

Jurisdiction Unbound: (Extra)territorial Regulation as Global Governance

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Abstract

The international law of jurisdiction is faced with far-reaching changes in the context of a globalizing world, but its general orientation, centred on territoriality as the guiding principle, has remained stable for a long time. This article traces how, in contrast to the prevailing rhetoric of continuity, core categories of jurisdiction have been transformed in recent decades in such a way as to generate an ‘unbound’ jurisdiction, especially when it comes to the regulation of global business activities. The result is a jurisdictional assemblage – an assemblage in which a multiplicity of states have wide and overlapping jurisdictional claims, creating a situation in which, in practice, a few powerful countries wield the capacity to set and implement the rules. Jurisdiction is thus misunderstood if framed as an issue of horizontal relations among sovereign equals but should rather be regarded as a structure of global governance through which (some) states govern transboundary markets. Using a governance prism, this article argues, can help us to gain a clearer view of the normative challenges raised by the exercise of unbound jurisdiction, and it shifts the focus to the accountability mechanisms required to protect public accountability and self-government in weaker states.

1 Introduction

Jurisdiction is one of the classical categories of international law that, foundational but largely taken for granted, are not often subjected to sustained inquiry. Its starting

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point – ‘the presumption that jurisdiction (in all its forms) is territorial and may not be exercised extraterritorially without some specific basis in international law’¹ – has remained constant for a long time and remains uncontroversial, and new developments, such as the rise of universal jurisdiction, are seen to affect the edges rather than the core of this area of the law.² Jurisdiction thus continues to be portrayed as a corollary of statehood and sovereign equality, with its ‘*fons et origo* [being] the principle of territoriality’³ and its function that of a horizontal demarcation of spheres between states, albeit with certain overlaps.⁴

This aura of continuity and stability in the law of jurisdiction is surprising, given that the environment in which it operates has undergone rapid and extensive change over the past decades. Its territorial orientation seems to stand in tension with the ever greater interdependence of a globalizing world in which actors, markets and problems straddle boundaries to a far greater extent than before. Legislators, regulators and courts face increasingly transboundary challenges that they find difficult to tackle if limited to their own state, and calls for a reorientation of jurisdiction towards the solution of common problems and the protection of global interests have grown as a result. By most accounts, however, practice continues on the traditional, territorial path,⁵ and current law-making efforts – on business and human rights, for example – largely operate in this frame as well.

Yet below the surface of this apparent continuity, I argue in this article, the law of jurisdiction has undergone a fundamental transformation – a transformation that retains traditional categories but has redefined them in such a way as to challenge the core imagery that portrays jurisdiction as a form of horizontal delimitation. As I seek to show through the consideration of different areas of business regulation, practice has largely ‘unbound’ territoriality from its constraining aspects, opening the door to an exercise of jurisdiction on the basis of thin connections with the issue at hand and, thus, a normalization of regulation with few traditional territorial links. The result is a jurisdictional assemblage – an assemblage in which a multiplicity of states have valid jurisdictional claims, yet without established hierarchies or priorities between them. In practice, however, this leaves especially major economies with few constraints on their use of extraterritorial economic regulation.

When it comes to regulating multinational companies and transnational economic activities, jurisdiction is thus misunderstood if framed as an issue of horizontal relations among sovereign equals – as an issue of delimiting their separate spheres. Instead, it appears as a structure of global governance through which some states govern transboundary markets – an often oligarchical structure in which a few

¹ J. Crawford, *Brownlie’s Principles of Public International Law* (8th edn, 2012), at 456.

² See also Mills, ‘Rethinking Jurisdiction in International Law’, 84 *British Yearbook of International Law (BYIL)* (2014) 187.

³ J. Klabbers, *International Law* (3rd edn, 2020), at 100–101.

⁴ C. Ryngaert, *Jurisdiction in International Law* (2nd edn, 2015), at 29.

⁵ See, e.g., Colangelo, ‘Spatial Legality’, 107 *Northwestern University Law Review* (2012) 69; C. Ryngaert, *Jurisdiction in International Law* (2nd edn, 2015), at 100.

powerful countries wield the capacity to set and implement rules. This arrangement may help to overcome collective action problems and provide public goods in a decentralized international order, but it also undermines the sovereignty-protecting function often attributed to the law of jurisdiction. Rebalancing the regime would require the introduction of new forms of accountability that respect self-government while providing effective tools to regulate multinational companies.

The article proceeds through four main steps. It begins by outlining the challenges for traditional jurisdictional categories and highlights different responses to them in scholarship as well as the persistence of established frames in legal discourse (section 2). It then contrasts these with actual jurisdictional practices through five vignettes of contemporary cases of business regulation (section 3). In section 4, the article draws the insights from these vignettes together with observations from the literature to develop a broader picture of the emerging 'jurisdictional assemblage' and its structuring principles. In section 5, it suggests that we take into view the vertical, hierarchical elements in the exercise of unbound jurisdiction and that we reconceive it as a form of global governance, with significant implications for theorizing legitimacy questions and designing mechanisms to ensure accountability and self-government.

2 Continuity under Challenge

Jurisdiction – understood as the power to 'speak' or determine the law in a given domain⁶ – appears in many sites of contemporary international legal discourse. One such site is the United Nations (UN) Working Group on Transnational Corporations and Other Business Enterprises with Respect to Human Rights and its negotiations over a treaty – or, in the parlance of the working group, a 'legally binding instrument' – on business and human rights.⁷ The first drafts have sparked controversy,⁸ but the jurisdictional frame they use are largely consensual and very familiar. Jurisdiction is primarily defined territorially: the power to adjudicate (as well as to determine the applicable law) vests in the states in which the acts in question occurred, in which the victim is domiciled or in which the defendant company is domiciled.⁹ This dominance of the territorial principle is an expression of a striking continuity. Formulated quite

⁶ See Allen *et al.*, 'Introduction: Defining State Jurisdiction and Jurisdiction in International Law', in S. Allen *et al.* (eds), *The Oxford Handbook of Jurisdiction in International Law* (2019) 3, at 5.

