterritorial regulation presents new challenges in this context, as it expands the traditional grounds of liability beyond the flag state of the vessel or the territorial state of her disposition. From a state perspective, shipping industry is inherently susceptible to regulatory gaps, which justify a recourse to

¹ *Trail smelter case (United States, Canada), Award (April 16, 1938, and March 11, 1941)* (1941) III Rep Int Arbitr Awards 1905 (Warren, Greenfield, Hostie) 1965.

² The on private parties is only a part of a more general aspiration of some states and state unions to promote their regulatory practices beyond their territorial borders. See eg Marise Cremona and Joanne Scott, ‘Introduction: EU Law Beyond EU Borders’, *EU Law Beyond EU Borders* (Oxford University Press 2019).

³ For one of the earliest accounts, see Prosper Fedozzi, ‘De l’efficacité Extra-Territoriale Des Lois et Des Actes de Droit Public’, *Collected Courses of the Hague Academy of International Law*, vol 27 (1929).

extraterritorial legislation when other means of regulatory control appear non-efficient.

The article illustrates extraterritorial regulation in shipping with several examples, such as modern slavery statutes, anti-bribery legislation, and unilateral sanctions. While it seeks to draw a holistic picture of extraterritoriality, it concentrates mainly on its civil law aspects. It observes how private parties not only comply with the extraterritorial regulation but also dispose of rights and allocate liability by passing the regulatory objectives further on other companies and business partners. As a result, the state's regulatory interest transforms into a matter of private regulation, exercised by private actors through private means. The resulting schematic contributes to the discussion of the contemporary phenomenon of private governance.

The article proceeds with the following structure. Part 1 sets the public international law foundations of state jurisdiction, explaining its types and use. Part 2 concentrates on the conditions and limitations for extraterritorial jurisdiction. The discussion of regulatory interest, presented in Part 3, secures a further inquiry into the private international law and its conflict of laws rules. Part 4 conceptualizes extraterritorial regulation as comprised of two categories, either co-existing with the existing domestic standards or filling their regulatory gaps. Part 5 discusses the 'privatization' of extraterritoriality by looking into the private responses by the types of regulation and the mechanisms of adaptation. It also observes the trend for universalization of private responses, showing detachment from the original state-based regulation. The concluding part suggests that the extraterritorial regulation contributes to the delocalized private regulation of shipping activities, demonstrating a shift from state's regulation towards private governance mechanisms.

1 The origins of territorial jurisdiction

The term 'jurisdiction' originates from Roman law. Its direct translation from Latin (*ius dicere*) means an authority to pronounce the law.⁴ Its modern use covers two situations, which are common in both national and international law. The first situation describes the limits of sovereign authority to prescribe, adjudicate and enforce legal rules upon persons and within certain territory.⁵ The second situation relates to dispute settlement and describes the authority of an adjudicator to decide on the merits of a claim.⁶ The present article discusses only the first

⁴ Aaron X Fellmeth and Maurice Horwitz, 'Ius Dicere', *Guide to Latin in International Law* (Oxford University Press 2009); Bruno Simma and Andreas Th. Müller, 'Exercise and Limits of Jurisdiction' in James Crawford and Martti Koskenniemi (eds), *The Cambridge Companion to International Law* (Cambridge University Press 2012) 134.

⁵ James Crawford, *Brownlie's Principles of Public International Law* (8th edn, Oxford University Press 2012) 456.

⁶ Christopher Staker, 'Jurisdiction' in Malcolm D Evans (ed), *International law* (4th edn, Oxford University Press 2014) 310.

situation as a more general one, leaving the procedural questions of jurisdiction beyond the scope of inquiry.⁷

The foundation of the first situation lies in contemporary international law. According to one of its ground principles, the principle of sovereign equality, states enjoy sovereignty within the limits of their territorial jurisdiction.⁸ The origins of the principle, commonly known as '*par in parem non habet imperium*,' stem from medieval canon law.⁹ Its modern understanding postulates that states have no right to impose jurisdiction on other sovereigns, absent a permissive rule of international law to the contrary.¹⁰

Two elements of the principle are relevant for the present discussion. The first one concerns the subjective scope of its application. International law regards not only sovereign states, but also some private entities exercising governmental functions or otherwise closely connected to state's interests as covered by immunity from jurisdiction. The second deals with the scope of authority implied under the term jurisdiction, whether concerning an ability to prescribe rules of behavior or enforce them (for example, in domestic courts) or both. This section reviews these elements in a historical perspective, showing how much the origins of jurisdiction determine and precondition its use in the contemporary international law.

Regarding the scope of subjects, covered by a state's jurisdiction, one distinguishes between sovereign states and their nationals. The quoted Latin maxim mentions *imperium*, which was the power to impose authority and a special quality of public administrators in Roman law.¹¹ While different public administrators possessed distinctive levels of authority depending on their position in the system, those belonging to the same horizontal level were equal in

⁷ Besides, there may be little need to identify adjudicative jurisdiction as a separate notion. Proponents of two-fold understanding argue that courts either follow the prescribed norms or enforce them, combining two other manifestations of jurisdiction. See Crawford (n 5) 456 fn 2.

⁸ *ibid* 447.

⁹ Latin: 'Equals have no sovereignty over each other'. See Aaron X Fellmeth and Maurice Horwitz, '*Par in Parem Non Habet Imperium*', *Guide to Latin in International Law* (Oxford University Press 2009).

Yoram Dinstein traces the first mentions of the modern 'horizontal' understanding of the principle to XIII century and much later later to Dante Alighieri, while its earlier use concerned the freedom of Popes to decide against the constraining will of their predecessors. See Yoram Dinstein, '*Par in Parem Non Habet Imperium*' (1966) 1 *Israel Law Review* 407, 408–409.

¹⁰ *The Case of the SS 'Lotus', Judgment (7 September 1927)* [1927] Permanent Court of International Justice (PCIJ) 9, Series A 10 18–19:

'Now the first and foremost restriction imposed by international law upon a State is that-failing the existence of a permissive rule to the contrary - it may not exercise its power in any form in the territory of another State. In this sense jurisdiction is certainly territorial; it cannot be exercised by a State outside its territory except by virtue of a permissive rule derived from international custom or from a convention.'

¹¹ See Aaron X Fellmeth and Maurice Horwitz, '*Imperium*', *Guide to Latin in International Law* (Oxford University Press 2009).

Dinstein (n 9) 413:

'[The] ordinary signification [of the term *imperium*] clearly appears to connote power in the sense of authority, control or even dominion.'

their legal power. The medieval law adopted the principle *par in parem* in order to limit the authority of equally-positioned public administrators, feudals and monarchs, towards each other.¹² At the same time, their powers remained the same in the vertical relationships, allowing to compel those standing lower in the hierarchy. The adoption of the principle in public international law preserved the distinction. States as sovereign legal entities cannot impose legal authority upon each other. However, they can compel non-sovereign actors, such as natural and legal persons, to comply with their will. One can find examples in the law of immunities, where warships and diplomatic entities enjoy immunity from the territorial jurisdiction of host state's authority,¹³ while ordinary ships and persons are lacking such a privilege. As a result, sovereign immunity not only shields other states from the authority of each other, but also can fictionally cover certain entities as 'emanations' of the state, such as embassies and warships. Their special status, conditioned by immunity from the jurisdiction of other states, speaks in favor of excluding such entities from the analysis. The following discussion concerns only 'genuine' private entities, who may be subject to conflicting and overlapping jurisdiction.

When it comes to the scope of authority conveyed by jurisdiction, the historical examples seem to be of limited use. While the Roman definition concerns the ability 'to pronounce the law,' its use in international law also extends to the ability to adjudicate, mentioned earlier, and the ability to enforce. It is the distinction between the prescriptive and enforcement jurisdiction, which brings attention.

2 The limits of jurisdiction and 'connecting factors'

Traditionally, the jurisdiction to enforce rules has strict territorial borders.¹⁴ The enforcement of rules implies the exercise of state's power and its monopoly of oppression.¹⁵ It would thus constitute an interference in the affairs of other states, if exercised without their consent.¹⁶ However, an exercise of prescriptive jurisdiction, an ability to create laws and rules for private actors beyond territorial borders, seems to evade the limitation.¹⁷ There are many examples where different

¹² Dinstein (n 9) 409.

¹³ United Nations Convention on the Law of the Sea 1982 s 32; Vienna Convention on Diplomatic Relations 1961 s 22.

¹⁴ Simma and Th. Müller (n 4) 147. See also Crawford (n 5) 478 ('[T]he unilateral and extra-territorial use of enforcement jurisdiction is impermissible.').

¹⁵ Fedozzi (n 3) 163.

¹⁶ The issue of consent of the affected state is crucial, as in some cases, states may allow other states to exercise their adjudicative and enforcement powers on their territory. Examples include mixed criminal tribunals, which often perform the functions of national courts located abroad. See Crawford (n 5) 682–687. Another example concerns NATO military police in the military bases across the world, see Staker (n 6) 313.

¹⁷ In addition to prescriptive *extraterritorial* jurisdiction, one needs to consider domestic jurisdiction of states which causes economic effects beyond the state's territory. Dan Danielsen refers to the rise in wages for factory workers in China, which leads to the worldwide rise in prices for goods. See Dan Danielsen, 'Local Rules and a Global Economy: An Economic Policy Perspective' (2010) 1 *Transnational Legal Theory* 49, 62.

states declare their interest to prescribe rules for activities happening beyond their territory.¹⁸ The justifications, known under different headings,¹⁹ act as exceptions to the territorial limitation in international law. They justify the application of extraterritorial jurisdiction by serving as ‘connecting factors’ between the ‘affected’ state and the case at hand.²⁰ Thus, prescriptive jurisdiction allows extraterritorial application under certain conditions, while enforcement jurisdiction applies strictly within the territorial borders.