⁷ On the treaty project, see De Schutter, 'Towards a New Treaty on Business and Human Rights', 1 *Business and Human Rights Journal (BHRJ)* (2016) 41.

⁸ See section 5.C.

⁹ Third Revised Draft Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises, OEIGWG Chairmanship, 17 August 2021, Art. 9, available at www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session6/LBI3rdDRAFT.pdf. Art. 9(5) of the draft goes somewhat beyond that frame by providing for a *forum necessitatis*, but this aspect remains contested. See the first, second and third Revised Draft legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises. The different drafts and related documents can be found at www.ohchr.org/en/hrbodies/hrc/wgtranscorp/pages/igwgonc.aspx.

similarly, it was already central more than three centuries ago,¹⁰ and, despite certain modifications over time, the territorial principle still anchors most of today's accounts of the law of jurisdiction.¹¹

This continuity was also at the heart of the 1964 Hague Lecture by F.A. Mann, which is cited as fundamental in virtually every modern text on the topic. Mann stressed at the time how much the territorial principle had shaped the thinking about jurisdictional boundaries for centuries and how it continued to do so. But he also had serious doubts as to whether it was still appropriate for the present and the future. For him, the 'complications of modern life' were responsible for the ever more widespread reluctance to 'localise' facts, events or relationships; as already mentioned, the focus on territorial connections led him to 'results which in a shrinking world may no longer be adequate'.¹² He therefore suggested even then to move away from territoriality as the guiding principle and focus instead on 'contacts'. According to this approach, a state could regulate certain facts if its contact with them 'is so close, so substantial, so direct, so weighty, that legislation in respect of them is in harmony with international law'.¹³

In the half-century since Mann's lecture, the 'complications of modern life' have only increased and, in some respects, dramatically so, placing ever stronger pressure on the territorial foundations of the law of jurisdiction.¹⁴ Processes of political internationalization and economic liberalization, privatization and globalization have further undermined the idea of separate states sitting alongside each other, distinguishable along territorial boundaries. The notion of territory itself has been problematized and reimagined with alternative spatial visions, leaving the classical, legal territoriality behind.¹⁵ For questions of jurisdiction, these developments translate into a host of challenges, especially from unlocalizable acts (especially visible in cyberspace, but similarly in other economic transactions), ubiquitous actors (particularly in regard to multinational companies and global value chains), globalized markets and borderless effects (in environmental as well as economic terms). The rise of a global value discourse has further helped to erode the sense of distinct regulatory spaces.

Under a regime of largely territorial jurisdiction, states are bound to have difficulty coping with such challenges, at least insofar as there are no effective international mechanisms that could respond to them. We would thus expect significant pressure

¹⁰ See, e.g., Huber, 'De Conflictu Legum Diversarum in Diversis Imperiis', 18 *BYIL* (1937) 64.

¹¹ See, e.g., the analysis in Ryngaert, *supra* note 4.

¹² Mann, 'The Doctrine of Jurisdiction in International Law', 111 *Recueil des Cours de l'Académie de Droit International (RCADI)* (1964) 9, at 36–37.

¹³ *Ibid.*, at 49.

¹⁴ See Buxbaum, 'Territory, Territoriality, and the Resolution of Jurisdictional Conflict', 57 *American Journal of Comparative Law (AJCL)* (2009) 631; Michaels, 'Territorial Jurisdiction after Territoriality', in P.J. Slot and M. Bulterman (eds), *Globalisation and Jurisdiction* (2004) 105. Mann himself took up some of these changes 20 years later. See Mann, 'The Doctrine of Jurisdiction in International Law Revisited after Twenty Years', 186 *RCADI* (1984) 9.

¹⁵ See, e.g., Sassen, 'When Territory Deborders Territoriality', 1 *Territory, Politics, Governance* (2013) 21. See also section 4.B.

for change in the law of jurisdiction – an expansion of jurisdictional boundaries in order to come to terms with the difficulty of localizing acts and regulating business actors operating on a global scale.¹⁶ Yet, at first glance, surprisingly little change is apparent in the international legal discourse around jurisdiction – the predominant conceptual framework and terminology move on familiar terrain. Most accounts operate with the traditional categories of jurisdiction: the territoriality principle as a starting point, coupled with personality (active and, more controversially, passive), the protective principle (somewhat unstable) and the principle of universality (expanding but still limited in scope).¹⁷ Only the effects doctrine, developed relatively anew after World War II, remains contested, especially outside the area of competition in which it originated.¹⁸ Observers have noted some shifts between the various categories – in particular, a shift in practice towards more extraterritorial forms¹⁹ – but the categories themselves appear largely stable.

This continuity is reflected, for example, in the standard work by Cedric Ryngaert, in the overview prepared by the Secretariat of the International Law Commission in 2006 or in the recent *Restatement (Fourth)*, all of which follow relatively similar lines.²⁰ Some movement, however, is visible in attempts to frame the exceptions to territorial jurisdiction as an expression of a common principle. The aforementioned report for the International Law Commission, for example, sees the ‘legitimate interest’ of a state on the basis of a ‘connecting link’ as a ‘common element’ of the foundations of extra-territorial jurisdiction.²¹ This principled reading has also found significant support in scholarship.²² The *Restatement (Fourth)* goes one step further, thus breathing life into the approach proposed by Mann more than five decades earlier. In the *Restatement*, the various points of contact are seen as an expression not only of a broader principle but also of a new general rule according to which the exercise of jurisdiction is permissible if there is a ‘genuine connection’ between the state and the object of regulation.²³

The broader jurisdictional spheres thus opened up may help to respond to some of the pressures outlined above. Yet the limited adaptations in practice and theory have hardly affected the dominant imagery of jurisdiction built around the idea of jurisdictional spheres of states, which, despite certain (and increasing) overlaps, largely remain separate and run in parallel. This imagery is given expression, for example, in Vaughan Lowe’s sketch of the law of jurisdiction in which ‘the basic principle is

¹⁶ See, e.g., Slot and Bulterman, *supra* note 14.

¹⁷ See, e.g., the account in Crawford, *supra* note 1, at 456–464. For a similar observation to that made here, see Mills, *supra* note 2, at 188.

¹⁸ See also Szigeti, ‘The Illusion of Territorial Jurisdiction’, 52 *Texas International Law Journal* (2017) 369. There, Szigeti describes the longer history of the effects doctrine.

¹⁹ Allen *et al.*, *supra* note 6, at 8.

²⁰ International Law Commission (ILC), Extraterritorial Jurisdiction: Report Prepared by the Secretariat, 2(2) *ILC Yearbook* (2006) 1, at 229; Ryngaert, *supra* note 4; *Restatement of the Law (Fourth): Foreign Relations Law of the United States* (2018).

²¹ ILC, *supra* note 20, at 231.

²² See, e.g., Crawford, *supra* note 1, at 457; R.Y. Jennings and A. Watts, *Oppenheim’s International Law* (9th edn, 1992), at 457–458.

²³ *Restatement (Fourth)*, *supra* note 20, at 187–195.

that jurisdiction is territorial'.²⁴ This is not merely a doctrinal starting point but, instead, understood as a reflection of states' 'primary right to set the laws that apply to everyone within their territory' and, thus, as an expression of core pillars of international law, such as territorial sovereignty, sovereign equality and the right to self-determination.²⁵ As quoted at the outset, James Crawford, in *Brownlie's Principles of International Law*, likewise understands the principle of territorial jurisdiction as an aspect and corollary of sovereignty and equality.²⁶ This understanding has crucial implications for the structure of the law of jurisdiction as it suggests, in Ryngaert's formulation, that 'the very regulating purpose of the international law of jurisdiction [is] delimiting States' spheres of action and thus reducing conflicts between States'.²⁷ Mills similarly observes that the 'rules on jurisdiction serve the important function of delimiting (while accepting some overlap of) state regulatory authority'.²⁸ The core image of the law of jurisdiction conveyed here is a horizontal one, organizing boundaries between the spheres of states. The overlaps – more or less extensive – are not usually seen to fundamentally alter this picture.

Alternatives to this conception of jurisdiction have had more limited resonance, but they do exist, both as a matter of reconstructing existing law and of taking it into a new direction.²⁹ One such alternative proposal starts not from states but, rather, from the community with which jurisdiction is associated. This takes one of the modern pillars of territorial jurisdiction – the link with a specific *polis* – and translates it into a world of multiple affiliations. Paul Schiff Berman captures this cogently: 'We belong to many communities. Some may be local, some far away, and some may exist independently of spatial location. Jurisdiction is the way that law traces the topography of these multiple affiliations.'³⁰ Berman's own account is cosmopolitan and pluralist in outlook – based on communities and jurisdiction at different levels, including the global, which sit alongside each other and frequently interact. Other community-oriented approaches place greater emphasis on the national political community as the predominant frame.³¹ Whatever the precise limits, the linkage between community and jurisdiction comes with an intuitive normative appeal and with the promise of reflecting changing (and potentially broadening) understandings of community. Yet it might be less suited to issues of economic regulation, especially because it has difficulty capturing the extra-community activities of corporations that often simply do not 'belong' to any community but themselves. This could be remedied, in part, by taking the 'international community' more directly as a reference point and conceptualizing

²⁴ V. Lowe, *International Law: A Very Short Introduction* (2015), at 86.

²⁵ *Ibid.*, at 99–100.

²⁶ Crawford, *supra* note 1, at 447, 456.

²⁷ Ryngaert, *supra* note 4, at 29.

²⁸ Mills, *supra* note 2, at 187.

²⁹ See also Ryngaert, 'Territory in the Law of Jurisdiction: Imagining Alternatives', 47 *Netherlands Yearbook of International Law (NYIL)* (2016) 49; Allen *et al.*, *supra* note 6.

³⁰ Berman, 'The Globalization of Jurisdiction', 151 *University of Pennsylvania Law Review* (2002) 311, at 530.

³¹ Kaushal, 'The Politics of Jurisdiction', 78 *Modern Law Review* (2015) 759.

jurisdiction as a means to realize its values, as Ryngaert suggests.³² Yet a community of such breadth runs the risk of remaining an abstract projection.

A second alternative is more openly functional in nature and understands the extent of jurisdiction as a function of the problems to be addressed, thus doing away with the state nexus in a more radical way. This sometimes begins from considerations of justice; more often it takes as a basis efficacy considerations in the context of (global) public goods, with the scope of jurisdiction following the need to respond to particular issues and problem constellations.³³ Ralf Michaels' call for domestic courts to act as 'global courts' in order to tackle global problems is a good example of this approach. While acknowledging that properly global institutions (established through worldwide agreement) might be better situated in theory, their absence in many areas leads him, *faute de mieux*, to advocate for a broader jurisdictional reach of national courts when faced with globalized markets, transboundary human rights violations and other problems of a global character.³⁴ The rise of jurisdictional obligations – especially in the context of human rights and international criminal justice – follows a similar direction.³⁵

National jurisdiction thus becomes – here and in some of the community-oriented conception – jurisdiction in the global interest. Yet because the exercise of that jurisdiction continues to operate in the decentralized, state-based model, the structural implications of this shift are typically less appreciated. These become more visible in critical accounts that often regard jurisdiction as a tool of control, exercised by powerful actors (or at their behest) over weaker ones. B.S. Chimni's recent attempt to read the history of jurisdiction in a Marxist light, with an emphasis on the protection of a (national or transnational) capitalist class, reflects this general strand well.³⁶ Yet others, too, have begun to conceive of jurisdiction primarily as a technology of governance – some from a generally critical perspective,³⁷ others from a close engagement with practices in particular issue areas.³⁸ The broadening of jurisdictional spheres (whether in the name of global interests or not) shifts away here from horizontal coordination to a more vertical, hierarchical imagery. Yet such reconceptualizations have so far remained rather marginal.