The different scope of application between the two types of jurisdiction can bring confusion to private parties. States may seek to regulate the behavior of private parties beyond the states’ territorial borders, which they nevertheless cannot enforce there. The enforcement jurisdiction becomes feasible when the subjects of regulation appear within the territory of the interested state.²¹

Furthermore, as states pursue different regulatory interests, an activity lawful in one state may be unlawful in another.²² The potential number of ‘affected’ legal systems is in theory indefinite, meaning that one can be never sure that a certain activity does not breach a rule with extraterritorial application, which exists elsewhere. As soon as the perpetrator appears within the territorial reach of the interested state, the liability may follow:

‘[A] prescriptive statement – even absent enforcement action – is fundamentally a threat, which may compel foreign nationals to alter their behavior.’²³

One can only add that the establishment of enforcement jurisdiction may not require physical presence of the actor. States may enforce their liability claims

The current article deals only with the legal aspects of extraterritoriality, leaving the economic aspects aside.

¹⁸ Crawford (n 5) 457:

‘There is no assumption (...) that individuals or corporations will be regulated only once, and situations of multiple jurisdictional competence occur frequently.’

¹⁹ Such as active [perpetrator] and passive [victim] personal jurisdiction, ‘effects’ doctrine and universal jurisdiction. See Simma and Th. Müller (n 4) 137–146.

²⁰ RY Jennings, ‘Extraterritorial Jurisdiction and the United States Antitrust Laws’ (1957) 33 *British Year Book of International Law* 146, 150:

‘It seems reasonable to infer from the existence of these principles of extraterritorial jurisdiction, firmly entrenched as they are in the practice of States, that some such justifying principle is thought to be necessary to found extraterritorial jurisdiction; that it is not a matter of sovereign discretion.’

See also Crawford (n 5) 457 (characterizing the requirement of ‘genuine connection’ as an emerging cardinal principle of jurisdiction).

²¹ It is worth recalling that in the *Lotus* case, the most important international law case on the matter, the Turkish authorities did not pursue the vessel on the high seas, but waited until it appeared in Turkish territorial waters. See *SS ‘Lotus’ case* (n 10); Staker (n 6) 314.

²² Staker (n 6) 310 (discussing the US sanctions):

‘Those laws (...) raise the question of the propriety - indeed, the legality – of one State purporting to forbid persons in another State to do things that are perfectly lawful in the State where those persons are located.’

²³ Crawford (n 5) 478 (citations omitted, emphasis added).

against the assets of the actor, which are present within their territorial jurisdiction. Here, the vessel stands in the center, as both a source of income and a convenient security for the satisfaction of potential claims. Her territorial disposition is therefore crucial for their enforcement. The limited role of ship registries in monitoring shipping activities only confirms the importance of territorial connection for the satisfaction of claims. For instance, the UK Modern Slavery Act authorizes British authorities to arrest and detain the ship under suspicion of being engaged in criminal activities, up to its total forfeiture upon conviction by court.²⁴ As a result, while the criminal acts may happen elsewhere, the enforcement and liability are only possible on the British soil in the absence of consent from another state.²⁵

It follows that the delay between prescription and enforcement acts as an additional factor of uncertainty. Wrongdoers would sail freely only until the circumstances allow bringing them liable for the breach of the rules, which they might not know.²⁶

The question is not that problematic due to at least two different safeguards, which prevent the enforcement of extraterritorial regulation upon unsuspecting foreign parties. First, the territorial limitation of enforcement jurisdiction acts as a natural safeguard against unpredictable responsibility.²⁷ For example, while a state may criminalize criticizing the figure of its ruler, foreigners will only face liability after appearing on the territory of such state.²⁸

The second safeguard is two-fold and combines the international law requirements to extraterritorial jurisdiction with practicalities of its typical design. As mentioned earlier the lawful exercise of extraterritorial jurisdiction under international law requires the existence of ‘connecting factors.’ Regulatory attempts in the absence of such factors may result in the exorbitant assertions of extraterritorial jurisdiction, criticized in international law scholarship.²⁹ However, states try to justify their regulatory interest by gradually expanding the list of connecting factors, which only adds to the situation of uncertainty.³⁰

²⁴ Modern Slavery Act 2015 ss 11–12, 35–39.

²⁵ See eg *ibid* 35(3)-35(4).

²⁶ The issue is not new to the international law scholarship; see Jennings (n 20) 151:

‘[I]t would be intolerable if a person can be put in jeopardy of a criminal law to which he has never owed allegiance for an act which was entirely lawful in the place where he did it.’

²⁷ Nico Krisch, ‘Global Governance through Extraterritorial Business Regulation’ (Graduate Institute of International and Development Studies, Center for Trade and Economic Integration 2020) PATHS Working Paper 6 19.

²⁸ In such a case, Jennings refers to the provisions of the Harvard Draft Convention on Jurisdiction, which deny the application of extraterritorial jurisdiction for activities, which are lawful under the territorial law. See Jennings (n 20) 155; ‘Draft Convention on Jurisdiction with Respect to Crime’ (1935) 29 *The American Journal of International Law* 439 Art 7. However, the status of the provision in international law remains uncertain.

²⁹ Although Crawford mentions ‘international criticism,’ which may follow cases of exorbitant jurisdiction, he stops shortly from admitting it as breach of international law. See Crawford (n 5) 486.

³⁰ See the discussion of the overlapping prescriptive jurisdiction below.

On a domestic level, the ‘connecting factors’ often find their place in the design of extraterritorial regulation. In order to prevent exorbitant jurisdiction, states may prescribe that extraterritorial acts apply only to nationals or residents of the interested states.³¹ They may further condition their application depending on where the act is committed, by whom and against whom. One may further appeal to the type of the legal relationship, whether domestic law characterizes it as criminal or civil in nature. The application of connecting factors in international legal practice concerned mostly the conflicting criminal jurisdiction of states.³² Their use for establishing civil jurisdiction shows somewhat lesser degree of uniformity.³³

The characterization of the activity according to domestic law as either civil or criminal can hardly serve as a criterion for its differentiation on the international law level. The distinction is heavily dependent on the state practice, where states express different regulatory interests.³⁴ For instance, the extraterritorial reach of anti-suit injunctions may bring both civil law (fines) and criminal law (contempt of court) liability. The article further concentrates on the civil liability prescriptions, discussing the ability of private parties to regulate and re-allocate liability resulting from extraterritorial acts.

It follows that limitation by design is only a matter of convenience, but not a legal requirement under international law. The only requirement under international law is the existence of recognized regulatory interest in extraterritorial regulation.³⁵ The reliance on the connecting factors may be the best strategy for justifying the regulatory interest.³⁶ Yet, history shows that states may assert other justifications as well, to varying appreciation from other states.³⁷

³¹ For example, the UK Bribery Act penalizes bribery of foreign public officials with extraterritorial effect for persons having *a close connection* to the UK. See Bribery Act 2010 ss 6, 12(2–4). The Norwegian Compensation Act regulates the civil law consequences of corruption with a narrowed domicile connection. See Lov om skadeserstatning (skadeserstatningsloven) [The Norwegian Compensation Act] 1969 s 1.6:

‘If the person responsible or his employer is domiciled in Norway, the liability also applies if the corruption takes place abroad or the damage occurs abroad.’

³² Crawford (n 5) 457–471.

³³ *ibid* 471–474 noting the difference in the assertion of civil jurisdiction between the common and civil law systems.

³⁴ Staker (n 6) 312 (noting the expansion of US regulatory assertions on new legal relationships, such as taxation matters and fight with terrorism).

³⁵ Jennings uses ‘legitimate interest,’ referring to its acceptance by the ‘common practice of States.’ See Jennings (n 20) 152–153. The present article refers to ‘regulatory interest’ following a more pragmatic approach. While cases of exorbitant extraterritorial prescriptive jurisdiction may result in political conflicts, their status under international law remains unclear.

³⁶ Menno T Kamminga, ‘Extraterritoriality’, *Max Planck Encyclopedia of Public International Law [MPEPIL]* (2012) para 9 (postulating that ‘the exercise of extraterritorial prescriptive and adjudicative jurisdictions are permitted only if there is a sufficient connection between the State exercising it and the extraterritorial event.’).

³⁷ For instance, one can recall the assertion of the ‘nationality’ of technology requirement by the US in the attempt to impede its migration for the technological development of the Soviet Union in the 1980s. The European States protested against the exorbitant assertion. See Staker (n 6) 327.

The next session discusses the potential conflicts of jurisdiction resulting from such assertions.

3 The private law understanding of ‘interest’: the conflict of laws rules

The state’s interest in regulating a certain matter with extraterritorial effect becomes the crucial factor in determining its prescriptive jurisdiction. While states may assert their interest according to different intrinsic reasons, their ability to do so remains constrained by the international law rules on jurisdiction. However, when it comes to the scope of permissible expansion of prescriptive jurisdiction with extraterritorial effect, the rules remain notoriously silent.³⁸ One cannot probably avoid the conflicts of prescriptive jurisdiction, yet certain management strategies are possible.³⁹ In particular, for the determination which state’s regulatory interest should apply under international law, one can look at the rules of private international law, as manifested in the conflict of laws rules.⁴⁰ The question is whether courts shall resolve the conflicts of public regulatory laws of different states by the same principles as conflict of laws rules applicable to private contractual and tort relationships.⁴¹ In such a case, conflict of laws rules may set the limits for extraterritorial prescriptive jurisdiction. The present section notes the shortcomings of this hypothesis, due to the normative prevalence of the territorial connection, as explained in greater detail below.

Conflict of law rules serve to determine the law of which state applies to a particular legal relationship. While their application varies between states, one can talk of certain common principles. For instance, many states allow private parties to agree on the application of a law of a particular state (and, arguably, non-state based law⁴²) to some aspects of their contractual relations. At the same

Similarly, Cedric Ryngaert appeals to the acceptance of jurisdiction by other states. See Cedric Ryngaert, ‘Extraterritorial Export Controls (Secondary Boycotts)’ (2008) 7 Chinese Journal of International Law 625, 645:

‘[T]he legality of a particular jurisdictional assertion is ordinarily not only dependent upon an objective assessment of jurisdictional criteria being fulfilled, but also upon the foreign reactions with which the assertion is met.’

³⁸ *SS Lotus’ case* (n 10) 19 (mentioning the ‘wide measure of discretion,’ which the states enjoy to assert extraterritorial jurisdiction).

³⁹ Crawford (n 5) 457 (‘[T]he consequences of multiple laws applying to the same transaction are managed rather than avoided [...].’).

⁴⁰ Jennings (n 20) 173 (‘In such a situation a municipal court will naturally turn in the first instance to its system of private international law.’). See also Crawford (n 5) 480; William S Dodge, ‘Extraterritoriality and Conflict-of-Laws Theory: An Argument for Judicial Unilateralism’ (1998) 39 Harvard International Law Journal 101.

⁴¹ *Hartford Fire Insurance Co v California* (1993) 509 US 764 (United States Supreme Court) 821 (Scalia’s dissent):

‘Where applicable foreign and domestic law provide different substantive rules of decision to govern the parties’ dispute, a conflict-of-laws analysis is necessary.’

⁴² The choice of non-state law is not universally recognized. See eg Michael McParland, *The Rome I Regulation on the Law Applicable to Contractual Obligations* (Oxford University Press 2015) s 4.75 (‘[T]he Rome I Regulation does not authorize the use of non-State body of law [...].’). Cf. *Постановление Пленума Верховного Суда РФ от 09/07/2019 N 24 ‘О применении норм международного частного права судами Российской Федерации’* [Resolution of the Plenum of the Supreme Court of the Russian

part, states usually preserve the interest of regulating other aspects, often without giving a right to derogate from them by contract. The picture gets notoriously complicated, as one needs to account for the diversity brought by the different personal statutes of the parties, the chosen applicable law to the contract (which may be subject to further split into several laws due to *depeçage*), the mandatory rules of the applicable law, and different overriding mandatory rules – most notably, of the curial law⁴³). Without going into details, one can conclude that conflict of laws rules assist in determining which state has an interest in regulating a particular legal relationship, often with an extraterritorial effect.

The situation where more than one state expresses interest in regulating a particular relationship resulted in a split in the conflict of laws doctrine.⁴⁴ The proponents of multilateral approach argue that upon a common consensus, conflict of laws rules shall resolve the collision of regulatory interests by pointing at the order with the ‘closest connection’ to the issue at hand.⁴⁵ In contrast, the proponents of unilateral approach accept the significant divergence of conflict of laws rules. They maintain that any state can express its regulatory interest without regard to the competing interests of other states⁴⁶ and achieve the uniform application of rules by other means (such as negotiations of international treaties).⁴⁷ One may suggest that the unilateral approach can conflict with the public international law principles on prescriptive jurisdiction to the extent it allows the exorbitant extraterritorial assertion of jurisdiction.

a. Limited extraterritoriality and prevailing territorial law in the conflict of law rules

On a more general level, conflict of laws shows many angles of extraterritoriality. The determination of the personal statute will require an application of the domestic law of the parties beyond its territorial borders. Similarly, the chosen applicable law to the contract may apply with extraterritorial effect. For instance, in maritime employment contracts the choice of applicable law can bring the protections of national law for sailors working overseas on foreign-flagged vessels. States may express their interest in protecting the employment rights of

Federation of 09072019 N 24 ‘On the application of the norms of private international law by the courts of the Russian Federation’] [2019] Supreme Court of the Russian Federation 24 32.

⁴³ Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I) 2008 s 9(2). One can also add the overriding mandatory rules of *lex arbitri*, in case the parties submit their dispute to arbitration.

⁴⁴ Dodge (n 40) 107–110.

⁴⁵ *ibid* 108–110; Eugene F Scoles and others, *Conflict of Laws* (4. ed., Thomson/West 2004) 12, 17–18.

⁴⁶ Dodge (n 40) 104:

‘Unilateral conflicts theories focus simply on whether the forum’s law applies to the activity in question, without worrying that another forum might also apply its law.’

⁴⁷ *ibid* 105–16.

sailors by virtue of their nationality⁴⁸ or the fact that the state law applies to the contract and the employment relationship has some connections to that state.⁴⁹

Furthermore, in the event of the dispute, the overriding mandatory rules of the curial law⁵⁰ and its public policy will be applicable.⁵¹ The curial law will not require extraterritorial application, but it may limit the scope of extraterritorial application of all other applicable laws.⁵² For instance, it may deny recognizing the personal statute of the parties, if for some reasons it would not be valid under the curial law.⁵³ A more traditional scholarly example concerns the denial of curial law to give effect to the parties' agreement on the applicable law (meaning, its extraterritorial application) if it contradicts the overriding mandatory rules or public policy.

Notably, these examples demonstrate another angle of extraterritoriality not relating to prescriptive jurisdiction. The state, which law the parties chose for their contract, does not need to express its interest in extraterritorial application. It comes by the virtue of curial law, which allows such extraterritorial application in certain circumstances.⁵⁴

A similar conclusion follows the mandatory rules of the applicable law, which do not allow the parties to derogate from them in the contract. While such mandatory public rules manifest the state's interest in regulation, it does not

⁴⁸ Such is the case with the employment of Filipino Seafarers, who enjoy a state-guaranteed right to protection under the standard employment contract. See Valeriano R Del Rosario and others, 'Chapter 35 - Philippines' in George Eddings, Andrew Chamberlain and Rebecca Warder (eds), *The shipping law review* (Law Business Research Ltd 2018) 414–415. *Cf.* the reports that in some cases the standard model resulted in lower protection as compared to other fora: William C Terry, 'Working on the Water: On Legal Space and Seafarer Protection in the Cruise Industry' (2009) 85 *Economic Geography* 463.

⁴⁹ The application of English law to the contract serves as one of the factors for extending the statutory employment rights available under English law to expatriate employees. See the discussion in *Green v SIG Trading Ltd* [2017] Employment Appeal Tribunal UKEAT/0282/16/DA.

⁵⁰ The curial law refers ultimately to *lex fori* of the court faced with the dispute. However, if the dispute is only subject to arbitration, one may also refer to its territorial connection with *lex arbitri*, as arbitrators are under an obligation to respect the public policy rules existing in the seat of arbitration. It follows, hardly surprisingly, that both in courts and in arbitration the overriding mandatory rules of the court or seat, respectively, would have normative prevalence over other potentially applicable laws.

⁵¹ Rome I s 9(2), 21.

⁵² For the 'trumping' effect of the law of the seat in private international law, see 'Arbitration in Private International Law' (Institut de Droit International 1957) <https://www.idi-il.org/app/uploads/2017/06/1957_amst_03_en.pdf> accessed 18 June 2020.

⁵³ Such would be the case of same-sex relationships in the countries not (yet) recognizing them.

⁵⁴ Crawford (n 5) 472 (emphasis added):

'[T]here is little by way of limitation on a state's exercise of civil jurisdiction in what are effectively private law matters; different states assert jurisdiction on different grounds, but *deference to foreign law through conflicts rules* mitigates any exorbitant elements.'

See also John G Collier, *Conflict of Laws* (Cambridge University Press 2001) 18:

'In practice, the English courts formulate the issue and define the ambit of the legal category for themselves, and then they determine whether a question posed by a foreign rule comes into that category.'

concern extraterritorial effects. It is the curial law, which allows another state's regulatory interest to operate with extraterritorial effects.⁵⁵

The private law lens allows drawing some insights on how the state's regulatory interest can apply with extraterritorial effect. On a fundamental level, the territorial application of curial law remains the rule, manifesting the state's interest in the maintenance of administration of justice on its territory.⁵⁶ The control of curial law may be strict when, for example, it comes to non-arbitrable subject matters or limitations of public policy.⁵⁷ There may be examples to the contrary, when the state lifts up the control under certain conditions.⁵⁸ Most commonly, the conflict of laws rules of curial law allow the application of rules belonging to other legal systems. These rules will apply beyond the territorial limits of their home states, meaning that the regulatory interests of such states will apply with extraterritorial effects. Their application is nevertheless subordinated and conditioned by the limitations of curial law, due to the default trumping role of the territorial connection.

Furthermore, the expression of state's regulatory interest through its prescriptive jurisdiction does not follow the division between public and private law. The limitations of somebody's personal statute or contractual capacity may equally manifest the state's regulatory interest, no matter whether they belong to 'public law' or 'private law' areas of legislation or scholarly classification.⁵⁹ As a result, conflict of laws rules allow accounting for regulatory interests of different states, including the ones applying with extraterritorial effect.

b. Conflict of law rules are ill-suited for 'external' liability risks

The expansion of domestic regulation of private activities with extraterritorial effects does not fall neatly in the existing conflicts of laws systems. The reason lies in the expectation of compliance elsewhere, which is capable of interfering in the process governed by the curial law. The territorial link, which forms the ultimate basis of conflict of law rules, does not apply in situations when one or several states expect extraterritorial compliance with their laws. For instance, in

⁵⁵ Scoles and others (n 45) 3:

'[T]he claims or interests of another state or country can influence the resolution of a multistate dispute only when and to the extent permitted by the conflicts of law of the forum.'