³² See Ryngaert, *supra* note 4, at 228–230.

³³ See, e.g., Bodansky, 'What's So Bad About Unilateral Action to Protect the Environment?', 11 *European Journal of International Law (EJIL)* (2000) 339; Fabre, 'Secondary Economic Sanctions', 69 *Current Legal Problems* (2016) 259; Michaels, 'Global Problems in Domestic Courts', in S. Muller *et al.* (eds), *The Law of the Future and the Future of Law* (2011) 165; Reinisch, 'Human Rights Extraterritoriality: Controlling Companies Abroad', in E. Benvenisti and G. Nolte (eds), *Community Interests across International Law* (2018) 396.

³⁴ Michaels, *supra* note 33.

³⁵ See Mills, *supra* note 2, at 209–230.

³⁶ Chimni, 'International Law of Jurisdiction: A TWAAIL Perspective', 35 *Leiden Journal of International Law* (2022) 29.

³⁷ See S. Dorsett and S. McVeigh, *Jurisdiction* (2012). See also the survey in McVeigh, 'Critical Approaches to Jurisdiction and International Law', in S. Allen *et al.* (eds), *The Oxford Handbook of Jurisdiction in International Law* (2019) 183.

³⁸ Brummer, 'Territoriality as a Regulatory Technique: Notes from the Financial Crisis', 79 *University of Cincinnati Law Review* (2010) 499, at 525–526.

3 Practices of Jurisdiction

The accounts discussed in the previous section aim at generality, and they thus abstract, to a greater or lesser extent, from the ways in which actors conceive of jurisdiction in particular instances and issue areas. This section adopts the latter perspective to better understand where the practice of jurisdiction stands today. To what extent has it responded to the pressures for jurisdictional change mentioned at the outset, and does it follow any of the proposed paths? What structure emerges as a result?

I approach these questions by zooming in on contemporary jurisdictional practices through five vignettes of specific transboundary problem contexts – contexts of business regulation in which, because of tight links with transnational markets and problems, the pressures for jurisdictional change are likely to be strong. These contexts may not be representative, but insights gained from them can give us indications of connecting lines and trends in other strongly transnationalized environments.

We do, however, need to be cautious about generalizations. The practice on jurisdictional issues is confusing, widely ramified and a conglomerate of specific partial practices – regimes in individual countries and subject areas are often only loosely related to each other, also because the actor constellations are nationally shaped and factually heterogeneous.³⁹ The practice in competition law differs from that in environmental law, the practice in combating corruption differs from that in financial regulation and all of these in turn differ from the practice in combating human rights violations abroad. It is therefore more a patchwork than a coherent system, and developments in one area may be, partly or fully, disconnected from those in another.

A Football

The travails of regional and global football associations have been in the public eye for some time, and they are instructive not only for football enthusiasts but also for those interested in jurisdictional boundaries. Here, we focus on the recent corruption scandal surrounding the Fédération Internationale de Football Association (FIFA) – the global footballing body, registered as a Swiss non-profit association. The scandal was provoked by the fact that some of FIFA's highest officials accepted significant rewards for their voting behaviour, especially when it came to decisions about the location of World Cup competitions.⁴⁰

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

³⁹ See also Ryngaert, *supra* note 4, at 1–2.

⁴⁰ See, e.g., D. Conn, *The Fall of the House of FIFA* (2017).

criminal law to these cases, motivated also by the suspicion that Swiss prosecutors may be too lax to generate convictions.⁴¹ The technical argument relies on the fact that the crimes were partly committed within the USA – that relevant payments were made via US banks, that US subsidiaries benefited from marketing deals and that participants travelled via New York airports with bribery cheques.⁴² These territorial links become relevant because of the crimes chosen for prosecution – crimes such as wire fraud, for example, for which the defendants only needed to have made ‘more than minimal’ use of transfers to or from the USA.⁴³ The extraterritorial reach of some of the offences in question may be in doubt under US law.⁴⁴ But, on the international plane, neither Switzerland nor the other countries seem to have protested against the US action in these cases, and many defendants have been extradited to the USA.⁴⁵

The FIFA prosecutions rest on direct (even if partial) territorial links,⁴⁶ and the case is a good illustration of the scope of the territorial principle when it comes to global economic relations – relations that extend across large parts of the world – and especially where transnational financial crime is concerned.⁴⁷ US anti-corruption law has been a vanguard in this respect, and its broad jurisdictional approach has been vindicated by the Organisation for Economic Co-operation and Development’s Anti-Bribery Convention.⁴⁸ If they have the resources, states can bring global economic relations under their jurisdiction, even if only a limited aspect is linked to their territory. The result is a multiplication of potentially competent states – the indictment in the FIFA case mentions acts in more than a dozen states.

B Finance

Financial markets epitomize globalization’s latest phase, with financial flows zigzagging across borders in a matter of seconds.⁴⁹ Jurisdictional boundaries hardly fit such globalized processes, and, especially for the USA – counting by far the largest amount

⁴¹ Leary, ‘Where Should They Go? Why the United States Should Have Jurisdiction over Those Being Charged in the FIFA Corruption Scandal’, 40 *Loyola of Los Angeles International and Comparative Law Review* (2017) 51.

⁴² US District Court for the Eastern District of New York, Indictment of 20 May 2015, Doc. 15 CR 0252(RJD) (RML).

⁴³ *U.S. v. Napout et al.*, 332 F.Supp.3d 533 (US District Court for the Eastern District of New York, 2018). For a detailed analysis, see Struebing, ‘Federal Criminal Law and International Corruption: An Appraisal of the FIFA Prosecution’, 21 *New Criminal Law Review* (2018) 1.

⁴⁴ Struebing, *supra* note 43, at 12–27.

⁴⁵ Most of the defendants have entered into agreements on criminal proceedings in the USA; others have been convicted. See A. Das, ‘Former Brazilian Soccer Official José Maria Marin Is Sentenced to Four Years in FIFA Case’, *New York Times* (23 August 2018), at B11.

⁴⁶ Struebing, *supra* note 43, at 17, 21.

⁴⁷ See also Le Nguyen, ‘National Criminal Jurisdiction over Transnational Financial Crimes’, 27 *Journal of Financial Crime* (2020) 1361.

⁴⁸ See Brewster, ‘Enforcing the FCPA: International Resonance and Domestic Strategy’, 103 *Virginia Law Review* (2017) 1611; K.E. Davis, *Between Impunity and Imperialism: The Regulation of Transnational Bribery* (2019); Convention on Combating Bribery of Foreign Public Officials in International Business Transactions 1997, 2802 UNTS 225.

⁴⁹ G.A. Epstein, *Financialization and the World Economy* (2005).

of transboundary financial flows worldwide – it has become common practice to also regulate various extraterritorial aspects.⁵⁰ The jurisdictional nexus here is mainly established through the fact that the regulated actors are also present in American markets. Companies trading shares on the New York Stock Exchange as well as banks offering products in the USA are regarded as domestic and consequently subject to US law. In addition, many rules also apply to the parent companies of banks operating in the USA, even if they are incorporated abroad. For example, banks whose subsidiaries are active on the US market must demonstrate to the Federal Reserve Bank that their global operations are sufficiently capitalized.⁵¹ And as soon as (foreign) banks conduct transactions via US accounts – which is difficult to avoid given the central position of the US dollar⁵² – they often expose themselves to the full application of US law, for example in regard to sanctions against third countries.⁵³

Yet the USA is not alone in this approach. The European Union (EU) also requires, for example, that foreign hedge funds wishing to offer products within the Union comply with European rules on liquidity, capitalisation, conflicts of interest and risk management. This can be relaxed under certain circumstances, but only if ‘equivalent’ rules apply in the home state.⁵⁴ With these far-reaching measures, the USA and the EU are trying to get a grip on globally operating financial markets and thus seek to overcome the problems arising from the disjuncture between political fragmentation and market integration. As a result, their jurisdictional claims cover most relevant actors on the respective markets for most of their activities, wherever they physically take place. Despite certain reservations in detail,⁵⁵ this expansion of jurisdictional claims does not seem to be seriously questioned in principle, not even where it has led to enormous penalties for foreign banks – except in the area of secondary sanctions imposed by the USA, which remain highly contested.⁵⁶

C Ports

Port cities have always been particularly globalized places, interfaces with the rest of the world.⁵⁷ Not only are their inhabitants exceptionally diverse, mobile and cosmopolitan, but these cities also offer access to market actors – ships – from all over the

⁵⁰ C. Brummer, *Soft Law and the Global Financial System: Rule Making in the 21st Century* (2nd edn, 2015), at 34–61; P.-H. Verdier, *Global Banks on Trial: US Prosecutions and the Remaking of International Finance* (2020).

⁵¹ Brummer, *supra* note 38, at 504.

⁵² Emmenegger, ‘The Long Arm of Justice: US Structural Power and International Banking’, 17 *Business and Politics* (2015) 473.

⁵³ See Verdier, *supra* note 50; see also Daugirdas and Mortenson, ‘Contemporary Practice of the United States Relating to International Law’, 108 *American Journal of International Law (AJIL)* (2014) 783, at 826–831 (on the penalties for European banks for the circumvention of US sanctions).

⁵⁴ Scott, ‘Extraterritoriality and Territorial Extension in EU Law’, 62 *AJCL* (2014) 87, at 104–105.

⁵⁵ See, e.g., *ibid.*, at 122–123.

⁵⁶ See Ruys and Ryngaert, ‘Secondary Sanctions: A Weapon Out of Control? The International Legality of, and European Responses to, US Secondary Sanctions’, *BYIL* (forthcoming).

⁵⁷ Cartier, ‘Cosmopolitanism and the Maritime World City’, 89 *Geographical Review* (1999) 278.

world. This access gives governments opportunities to enhance not only trade but also control – for example, to enforce rules on global environmental protection or fisheries regulation. Exercising this kind of control, however, is often difficult to square with the freedom of the high seas and the sole jurisdiction of the flag state there.⁵⁸ For example, according to the Court of Justice of the European Union (CJEU), vessels from third countries are not subject to EU jurisdiction on the high seas, but, once they call at an EU port, they can face punishment for illegal high-seas fishing (as well as confiscation of the catch).⁵⁹ And the USA has long made the importation of fish caught illegally on the high seas a punishable offence. Some such action by port states has found a conventional legal basis in the 2009 Food and Agriculture Organization's (FAO) Agreement on Port State Measures, but only as between the contracting parties and short of criminal penalties or confiscation.⁶⁰ The agreement's ambiguity on further-reaching measures – it explicitly does not affect a port state's right to take more stringent measures 'in accordance with international law'⁶¹ – seems to reflect a continued hesitation by parts of the FAO's membership to give broader practices formal sanction.⁶²

Such hesitation notwithstanding, the EU regards those who enter its ports as being subject to the regulation of their behaviour wherever it occurs, typically 'territorializing' activities abroad (or on the high seas) by construing links with behaviour in the port.⁶³ EU regulations have increasingly used this mechanism to broaden their extra-territorial reach – for example, with regard to reporting obligations on global carbon dioxide emissions on journeys to or from the EU or by forcing ships to comply with the rules of a shipping service even outside EU waters.⁶⁴ The EU is now also considering the inclusion of shipping emissions into its emissions trading scheme.⁶⁵ Its regulations typically equate ships bound for an EU port with those flying the flag of a member state.