⁵⁶ Stavros Brekoulakis, 'Arbitrability and Conflict of Jurisdictions: The (Diminishing) Relevance of Lex Fori and Lex Loci Arbitri' in Franco Ferrari and Stefan Kröll (eds), *Conflict of Laws in International Arbitration* (Verlag Dr Otto Schmidt 2010) 118.

⁵⁷ Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 Art V(2). For comparative studies, see Pascal Hollander, 'Report on the Public Policy Exception in the New York Convention' (2016) 10 *Dispute Resolution International* 35; Pascal Hollander, 'Report on the Concept of Arbitrability under the New York Convention' (2017) 11 *Dispute Resolution International* 47.

⁵⁸ One notable example is the waiver of set-aside proceedings for challenging an arbitral award, which usually applies under very limited circumstances. See eg Switzerland's Federal Code on Private International Law (CPIL, revision 2007) 1987 s 192.

⁵⁹ Bernard H Oxman, 'Jurisdiction of States', *Max Planck Encyclopedia of Public International Law [MPEPIL]* (2007) paras 7–8 (noting the limited use of the categories); Staker (n 6) 331–332 (discussing tort law as an example of a mixed category).

the case of unilateral sanctions, the prescriptive jurisdiction of the sanctioning state may interfere with extraterritorial effect in the processes governed by the prescriptive jurisdiction of other states.

The English case *Lamesa v. Cynergy* helps to illustrate such controversial expansion of prescriptive jurisdiction.⁶⁰ The case concerned interest payments under a loan taken by an English bank from a Cypriot company. The agreement provided for English governing law and exclusive English jurisdiction. The Cypriot company was indirectly owned by a Russian national, which later appeared in the US sanctions lists. The agreement contained a clause, justifying the refusal to pay interest in order to comply with ‘any mandatory provision of law, regulation or order of any court of competent jurisdiction.’⁶¹ According to the interpretation of the Court of Appeal, the risk of US sanctions upon the English bank fell under the scope of the provision.⁶²

It follows from the facts that neither of the parties was domiciled in the US, nor the agreement in any part referred to US law. Thus, one cannot say that the territorial or personal connection of the agreement made the extraterritorial prescriptive jurisdiction of US law applicable to the relationship between the parties. The conflict of law analysis would likely limit the ‘mandatory rules’ only to those binding upon the Bank:

‘If one looks only at the black letter meaning of the words of the proviso, I would accept that one might think the Facility Agreement was only intended to excuse default where the non-payment was mandated or required by a statute, regulation or order directly binding on the borrower.’⁶³

However, in the case at hand it was the ‘external’ risk of US sanctions that presented a threat of liability under US law, which the Bank wanted to escape:

‘[T]he important point is that its language refers to the provisions of US secondary sanctions legislation (...) as imposing a "requirement or prohibition" on EU entities. That is the reality of the position. An EU entity cannot ignore such legislation, because if it does so, its business will be disrupted (...).’⁶⁴

Such ‘external’ obligations of compliance cannot be settled with the help of the traditional conflict of laws rules.⁶⁵ Yet, they may create significant liability risks

⁶⁰ *Lamesa Investments Ltd v Cynergy Bank Ltd* [2020] EWCA Civ 821.

⁶¹ *ibid* 5.

⁶² *ibid* 46.

⁶³ *ibid* 36.

⁶⁴ *ibid* 44.

⁶⁵ Krisch (n 27) 22–23:

for private parties. The following section observes the conflicts of prescriptive jurisdiction resulting from the adoption of extraterritorial regulation of private activities.

4 The overlapping and gap-filling prescriptive jurisdiction

In recent decades, the expansion of legislation with extraterritorial effects diluted the application of *par in parem* principle. States seek to widen their jurisdiction to legislate, adjudicate and enforce the rules dealing with private activities that happen overseas. The threat of enforcement pushes private parties to comply with the extraterritorial regulation. They perceive such regulation as law (often imposed on them through the nationality or residence requirements), even though the imposing state lacks an opportunity of enforcement beyond its borders. Scholars have noticed that this threat of delayed enforcement often results in ‘prudential compliance.’⁶⁶ It explains the motivation of private parties to seek ‘voluntary’ compliance with the extraterritorial regulation in the anticipation of potential risks elsewhere.⁶⁷

Furthermore, one can categorize extraterritorial regulation by its interaction with the territorial regulation of the host state.⁶⁸ In some cases, two or more states claim overlapping prescriptive jurisdiction over the matter, while in others extraterritorial regulation serves to fill the regulatory gaps of territorial law. Thus, one can categorize all cases of extraterritorial prescriptive jurisdiction into two groups, overlapping jurisdiction and gap-filling jurisdiction. The present section discusses both categories with the help of existing examples.

a. Overlapping prescriptive jurisdiction

The first situation of overlapping and potentially conflicting jurisdiction is a traditional topic for discussion in international law. As a manifestation of power dynamics in international relations, states may assert their prescriptive jurisdiction for activities happening abroad. However, such regulation may conflict with the local territorial laws, resulting in political disagreement and bringing a state of confusion to private parties.⁶⁹

One can trace the historical roots of overlapping jurisdiction in emergence of the effects doctrine in the US antitrust law.⁷⁰ The previously known ‘connecting factors,’ such as territorial and nationality links, turned out useless in

‘Today, however, most observers find that, as a matter of practice, there is little indication of such [conflict] (or other) rules to resolve conflicts.’

⁶⁶ Staker (n 6) 330.

⁶⁷ Ryngaert (n 37) 634:

‘As long as the territorial State does not enact contrary legislation, corporations could of course decide to submit voluntarily to U.S. export controls.’

⁶⁸ Such was the case in *Hartford v California*, where the US Supreme Court, by majority, agreed that the absence of conflicts between UK and US laws in a particular dispute justified the extraterritorial application of US law. See *Hartford v California* (n 41) 798–799.

⁶⁹ Krisch (n 27) 22:

‘Unbound territoriality, coupled with few clear limitations, tends to produce a multiplicity of competing claims, especially when it comes to corporations.’

⁷⁰ Staker (n 6) 318.

regulation of cartel agreements of foreign companies on a foreign territory. However, the fact that their economic *effects* could bring damage on the US territory resulted in the assertion of a new connecting factor.⁷¹ After some criticism from other states⁷² and international law scholars,⁷³ the ‘effects’ doctrine received gradual recognition in other legal systems.⁷⁴

For another example of overlapping prescriptive jurisdiction, one can look at unilateral sanctions.⁷⁵ During the last decades of the XX century, the US has adopted unilateral sanctions against its political adversaries such as Cuba, Iran, and Libya.⁷⁶ The sanctions may be primary or secondary, depending on the scope of subjects they regulate.⁷⁷ In the case of primary subjects, the prescription covers state’s nationals and residents, prohibiting persons under the state territorial or personal jurisdiction to deal with certain political adversaries.⁷⁸ Secondary sanctions, on the contrary, apply to persons beyond state’s jurisdiction, yet in a similar manner prohibiting them to deal with political adversaries.⁷⁹ The non-compliance with sanctions may result in severe fines under US law. While their application is arguably non-problematic under US territorial jurisdiction, the extraterritorial effect of sanctions created a situation of unpredictability for

⁷¹ *United States v Aluminium Co of America et al* [1945] Circuit Court of Appeals, Second Circuit 144, 1945 F2d 416, 443.

Cf. Oxman finds the origins of the effects doctrine in ‘The Lotus’ case (1927), see Oxman (n 59) para 23.

⁷² *Rio Tinto Zinc Corporation v Westinghouse Electric Corporation* (1977) 1978 AC 547 (House of Lords) 594:

‘The application of the effects doctrine to found jurisdiction in penal matters is regarded by Her Majesty’s Government as being particularly objectionable in the field of anti-trust legislation. (...) The assertion of extraterritorial jurisdiction in antitrust matters represents an extension of the economic policy of one state which is likely to conflict with that of other states.’

See also Oxman (n 59) para 8 ([E]fforts by the courts of one State to compel foreigners to appear or produce evidence in some civil cases have led to protests from other States on grounds of violation of their sovereignty.’).

⁷³ Kamminga (n 36); Staker (n 6) 318 (suggesting that other factors back its acceptance in other countries).

⁷⁴ Oxman (n 59) para 53, referring to *Gencor Ltd v Commission* [1999] European Court of Justice T-102/96 [90]. See also Dietmar Baetge, ‘The Extraterritorial Reach of Antitrust Law between Legal Imperialism and Harmonious Coexistence: The Empagran Judgment of the U.S. Supreme Court from a European Perspective’ in Eckart Gottschalk and others (eds), *Conflict of Laws in a Globalized World* (Cambridge University Press 2007) 227–232.

⁷⁵ Not to be confused with multilateral or institutional sanctions. See Kamminga (n 36) para 18.

⁷⁶ Cuban Liberty and Democratic Solidarity (Libertad) Act of 1996 1996; Iran and Libya Sanctions Act of 1996 1996.

⁷⁷ Jeffrey A Meyer, ‘Second Thoughts on Secondary Sanctions Symposium Article’ (2008) 30 *University of Pennsylvania Journal of International Law* 905, 905.

⁷⁸ Helms-Burton Act s 103(a) (prohibiting indirect financing by US nationals, permanent resident aliens and US agencies).

⁷⁹ For example, the Iran and Libya Sanctions Act penalizes the assistance, rendered by any person, no matter of residence or nationality. See Iran and Libya Sanctions Act of 1996 s 5(c). See also Nicholas Davidson, ‘U.S. Secondary Sanctions: The U.K. and EU Response’ (1998) XXVII *Stetson Law Review* 1425, 1431–1432.