A jurisdictional link in cases of importation may traditionally be more widely recognized than when a ship merely calls in a port, but the contemporary importance of the latter is reflected in many instances also beyond Europe. An example is the dispute

⁵⁸ See Kopela, 'Port-State Jurisdiction, Extraterritoriality, and the Protection of Global Commons', 47 *Ocean Development and International Law* (2016) 89; Ryngaert and Ringbom, 'Port State Jurisdiction: Challenges and Potential', 31 *International Journal of Marine and Coastal Law (IJMCL)* (2016) 379; C. Ryngaert, *Selfless Intervention: The Exercise of Jurisdiction in the Common Interest* (2020), at 144–161.

⁵⁹ C-286/90, *Anklagemyndigheden v. Poulsen und Diva Navigation Corp.* (EU:C:1992:453), para. 28.

⁶⁰ Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing 2009, UNTS I-54133 (forthcoming), available at www.fao.org/3/i5469t/i5469t.pdf.

⁶¹ *Ibid.*, Art. 4(1b).

⁶² See also Witbooi, 'Illegal, Unreported and Unregulated Fishing on the High Seas: The Port State Measures Agreement in Context', 29 *IJMCL* (2014) 290, at 308–314.

⁶³ Ryngaert and Ringbom, *supra* note 58, at 384.

⁶⁴ Council Regulation 2015/757, OJ 2015 L 123/55; Commission Directive 2002/59, OJ 2002 L 208/10, Art. 8(b).

⁶⁵ See European Parliament, Parliament Says Shipping Industry Must Contribute to Climate Neutrality, 16 September 2020, available at www.europarl.europa.eu/news/en/press-room/20200910IPR86825/parliament-says-shipping-industry-must-contribute-to-climate-neutrality.

over the *Torres Strait* between Australia and Papua New Guinea,⁶⁶ in which Australia, in response to protests from various states, including Singapore and the USA, had to limit its mandatory pilot service for ships passing the strait to those vessels entering one of its ports. Here again, regulation only becomes possible when a territorial nexus is established, even if that nexus – entering a port – has nothing to do with the regulated activity itself.

D Rights

When it comes to the protection of human rights against corporate activities abroad, all eyes were long on the Alien Tort Claims Act (ATCA), which served as a basis for US courts hearing claims over rights violations by private actors around the world.⁶⁷ With the decision of the US Supreme Court in *Kiobel* in 2013, this discussion has lost much of its interest as acts outside the USA that do not ‘touch or concern’ the USA sufficiently are now excluded from the scope of the ATCA.⁶⁸ The earlier practice had engendered significant debate over jurisdictional boundaries and led some to diagnose an ‘emerging universal civil jurisdiction’.⁶⁹ The Supreme Court did not enter, let alone resolve, this debate – it eventually restricted the ATCA’s reach solely on the basis of the presumption against extraterritoriality in domestic law.⁷⁰

The focus of human rights activists has thus shifted to other fora and mechanisms.⁷¹ One such forum is the UN Human Rights Council, with the treaty negotiations mentioned above as well as the further development of the *Guiding Principles on Business and Human Rights*.⁷² Other sites of engagement are to be found around national and regional legislation.⁷³ While the *Guiding Principles* only recommend that states set out an expectation that businesses domiciled in their territory respect human rights ‘throughout their operations’, the national statutes contain firmer requirements and geographically extend the scope of certain national standards of human rights

⁶⁶ Kopela, *supra* note 58, at 101–102; D.R. Rothwell, ‘Compulsory Pilotage and the Law of the Sea: Lessons Learned from the Torres Strait’, Australian National University College of Law Research Paper no. 12–06 (2012), available at <https://papers.ssrn.com/abstract=2020781>.

⁶⁷ Alien Tort Claims Act, 28 U.S.C. § 1350 (codified 1948, enacted 1789). See, e.g., I. Meyer, *Der Alien Tort Claims Act: Zwischen Völkerrecht und amerikanischer Außenpolitik* (2018); T.L. Putnam, *Courts without Borders: Law, Politics, and US Extraterritoriality* (2016), at 202–254.

⁶⁸ *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108 (2013); see also *Jesner v. Arab Bank*, 584 U.S. ____ (2018); *Nestlé USA v. Doe*, 593 U.S. ____ (2021).

⁶⁹ Donovan and Roberts, ‘The Emerging Recognition of Universal Civil Jurisdiction’, 100 *AJIL* (2006) 142.

⁷⁰ See Buxbaum, ‘The Scope and Limitations of the Presumption against Extraterritoriality’, 110 *AJIL Unbound* (2016) 62; Dodge, ‘The New Presumption against Extraterritoriality’, 133 *Harvard Law Review* (2019) 1582. The Court also found (outside of the rights context) that jurisdiction might be construed more broadly for criminal prosecutions rather than private lawsuits. See *RJR Nabisco v. European Community*, 579 U.S. 325 (2016).

⁷¹ See generally Chambers, ‘An Evaluation of Two Key Extraterritorial Techniques to Bring Human Rights Standards to Bear on Corporate Misconduct’, 14 *Utrecht Law Review* (2018) 22; Reinisch, *supra* note 33.

⁷² Human Rights Council, *Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework*, Doc. A/HRC/17/31, 21 March 2011.

⁷³ For an overview, see *Business and Human Rights in Law, Key Developments*, available at www.bhrinlaw.org/key-developments.

protection. The substantive and procedural obligations they create typically apply to the entire supply chain, regardless of where in the world suppliers are located.⁷⁴ And the circle of obligated companies often goes far beyond those incorporated in the country; instead, it includes all companies – typically, large corporations – doing business there. For example, the 2019 Dutch Child Labour Due Diligence Act imposes strict requirements on all companies selling goods in the Netherlands, no matter where they are based.⁷⁵ And, in the case of the United Kingdom (UK), the disclosure requirements under the Modern Slavery Act apply to any company above a certain size that ‘carries on a business, or part of a business’ in the UK.⁷⁶ The companies concerned thus do not have to have an exclusive, or even a particular, link with the country – in practice, the UK legislation covers any globally operating company of a certain size, regardless of where it is incorporated or has its business focus.

While the UK Act foresees only disclosure requirements, not substantive obligations, across the supply chain, obligations in other contexts go further. The French Loi relative au devoir de vigilance, for example, provides for the civil responsibility of companies for damages resulting from the failure to draw up a ‘*plan de vigilance*’.⁷⁷ And the draft UN treaty contains an obligation for contracting states to require human rights due diligence obligations and to impose liability on companies not only for harm they have caused themselves but also for harm caused by other businesses if they control the latter or should have foreseen risks of human rights abuses, regardless of where these are committed.⁷⁸

The scope and strength of extraterritorial human rights protection still vary heavily, but, in their different ways, all these initiatives push corporations to assume human rights responsibilities on a global scale – often regardless of where they are incorporated or where potential human rights violations are committed. Even in those cases in which the circle of targeted companies is more narrowly defined, the obligations themselves also relate to the monitoring of subsidiaries located abroad or to entire global value chains. A number of recent court cases point in a similar direction,⁷⁹ thus counteracting the ‘jurisdictional cuts’ established in modern law through political borders and corporate organization.⁸⁰ Boundaries do not disappear entirely here: resistance continues against ‘suits by foreign plaintiffs against foreign corporate

⁷⁴ See, e.g., German Law on Due Diligence Obligations in Supply Chains, BGBl 2021 I, at 2959, para. 3.

⁷⁵ Wet zorgplicht kinderarbeid (2019), Statsblad 2019, 401; A. Hoff, ‘Dutch Child Labour Due Diligence Law: A Step towards Mandatory Human Rights Due Diligence’, *Oxford Human Rights Hub*, 10 June 2019, available at <http://ohrh.law.ox.ac.uk/dutch-child-labour-due-diligence-law-a-step-towards-mandatory-human-rights-due-diligence>.

⁷⁶ UK Modern Slavery Act (2015), ch. 30 Art. 54, para. 12(a), available at www.legislation.gov.uk/ukpga/2015/30/pdfs/ukpga_20150030_en.pdf (last visited 7 June 2022).

⁷⁷ Loi no. 2017-399, JORF no. 0074 du 28 mars 2017, Art. 2, available at www.legifrance.gouv.fr/eli/loi/2017/3/27/2017-399/jo/texte.

⁷⁸ Third Revised Draft, *supra* note 9, Art. 8(6).

⁷⁹ See, e.g., *Vedanta Resources PLC et al. v Lungowe et al.*, (2019) UKSC 20; *Nevsun Resources Ltd v Araya*, 2020 SCC 5. On a similar case in the Netherlands, see Ryngaert, *supra* note 29, at 76.

⁸⁰ See Eckert, ‘Entangled Hopes: Towards Relational Coherence’, in N. Krisch (ed.), *Entangled Legalities beyond the State* (2021) 399, at 402–405.

defendants for conduct that took place entirely within the territory of a foreign sovereign'.⁸¹ Yet, in most cases in which some – however remote – nexus is present, the limitations of territoriality (and jurisdiction based on personality) are gradually untied.⁸²

E Data

Traditional, territorially oriented models of jurisdiction are nowhere nearly as much under pressure as in the context of the Internet. With data moving across borders incessantly, often composed of elements distributed across servers in different geographical locations, its fleeting character stands in contrast to the spatial fixity associated with territory. Whether 'data is different' or not,⁸³ it certainly forces us to reappraise what jurisdiction means in the space it constitutes.⁸⁴

One area in which such reappraisals have become particularly visible in recent years is that of delisting requirements, especially around the 'right to be forgotten'. Soon after this right was acknowledged by the CJEU, questions arose as to its boundaries. While Google took the view that the need to remove links to certain pages at a user's request was limited to its country-domain search engine, many regulators sought a broader scope. The French Commission Nationale de l'Informatique et des Libertés, notably, wanted Google to pursue delisting on a global scale to make the protection for the individual effective.⁸⁵ In the resulting fresh round of litigation, the CJEU found in favour of Google, but only as a matter of interpretation of the EU directive in question. Its view on jurisdiction in general was not so limited:

In a globalised world, internet users' access – including those outside the Union – to the referencing of a link referring to information regarding a person whose centre of interests is situated in the Union is thus likely to have immediate and substantial effects on that person within the Union itself. ... Such considerations are such as to justify the existence of a competence on the part of the EU legislature to lay down the obligation, for a search engine operator, to carry out ... a de-referencing on all the versions of its search engine.⁸⁶

A similarly effects-based argument prevailed in a recent Canadian case concerning the protection of intellectual property. Rejecting Google's challenge of an injunction to delist worldwide, the Supreme Court of Canada emphasized that '[t]he Internet has no borders – its natural habitat is global' and that in order for the injunction to become effective it had to 'apply where Google operates – globally'.⁸⁷

⁸¹ See, e.g., the position of Germany in the *Kiobel* litigation, *supra* note 68; Liste, 'Geographical Knowledge at Work: Human Rights Litigation and Transnational Territoriality', 22 *European Journal of International Relations* (2016) 217, at 228–229. But see also the *forum necessitatis* clause in Third Revised Draft, *supra* note 9, Art. 9(5).