European companies falling under their personal scope. Dealing with US adversaries was lawful under the domestic law of European states.⁸⁰

In other words, the prescriptive jurisdiction of European states saw no reason to give effect to the extraterritorial application of US sanctions. However, under US law, such companies faced risks of severe liability. The domestic prescriptive jurisdictions of European states and the extraterritorial prescriptive jurisdiction of the US overlapped and required different behavior from European companies, owned by US nationals. The situation resulted in adoption of special legislation, known as ‘blocking statutes,’⁸¹ which mandating the European companies to resist compliance with the territorial jurisdiction of European states.⁸² However, the adoption did not relieve the press of US sanctions, which remains an ongoing risk and an incentive to exercise compliance.⁸³

For more recent examples, one can refer to the unilateral and collective sanctions, implemented by several states against Russia after the annexation of Crimea.⁸⁴ Such sanctions disturb the default state of contractual relationships with listed persons. Any contractual performance, expected under Russian law, may lead to the company’s liability elsewhere. Russian legislature responded to sanctions by adopting a law, which granted Russian courts exclusive adjudicative jurisdiction in sanction-related disputes.⁸⁵ The affected sanctioned parties also received a right to apply for anti-suit injunctions, precluding litigation in other legal systems under the threat of court-ordered fines in Russia. The law did not attract much attention at the moment of writing, save for its politically-charged background and the extraterritorial assertion of exclusive adjudicative

⁸⁰ Gary H Perlow, ‘Taking Peacetime Trade Sanctions to the Limit: The Soviet Pipeline Embargo’ (1983) 15 Case Western Reserve Journal of International Law 253, 256 (‘Companies soon found themselves caught between the conflicting directives of determined sovereigns.’).

⁸¹ Staker (n 6) 330.

⁸² Council Regulation (EC) No 2271/96 of 22 November 1996 protecting against the effects of the extra-territorial application of legislation adopted by a third country, and actions based thereon or resulting therefrom 1996 (OJ L). Article 4 prohibits the enforcement of non-EU court decisions giving effect to the sanctions. Article 5 imposes a prohibition on compliance with sanctions for all EU nationals, residence and persons within the jurisdiction of EU Member States. For a preceding UK statute, see Protection of Trading Interests Act 1980 1980. See also Davidson (n 79).

⁸³ Notably, the Council Regulation (EC) 2271/96 allows the affected EU persons to apply for authorization to comply with the sanctions, ‘to the extent that non-compliance would seriously damage their interests or those of the Community.’ See Council Regulation (EC) No 2271/96 of 22 November 1996 protecting against the effects of the extra-territorial application of legislation adopted by a third country, and actions based thereon or resulting therefrom Art 5(2).

⁸⁴ See, among others, ‘Canadian Sanctions Related to Russia’ (*Government of Canada*, 19 October 2015) <https://www.international.gc.ca/world-monde/international_relations-relations_internationales/sanctions/russia-russie.aspx?lang=eng> accessed 24 June 2020; ‘Congress Enacts Sanctions Legislation Targeting Russia’ (2017) 111 American Journal of International Law 1015; ‘EU Restrictive Measures in Response to the Crisis in Ukraine’ (*European Council and the Council of the EU*, 2020) <<http://www.consilium.europa.eu/en/policies/sanctions/ukraine-crisis/>> accessed 24 June 2020.

⁸⁵ Federal Law from 8 June 2020 N 171-FZ.

jurisdiction.⁸⁶ Another criticism appeals to the introduction of anti-suit injunctions as a common law institute ‘imported’ into Russian continental law legal system.⁸⁷ As a result, one may observe a conflict between the Russian territorial jurisdiction to regulate and the sanctioning states’ jurisdiction to regulate with extraterritorial effects.

The position of international law scholarship has been traditionally critical to overlapping prescriptive jurisdiction, regarding it as an abuse of exorbitant jurisdiction.⁸⁸ However, the lack of clarity about the permitted ‘connecting factors’ and the power dynamics in international relations make the assertion of such jurisdiction a reality.⁸⁹ Thus, the exercise of overlapping prescriptive jurisdiction may lead to both political conflicts and increased liability risks for private parties.

b. Gap-filling prescriptive jurisdiction

It is further possible to imagine another situation, in which the extraterritorial assertion of prescriptive jurisdiction by one state meets a regulatory gap existing in another state. Depending on the type of the relationship, the situations can be different. For instance, international law recognizes the extraterritorial assertion of jurisdiction for the protection of state’s vital interests in criminal law matters (‘protective’ principle or connecting factor).⁹⁰ Historical examples include the criminalization of counterfeiting of the state’s currency and official documents, or attacks on its diplomats, which happen beyond its territorial borders.⁹¹ Despite the fact, that such activities did not violate any laws in their territorial states, the right of the interested state to ‘protect its own governmental functions’⁹² by asserting its prescriptive jurisdiction over them is beyond doubt. While the list of

⁸⁶ Сергей Гландин, ‘Антиисковой Запрет, Или Мина Замедленного Действия Для Бизнеса // Как Протекционизм По «Закону Лугового» Победил Право’ (*Zakon.ru*, 6 August 2020) <https://zakon.ru/blog/2020/6/8/antiiskovoj_zapret_ili_mina_zamedlennogo_dejstviya_dlya_biznesa__kak_protexionizm_po_zakonu_lugovog> accessed 29 June 2020.

⁸⁷ Алексей Акужинов and Сергей Коновалов, ‘Комментарий к Закону, Устанавливающему Исключительную Компетенцию Российских Судов По Санкционным Спорам, а Также Возможность Применения Antisuit Injunction’ (Saveliev, Batanov & Partners 2020) <https://sbplaw.ru/media/documents/%D0%9E%D0%B1%D0%B7%D0%BE%D1%80_%D0%B7%D0%B0%D0%BA%D0%BE%D0%BD%D0%B0_1_%D0%A1%D0%B0%D0%BD%D0%BA%D1%86%D0%B8%D0%BE%D0%BD%D0%BD%D1%8B%D0%B5_%D1%81%D0%BF%D0%BE%D1%80%D1%8B_%D0%B8_antisuit_injunction.pdf> accessed 29 June 2020.

⁸⁸ Jennings (n 20) 151:

‘The countervailing principle must surely be this: that extraterritorial jurisdiction may not be exercised in such a way as to contradict the local law at the place where the alleged offence was committed.’

⁸⁹ *Cf.* the discretionary assessment of factors for ‘state interest’ in ‘Restatement (Third) of Foreign Relations Law of the United States’ (American Law Institute 1987) s 403(3) <<https://iow.eui.eu/wp-content/uploads/sites/28/2016/04/EU-15-Scott-Third-Restatement.pdf>> accessed 1 September 2020.

⁹⁰ Staker (n 6) 321.

⁹¹ Oxman (n 59) para 27.

⁹² *ibid.*

‘vital’ interests that states can invoke remains open, both doctrine and state practice speak against its unreasonable expansion.⁹³

The present section discusses another situation of gap-filling prescriptive jurisdiction, which follows from the proliferation of national legislation imposing certain standards of business conduct, often with extraterritorial effects.⁹⁴ While belonging to the same gap-filling category, extraterritorial regulation of business does not rely on the protective principle. It does not pursue criminal law objectives as a primary goal neither does it serve to protect any ‘vital’ governmental functions. However, it represents a growing number of statutes with extraterritorial gap-filling effects, adopted for the promotion of responsible business conduct. The limitation of the scope of inquiry to business-related regulation promises better chances for a discovery of uniform principles behind extraterritoriality in a particular sector, as compared to a holistic study of all possible situations.⁹⁵

Examples of such statutes include the US Foreign Corrupt Practices Act, UK Bribery Act⁹⁶ and UK Modern Slavery Act,⁹⁷ French Law of diligence⁹⁸ and others.⁹⁹ The prescriptive jurisdiction of the acts may specify their application through the connecting factors of nationality or territory of application. However, in addition to the territorial link, these statutes also prescribe rules of behavior beyond national boundaries. By doing so, they serve to ensure responsible business conduct of domestic corporations, even in the absence of the regulatory framework in other countries. They often result in nominal or proactive compliance from companies, promising self-regulation and adherence to better standards.

For the present classification, it matters that the prescriptive jurisdiction conveyed by such acts does not overlap with the territorial prescriptive jurisdiction in the countries of their operation. The extraterritorial effect requires compliance with their domestic governance regime, which regulates certain matters (such as new emanations of forced labor or corporate gender balance) more thoroughly and demandingly than the governance regime in the place of

⁹³ Staker (n 6) 321 (reminding that the US exercise of extraterritorial jurisdiction in antitrust matters followed the ‘effects’ doctrine instead).

⁹⁴ Jaakko Salminen and Mikko Rajavuori, ‘Transnational Sustainability Laws and the Regulation of Global Value Chains: Comparison and a Framework for Analysis’ (2019) 26 *Maastricht Journal of European and Comparative Law* 602, 605:

‘[T]hese laws—which we call transnational sustainability laws—form the most recent mechanisms used to regulate the governance of social and environmental sustainability of production taking place outside a specific jurisdiction.’

⁹⁵ Kamminga (n 36) para 29 (suggesting that a sectoral codification of principles applicable to extraterritoriality may be more feasible than any general codification).

⁹⁶ Bribery Act.

⁹⁷ Modern Slavery Act.

⁹⁸ Loi n° 2017-399 du 27 mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d’ordre 2017 (2017-399).

⁹⁹ See the comprehensive review in Salminen and Rajavuori (n 94).

activity.¹⁰⁰ The liability for non-compliance exists only under the domestic law, similar to the previous case of overlapping jurisdiction. However, the absence of prescriptive jurisdiction in the host state prevents both the political conflict and the confusion of compliance for private parties.¹⁰¹

Furthermore, it is possible to conceive that the situations move between categories with time. The overlapping jurisdiction would become gap filling to the extent the domestic law of the actor imposes rules different from the host state. The case of gap-filling jurisdiction turning into overlapping one is arguably more interesting in the context of the continuous development of legal systems and borrowing of legal transplants among them.¹⁰² In such case, private parties face the necessity of adjustment to the requirements coming from different legal system within one or few compliance policies.¹⁰³

To conclude, both categories of prescriptive jurisdiction create liability risks for private parties, albeit to a different extent. In case of overlapping jurisdiction, private parties may find themselves in a state of confusion resulting from conflicting prescriptions.¹⁰⁴ In turn, gap-filling jurisdiction contributes with rules external to those existing in the host state. Such rules may require compliance from private parties under the threat of their enforcement elsewhere. The following section looks closely at the compliance strategies adopted by private parties.

¹⁰⁰ The situation, where the host state's regulations are in place but not enforced, lie in the grey zone of the suggested classification. However, one should probably ascribe them to the first category of potentially overlapping prescriptive jurisdiction due to the possibility of more proactive enforcement.

¹⁰¹ In addition, such acts may be compliant with international law as well, as argued by Ryngaert. See Ryngaert (n 37) 635 (citations omitted):

‘There is no rule of international law which prohibits private parties from “bonding” to higher regulatory standards (...). If States do not like their citizens to submit voluntarily to foreign regulation they have to intervene actively and enact legislation which prohibits them from complying with specific foreign regulation.’

¹⁰² One can observe such borrowing practices in the development of modern slavery legislation, as reported in Amy Sinclair and Justine Nolan, ‘Modern Slavery Laws in Australia: Steps in the Right Direction?’ (2020) 5 *Business and Human Rights Journal* 164, 165 (citations omitted):

‘In debating legislative provisions, stakeholder groups generally agreed that the Federal Act should not be a ‘copy and paste’ of the UK Act, but should improve upon the UK’s example by mitigating its weaknesses. A key consideration in Australia was avoiding the poor reporting standards and low reporting levels experienced under the UK Act.’

In addition, Norwegian authorities voiced a similar ambition to adopt a UK-inspired modern slavery law, but without its drawbacks, see Bjørn Haugan and Hallgeir Vågenes, ‘Næringsministeren: Vil utrede norsk slaverilov’ (*VG*, 12 January 2020) <<https://www.vg.no/i/kJLVak>> accessed 19 May 2020.

¹⁰³ For example, see the legal notices page of the global law firm Shearman & Sterling, which provides a comprehensive ‘catch-all’ notification of compliance: ‘Legal Notices’ (*Shearman & Sterling*) <<https://www.shearman.com/legal-notices>> accessed 21 May 2020.

¹⁰⁴ Jennings (n 20) 173 (predicting, on the example of the US antitrust laws, that ‘[a foreign] defendant may have been required to break a contract which is enforceable in his local law.’).

5 The privatization of extraterritoriality

The exercise of prescriptive jurisdiction creates the risks of both public and private law liability happening overseas. Such risks can only materialize through the exercise of enforcement jurisdiction with its territorial limitation.¹⁰⁵ However, their existence produces some peculiar effects for private parties, who seek to accommodate them through corporate (equity-based) or contractual-based means.¹⁰⁶

First, one can notice the adoption of mechanisms of self-governance (such as compliance policies and codes of conduct), as private parties seek to comply with extraterritorial regulation. Rather surprisingly, some private parties may decide to go beyond the statutory-mandated compliance towards voluntary undertakings, extending them over other companies within the corporate group. Second, private parties may further externalize the extraterritorial regulation by requiring compliance from their counterparties through different contractual clauses. The section observes both effects in a greater detail.

a. Compliance policies

Compliance policies represent private actor's commitments for observing a defined set of legal rules. One can further categorize the policies by the sources of rules, whether external or internal. The external rules often stem from statutory duties: serving to satisfy public law requirements, private parties undertake due diligence commitments. Examples include the 'know-your-client' [KYC] policy mandated by the legislation, combatting money laundering and financing of terrorism.¹⁰⁷ It also includes various reporting requirements, such as those under the UK Modern Slavery Act, the UK Gender Pay Gap Reporting Regulations and the French Duty of vigilance law.

While the jurisdictional scope of these acts varies broadly, it often includes elements of extraterritorial jurisdiction. For instance, some of those acts target domestic residents, defining them through the exercise of personal (prescriptive) jurisdiction and territory of operation.¹⁰⁸ The personal jurisdiction may well extend beyond territorial borders, whenever the actors subject to compliance operate overseas.¹⁰⁹ The jurisdictional scope may also depend solely

¹⁰⁵ However, such limitations do not exist in cases of the consent and cooperation of the affected state. For instance, the affected state may agree to extradite the perpetrator for further trial and enforcement in the interested state.

¹⁰⁶ The distinction reflects the legal organization of global value chains and the scope of application of national acts regulating their activities. See the discussion in Salminen and Rajavuori (n 94) 618–619.

¹⁰⁷ See eg 'Know Your Customer: Quick Reference Guide' (PWC 2016) <<https://www.pwc.com/gx/en/financial-services/publications/assets/pwc-anti-money-laundering-2016.pdf>> accessed 14 May 2020.

¹⁰⁸ This is the primary target of the Australian Federal Modern Slavery Act 2018, which imposes mandatory reporting requirements on Australian entities (*personal jurisdiction*) and entities carrying business in Australia (*territorial jurisdiction*), among others. See Modern Slavery Act 2018 Article 5.

¹⁰⁹ Crawford (n 5) 459 (citations omitted):

'Nationality, as a mark of allegiance and an aspect of sovereignty, is also generally recognized as a basis of jurisdiction over extra-territorial acts.'

For example, see Federal Modern Slavery Act 2018 (Australia) (Article 10):

on the territory of operation, while imposing no limitations on the geographical scope of reporting.¹¹⁰ The statutes may also involve alternative grounds for prescriptive jurisdiction.¹¹¹

Notably, the imposition of extraterritorial regulation sometimes shows spillover effects on other entities in the corporate group, such as parent and sister companies. One can observe them in the shipping companies' compliance policies with the UK Modern Slavery Act [MSA].¹¹² The international character of shipping business implies a diversity of players, where parent companies headquartered elsewhere have subsidiaries acting on the UK territory. One can argue that the minimization of risks under MSA would require constraining the reporting requirement by only those actors, who are operating on the UK's territory. The rest of the corporate group would then remain out of its regulatory reach.

However, in some cases, businesses report on behalf of their UK subsidiaries *and* the whole group. Such Modern Slavery statements, while being published by the subsidiaries, report on a much broader scope about the group commitments.¹¹³

One can further question, whether those cases constitute proactive compliance with MSA. It may not necessarily be so, as other companies of the

'Extra-territorial application

This Act extends to acts, omissions, matters and things outside Australia.'

¹¹⁰ For example, the UK Modern Slavery Act prescribes publishing a slavery and human trafficking statement to commercial entities operating, in part or in whole, in the UK's territory. The place of incorporation does not matter. See Modern Slavery Act s 54(12).

¹¹¹ The French Duty of vigilance law imposes reporting requirements for companies both established in France and foreign companies with French employees. See Loi de vigilance Article 1.

The UK Gender Pay reporting requirements apply both to English, Scottish, and Welsh employers; as well as foreign companies, which 'employed 250 or more people subject to English, Scottish or Welsh employment law.' See 'Gender Pay Gap Reporting: Overview' (GOV.UK, 22 February 2017) <<https://www.gov.uk/guidance/gender-pay-gap-reporting-overview>> accessed 14 May 2020. For the discussion in the context of conflict of laws, see 'Guidance: Managing Gender Pay Reporting' (Acas, the Advisory, Conciliation and Arbitration Service 2019) 8 <https://archive.acas.org.uk/media/4764/Managing-gender-pay-reporting/pdf/Managing_gender_pay_reporting_07.02.19.pdf> accessed 14 May 2020.

¹¹² The Article does not analyze the legal force of commitments undertaken under MSA by the shipping companies, concentrating mainly on their *personal* scope. However, their substantive scope, potential risks and remedies present significant interest for the future research.

¹¹³ 'Cosco Shipping (UK) Ltd Modern Slavery Statement' (2017) <<https://cosco.co.uk/wp-content/uploads/2017/11/Slavery.pdf>> accessed 2 March 2020:

'The China Cosco Shipping Group as a whole is opposed to slavery and human trafficking in all its forms and is committed to tackling and preventing any such activities within its business and supply chains.'

For a similar example, see 'Modern Slavery and Human Trafficking Statement 2019' (DP World PLC 2019) <https://www.dpworld.com/-/media/Modern_Slavery_and_Human_Trafficking_Statement_2019> accessed 26 February 2020 (emphasis added):

'This statement is made pursuant to section 54(1) of the UK Modern Slavery Act 2015 and constitutes DP World's [*Group - MU*] modern slavery and human trafficking statement for the financial year ending 31 December 2018. *It has been approved by DP World's board of directors.*'

group can operate on the UK's territory. Their ships may visit the UK ports, and instead of publishing separate statements, they may benefit from a group umbrella statement. Nevertheless, in other cases, the statements cover a broad range of companies, which indeed points to proactive compliance with MSA.¹¹⁴

To conclude, extraterritorial prescriptive jurisdiction may result in the adoption of compliance policies. Those policies may inspire proactive compliance among other group companies.

b. Contractual spill-over effect

Another way of mitigating external liability risks is with different contractual clauses. Such clauses may require due diligence from counterparties and provide them with exit strategies should the governing legal framework change. As a result, the responsibility for the maintenance of public regulations shifts upon the parties to the contract.

Following an earlier discussion of extraterritorial regulation in the conflict of laws doctrine, one can conceptualize how extraterritoriality affects contractual rights. The mapping exercise points towards positive, negative and neutral effects, each further explained.

First, extraterritorial regulation can expand their scope as a chosen applicable law. Pursuant to the principle of party autonomy, the parties can subject their relationship to a completely different legal framework and benefit from its institutions, which may be absent under the curial law. Notably, the curial law reserves its controlling function over the choice of law, with supervening mandatory rules.

Second, the exercise of extraterritorial prescriptive jurisdiction can limit the scope of contractual rights. Unilateral sanctions provide a relevant example, as they limit the ability of listed persons to operate overseas by outlawing and penalizing certain types of behavior. Because of extraterritorial prescription from their home state, US citizens experience a limited ability to enter into contracts with the political adversaries of the US. As a response to the limitation, private parties implement different compliance strategies (such as compliance policies, discussed earlier in the section, and compliance clauses).¹¹⁵ They serve to limit the negative effects of extraterritorial regulation through the exercise of screening, prevention and redress procedures.

Third, extraterritorial prescriptive jurisdiction may serve a gap-filling function, as discussed earlier. The CSR obligations in supply chain contracts may serve as a relevant example. Their initial inclusion in the text of the contract may follow public law requirements or intrinsic reasons of interested parties. However,

¹¹⁴ 'Modern Slavery Transparency Statement 2018' (MSC Mediterranean Shipping Company SA 2019) (emphasis added):

'This statement is submitted by MSC Mediterranean Shipping Company SA (hereafter "MSC") in line with Section 54 of the UK Modern Slavery Act 2015 and applies to all MSC employees and the MSC network of 228 Agencies (hereafter "MSC Agencies"), which includes Mediterranean Shipping Company (UK) Limited.'

¹¹⁵ See the example of BIMCO Sanctions compliance clauses below.

such reasons often seize to exist along the supply chain. The counterparties and intermediaries located in different states do not fall under the extraterritorial prescriptive jurisdiction to the same extent as the primary party. Nevertheless, the power dynamics within supply chains may incentivize all participating parties to pass the compliance obligations further along the chain. For instance, a major retail company may impose certain standards of compliance upon its minor suppliers.¹¹⁶ While the examples abound, the legal effects of such compliance statements remain unclear.¹¹⁷

To illustrate the point, one can refer to the Modern Slavery Act Statement of Evergreen Marine (UK) Ltd.¹¹⁸ The Company is a UK-subsiary of the Taiwan-based liner shipping conglomerate Evergreen Group. The Statement, which speaks on behalf of the board of the subsidiary, pronounces the commitment ‘to ensuring that there is no modern slavery or human trafficking in our supply chains or in any part of our business.’¹¹⁹ It further mentions the supplier adherence to these values, specifically pointing at the suppliers beyond the UK’s jurisdictional reach.¹²⁰ However, the section leaves the subsidiary company with a great amount of discretion whether to monitor compliance in its supply chains, or whether to take action under particular circumstances. The lack of clear and unconditional commitments points towards fictional and pro-forma compliance, which may result from the regulatory deficiencies of the Modern Slavery Act.

The earlier mentioned Modern Slavery Statement of the liner-shipping group DP World also refers to the requirements to its suppliers.¹²¹ The Statement declares that the suppliers ‘will be asked’ to conduct self-assessment of the risks of modern slavery and human trafficking ‘in the jurisdictions where they operate,’ and report on the policies and procedures in place.¹²² While the reach of the provision is commendable, its forward-looking character undermines the legal effects of the undertaking.

¹¹⁶ ‘Chapter 1.2.4 Widespread Use of Sustainability Contractual Clauses’, in Kateřina Peterková Mitkidis, *Sustainability Clauses in International Business Contracts* (Eleven International Publishing 2015).

¹¹⁷ ‘Part V Final Conclusions’, in Kateřina Peterková Mitkidis, *Sustainability Clauses in International Business Contracts* (Eleven International Publishing 2015) <<http://ebookcentral.proquest.com/lib/kbdk/detail.action?docID=1992198>>. Mitkidis admits the regulatory potential of CSR clauses if parties have such a desire; yet adds that many of the clauses face low chances of enforcement due to their vagueness and limited scope of action. Another rightful question here is whether compliance among counterparties will continue in the absence of contract; something what the present study cannot answer due to the lack of empirical data.

¹¹⁸ ‘Modern Slavery Act Statement’ (Evergreen Marine (UK) Ltd 2019) <https://www.shipmentlink.com/gb/tbo1/pdf/TBO1_ModernSlaveryStatement.pdf> accessed 26 February 2020.

¹¹⁹ *ibid* 1.

¹²⁰ *ibid* 2 (‘We consider that the greatest risk of modern slavery in our supply chains is when we deal with companies based in jurisdictions which do not have equivalent standards and legislation to the UK.’).

¹²¹ ‘Modern Slavery and Human Trafficking Statement 2019’ (n 113).

¹²² *ibid* 2.

In case of proactive compliance, a snapshot of the middle segment of the supply chain would show contractual CSR clauses in the absence of any active extraterritorial prescriptive jurisdiction over such segment. As a result, the initial jurisdiction will only indirectly affect the contractual rights of counterparties along the chain. The absence of a relationship between extraterritoriality and supply chain segments beyond its reach testifies to its spillover effects upon them.

c. The universalization trend

The expansion of extraterritorial prescriptive jurisdiction leaves private parties in the state of confusion. The problem originates from the political level and depends on the political will of participating states, leaving private parties little space for maneuver. The confusion seems more apparent in cases of overlapping jurisdiction, where it results from the multiplicity of legal orders requiring compliance with their legal rules. However, it may also arise in cases of gap-filling jurisdiction, whenever countries adopt new laws with extraterritorial reach targeting private parties.

In response, private parties often resort to all-encompassing, universal strategies in formulating their compliance policies and contractual clauses. Such solutions allow hedging the risks by declaring broader compliance than required by a particular regulatory act.

For the observation of a detailed, all-encompassing compliance policy, one can refer to the Modern Slavery Statement of the biggest liner shipping company, A. P. Møller - Mærsk A/S.¹²³ The Statement acknowledges that it is made in accordance with the UK Modern Slavery Act and has a complementary character to the Sustainability Report.¹²⁴ The Statement further provides an overview of the corporate efforts to prevent modern slavery, as codified in various other policy documents and reports. The existence of group-wide policies confirms the corporate ambition to maintain uniform regulatory practices, suggesting that they may positively detach from the local regulations towards some bigger scrutiny. Notably, among the findings of the modern slavery audits the Statement mentions a few examples, where the local laws or practices conflicted with the corporate policy.¹²⁵ The engagement of its local teams to mitigate the risks of modern slavery testifies to the enforcement of rules foreign to the local order. While the cause of the company's actions remains unclear (one cannot conclude with certainty from the text of the Statement whether the

¹²³ 'Modern Slavery Statement 2019' (A P Møller - Mærsk A/S 2020) <https://www.maersk.com/~/_/media_sc9/maersk/about/files/sustainability/sustainability-reports/apmm-uk-modern-slavery-statement-2019.pdf>.

¹²⁴ *ibid* 1.

¹²⁵ *ibid* 4:

'We found that in a few countries where we operate, local laws and practices may require employees to obtain approval from their current employer if they wish to move to a different employer. There are also a limited number of cases where employees are granted loans by the company. In these cases, we have worked with our local management teams to describe the rights and responsibilities of employees to avoid any situation that can give rise to a risk of bonded labour practices.'

company was mindful of the ‘external’ liability under the UK Modern Slavery Act or followed some internal motivations), the attempt to enforce its uniform regulatory practices on a foreign soil deserves merit.

In turn, the model contractual sanctions clauses for time and voyage charter parties,¹²⁶ developed by BIMCO, can serve as an example of the universalization trend. The Clauses contain no limitations on the subjective (‘Sanctioning Authority’) or objective (‘Sanctioned Activity’) scope of their application. While they expressly mention some potential sanctioning authorities (UN, EU, UK, and US), their list remains open.¹²⁷ Upon a brief analysis of the clauses, one can conclude that their design follows the goal of avoiding arrest of the vessel by the sanctioning authorities, which would endanger the financial interests of the shipowners. Pursuant to this goal, the shipowners contractually reserve the right to refuse to proceed with the operations in case they involve a sanctioned activity or sanctioning authority. In the context of the present discussion, one can interpret such clauses as a manifestation of implementation shift from public authorities to shipowners. Guided by their intrinsic financial reasons, shipowners become the guardians of states’ regulatory interests.

The adoption of universal catch-all solutions, where the behavior of private parties seeks to satisfy the regulatory interests of several states, leads to another conclusion. The clauses and policies become not only universal in their application, they also become self-regulatory (due to the transfer of adjudicative powers) and detached from any *particular* state. Indeed, private parties often come up with indigenous solutions in their attempts to comply with different regulatory regimes:

‘[W]hen corporations are subject to multiple unclear rules in multiple jurisdictions, they may seek to develop rules of their own. The result can be a kind of international “private” private law.’¹²⁸

As a result, the exercise of extraterritorial jurisdiction by several states results in denationalized approaches of private actors to comply with their prescriptions.

¹²⁶ ‘BIMCO Sanctions Clause for Time Charter Parties 2020’ <<https://f.hypotheses.org/wp-content/blogs.dir/4944/files/2019/12/lien.pdf>> accessed 13 April 2020; ‘BIMCO Sanctions Clause for Voyage Charter Parties 2020’ <<https://f.hypotheses.org/wp-content/blogs.dir/4944/files/2019/12/lien.pdf>> accessed 13 April 2020.

¹²⁷ The Explanatory Notes to the clauses confirm that the list is not exhaustive, and the parties can add other relevant authorities to it. See ‘BIMCO Sanctions Clause for Time Charter Parties - Explanatory Notes’ <https://www.standard-club.com/media/3229433/bimco-sanctions-clause-for-voyage-charter-parties-2020-explanatory-notes_.pdf> accessed 13 April 2020; ‘BIMCO Sanctions Clause For Voyage Charter Parties 2020 - Explanatory Notes’ <https://www.standard-club.com/media/3229433/bimco-sanctions-clause-for-voyage-charter-parties-2020-explanatory-notes_.pdf> accessed 13 April 2020.

¹²⁸ Dan Danielsen, ‘How Corporations Govern: Taking Corporate Power Seriously in Transnational Regulation and Governance Symposium: Comparative Visions of Global Public Order (Part I)’ (2005) 46 *Harvard International Law Journal* 411, 418.

Hardly surprisingly, the discussion of denationalization suggests looking back at the private law understanding of extraterritoriality and the conflict of laws rules. Indeed, some private international law scholars argue in favor of delocalized self-executing contracts, having only minimal (if any) connection with the law of any particular state.¹²⁹ While the examples of ‘stateless justice’ remain controversial,¹³⁰ one can observe a tendency of denationalization in certain particular areas. For instance, in the context of international commercial arbitration, the territorial connections of the dispute with *lex fori* and *lex arbitri* are gradually losing their legal importance.¹³¹ Among potential reasons, one can name the unification of arbitration legislation, borrowings within the arbitral practice and the ability of arbitrators to ensure compliance with some universal public policy rules.

Similar reasons may apply in the universalization of private responses to extraterritorial regulation, albeit in a less evident fashion. The rules of extraterritorial jurisdiction belong to the body of public international law and so are the rules governing the recognition and enforcement of arbitral awards.¹³² Private responses to extraterritoriality, similarly to arbitral awards, need to preserve validity in the legal environment of several states. Their diversity pushes both private actors and arbitrators for accommodating public concerns with a high degree of uniformity between different states.¹³³ One can only add that uniformity of regulation is particularly widespread in the maritime sphere, from long-standing universal jurisdiction for prosecution of piracy acts to common acceptance of International Maritime Organization (IMO) conventions and regulations.

With a grain of salt, one should add that these examples could hardly count as representative for the whole shipping industry. Instead, it seems more appropriate to present them as leading initiatives in the field. In order to find out the scope of their adoption among other actors, one requires further empirical research of other policies and clauses. Nevertheless, the authoritative positions of both A. P. Møller – Mærsk and BIMCO as ‘lead users’ falls in line with the theory of private governance, discussed in the following section.

To conclude, the expansion of extraterritorial prescriptive jurisdiction results in an active use of private law solutions. The section categorized them by the instrument of adoption, as either compliance policies or contractual clauses. Both categories may effectively transform the requirements of extraterritorial prescriptive jurisdiction into a matter of private regulation. Furthermore, the

¹²⁹ Ralf Michaels, ‘The True Lex Mercatoria: Law Beyond the State’ (2007) 14 *Indiana Journal of Global Legal Studies* 447, 449–450.

¹³⁰ Pietro Ortolani, ‘The Three Challenges of Stateless Justice’ (2016) 7 *Journal of International Dispute Settlement* 596.

¹³¹ See, generally, Brekoulakis (n 56).

¹³² New York Convention.

¹³³ Dan Danielsen suggests that in some cases companies may adopt the most stringent rule as a common denominator. According to his argument, a good faith effort of compliance with the highest bar can prevent severe penalties for non-compliance with less stringent requirements in other places. See Danielsen (n 128) 418–419.

article suggested that the proliferation of extraterritorial regulation may result in the adoption of ‘catch-all’ strategies by private parties. In the most peculiar case, such strategies lose attachment to the initial trigger, supporting the claim of a regulatory shift. The concluding section explains how privatization of extraterritoriality contributes to the phenomenon of private governance.

Conclusions: extraterritoriality as a trigger for private governance

The previous sections observed how public law regulations become the ignition of private law compliance. They further noted the examples of spillover effects, where private actors accept and endorse the regulatory goals of statutory legislation on their own initiative. The concluding section argues that extraterritorial prescriptive jurisdiction contributes to the proliferation of private governance mechanisms.

The phenomenon of private governance explains the regulatory shift from public actors, such as states, their organs and regulatory bodies, to private actors of commercial and non-commercial nature.¹³⁴ While the origins of private regulatory models lie in the medieval *lex mercatoria*, scholars observe their emergence in new areas, such as the regulation of cyberspace.¹³⁵

The scholarship further conceptualizes private governance as a combination of three regulatory pillars, which somewhat distantly mirror the traditional separation of powers.¹³⁶ The regulation pillar involves private rule making, such as industry standards, CSR undertakings and corporate policies.¹³⁷ The implementation pillar comprises monitoring and execution of the rules, through the means of auditing and certification processes. The dispute resolution pillar concerns the settlement of disputes by means, which are alternative to state courts, such as mediation and arbitration.

One can further add that the shift towards private governance solutions may emerge from both markets and states, as voluntary initiatives or public interest delegated and performed by private actors.¹³⁸ Private parties may effectively ‘opt-out’ from state legislation in order to establish their own regulation; yet only to the extent the state’s mandatory rules allow them to do

¹³⁴ *ibid* 412:

‘When corporations create or shape the content, interpretation, efficacy, or enforcement of legal regimes and, in so doing, produce effects on social welfare similar to the effects resulting from rulemaking and enforcement by governments, corporate actors are engaged in governance.’

¹³⁵ Thomas Riis, ‘User Generated Law: Re-Constructing Intellectual Property Law in a Knowledge Society’ in Thomas Riis (ed), *User generated law: re-constructing intellectual property law in a knowledge society* (Edward Elgar Publishing 2016) 3–4.

¹³⁶ Ole Hansen, Clement Salung Petersen and Vibe Ulfbeck, ‘Private Governance and the Potential of Private Law’ (2020) 2 *European Review of Private Law* 333, 334–335.

¹³⁷ See the discussion of the relationship between corporate undertakings and tort law principles in Carola Gliniski, ‘The Ruggie Framework, Business Human Rights Self-Regulation and Tort Law: Increasing Standards through Mutual Impact and Learning’ (2017) 35 *Nordic Journal of Human Rights* 15.

¹³⁸ Hansen, Petersen and Ulfbeck (n 136) 336.

so.¹³⁹ Depending on the scope of public policy considerations, state law may provide private parties certain ‘autonomy spaces’ for their regulation.¹⁴⁰ The scope of autonomy spaces may be broader in reality than on paper, as states may lack opportunities for enforcement of their laws.¹⁴¹ A relevant example of such ‘state-driven’ private governance is content moderation on digital platforms. There, the background ‘hard-law’ reflects the political consensus about the most urgent regulatory matters.¹⁴² However, the ‘massive explosion of online content’ limits the opportunity of public authorities to ensure its moderation.¹⁴³ As a result, big industrial actors contribute to the regulation by self-governing practices and codes of conduct.¹⁴⁴

The examples from A. P. Møller – Mærsk and BIMCO, observed in the previous section, show how the two largest industry actors are advancing policy objectives in a universal fashion. One can further characterize them as ‘lead users,’ a small number of industry forerunners who guide the innovation.¹⁴⁵ While they develop novel solutions primarily out of self-interest, other actors may pick them up, spread out and commercialize.¹⁴⁶ The regulatory goals of extraterritorial legislation will then pass on to other actors, yet in a novel universal form.

The observed application of extraterritorial prescriptive jurisdiction to private activities in shipping industry falls neatly in the private governance framework. The article observed how shipping companies exercise a private rule-making function by undertaking commitments dealing with modern slavery in their compliance policies. They may also impose regulatory clauses dealing with sanctions and the prevention of bribery further in their contracts. Furthermore, they often carry responsibility for monitoring compliance in own actions and the actions of their counterparties. Upon discovery, they may enforce contractual provisions allowing them to shift the risks or terminate the contract.

Taking as the state interest in extraterritorial regulation as a trigger, the article further looked at its qualitative shift towards a matter of private interest. The rules and procedures, mandated by the state regulatory force, spread beyond its ability to enforce, limited by the territorial borders. In some cases, the state’s regulatory interests spread even further, beyond its ability to prescribe, when private actors take the baton of promoting them in their networks. As a result,

¹³⁹ Riis (n 135) 5.

¹⁴⁰ *ibid* 10.

¹⁴¹ *ibid* 11.

¹⁴² Alexandre De Streel and others, *Online Platforms’ Moderation of Illegal Content Online: Law, Practices and Options for Reform* (European Union) 9.

¹⁴³ *ibid* 13.

¹⁴⁴ For EU territorial scope, see the comparison of ‘hard law,’ ‘soft law’ and self-governing regimes in *ibid* 33.

¹⁴⁵ Eric von Hippel, ‘1. Introduction and Overview’, *Democratizing Innovation* (The MIT Press 2005): ‘[Lead users] are ahead of the majority of users in their populations with respect to an important market trend, and they expect to gain relatively high benefits from a solution to the needs they have encountered there.’

¹⁴⁶ *ibid*.

the expansion of extra-territorial legislation may have spillover effects on other actors, not directly affected by it.

As a round-up exercise, one can recall that extraterritorial regulation is prone to political controversies, due to its potential interference in matters of sovereign regulation. The article observed the situations of overlapping and gap-filling jurisdiction, where the transfer of regulatory duties often results in a state of confusion for private actors. Solutions to the risks presented by the increasingly multilateral regulation include proactive compliance and universalization of clauses. The invention of uniform solutions comprising different interests of state and non-state actors testifies to the creation of a new regulatory regime, the regime of private governance.