⁸² See also Liste, *supra* note 81.

⁸³ See the contrasting positions in Daskal, 'The Un-Territoriality of Data', 125 *Yale Law Journal (YLJ)* (2015) 326; Woods, 'Against Data Exceptionalism', 68 *Stanford Law Review* (2016) 729.

⁸⁴ See, e.g., Johns, 'Data Territories: Changing Architectures of Association in International Law', 47 *NYIL* (2016) 107.

⁸⁵ See Woods, 'Litigating Data Sovereignty', 128 *YLJ* (2018) 328, at 341–345.

⁸⁶ C-507/17, *Google v. CNIL* (EU:C:2019:772), paras 57–58.

⁸⁷ *Google Inc. v. Equustek Solutions Inc.*, 2017 SCC 34, [2017] 1 SCR 824, at 826.

Despite attempts by some governments to reterritorialize the Internet,⁸⁸ Canadian and European courts portray it as a borderless space that requires a new and more expansive position on jurisdictional questions – at least one that stretches the notion of effects jurisdiction yet further. A similar approach seems to underlie recent developments regarding access to data in law enforcement where an initial, more territorially oriented stance has given way to an understanding of cloud data as ubiquitous, rather than localized, on the server on which it finds itself at a given moment.⁸⁹ Even if contestation continues in this field, a shift towards a more ‘globalized jurisdiction’⁹⁰ will be hard to avoid.

4 Towards a Jurisdictional Assemblage

The picture that emerges from these five vignettes is not entirely clearcut – practices differ significantly from one field to another, a small group of states is at the centre of the action and contestation is often muted but persists in some contexts. Not in all aspects have changing practices led to new, consolidated understandings of international legal limits. Nevertheless, it is a picture that stands in quite some contrast to the image of territorial jurisdiction as typically conceived – of countries with separate spheres of action and limited overlaps. Instead, we observe widespread assertions of practically globalized, ‘unbound’ jurisdiction and, as a result, a complex assemblage of jurisdictional spheres.⁹¹ In this assemblage, overlap and interaction rather than separation are dominant characteristics, and some countries’ spheres are much larger than others.

A Territorial Extensions

The discursive frames through which this assemblage is construed are notably traditional. In the examples we have surveyed, most claims are formulated on the basis of territoriality and active personality – jurisdiction is exercised over acts that take place at least in part on one’s own territory or over persons who have the nationality or their domicile there. It thus makes use of the most well-established, traditional categories of jurisdiction, and this stands in line with recent multilateral agreements, such as, for example, in the area of corruption.⁹² There are hardly traces of the more

⁸⁸ See Lambach, ‘The Territorialization of Cyberspace’, 22 *International Studies Review* (2020) 482, at 494–498.

⁸⁹ Daskal, ‘Borders and Bits’, 71 *Vanderbilt Law Review* (2018) 179, at 186–209; R. Vatanparast, ‘Data and the Elasticity of Sovereignty’, ESIL Conference Paper Series no. 25/2019 (2020), available at <https://papers.ssrn.com/abstract=3609579>; Woods, *supra* note 84, at 345–347; see also Eichensehr, ‘Data Extraterritoriality’, 95 *Texas Law Review* (2017) 145.

⁹⁰ Berman, *supra* note 30.

⁹¹ My use of the notion ‘assemblage’ here draws on the work of Saskia Sassen. S. Sassen, *Territory, Authority, Rights: From Medieval to Global Assemblages* (2006). See section 4.D.

⁹² See United Nations Convention against Corruption 2003, 2349 UNTS 41, Art. 42, at 20–21.

controversial categories, such as the principle of protection or universal jurisdiction. Even the effects doctrine is not as prominent as one might have expected – it may still be important in areas such as competition, financial markets and partly also in environmental protection,⁹³ but, in our vignettes, it only makes a (limited) appearance in the Internet context.⁹⁴

Classical categories can play such a central role largely because of their elasticity or capaciousness.⁹⁵ It is the very challenges for the jurisdictional regime mentioned above – unlocalizable acts, ubiquitous actors and unbound markets – that have led to a redefinition of what is understood as ‘territory’. While the traditional model of jurisdiction centres on individual acts and their concrete location, we are today faced increasingly with conglomerates of actions, temporally and geographically extensive, which take place everywhere and nowhere in particular. In globalized economic and communicative relations, ‘territorial’ connections can be established by almost every state, but they are always only partial and coexist in parallel.⁹⁶ Such thin, partial links now appear to be widely accepted to ground jurisdictional claims. For example, the official Commentaries to the Anti-Bribery Convention explicitly state that ‘[t]he territorial basis for jurisdiction should be interpreted broadly so that an extensive physical connection ... is not required’,⁹⁷ leading observers to find that ‘the slightest of connections is sufficient’.⁹⁸

The same applies to actors. The jurisdictional imagery focuses first and foremost on natural persons with a clear link to a state, primarily based on nationality. For legal persons, the situation has always been more complex, but the rise of multinational corporations has made the attempt to create a link with one state even more artificial. The evolution of the active personality principle compensates for this by creating a nexus mainly through presence: if a company is active on a country’s market (in however virtual a way), it is deemed to be subject to that country’s jurisdiction, including with respect to activities taking place elsewhere.⁹⁹ Here again, most larger companies are active on many markets, thus becoming subject to a number of jurisdictions for their worldwide operations. Jurisdiction then turns ‘ubiquitous’.¹⁰⁰

Joanne Scott has described aspects of this expansion as ‘territorial extensions’, sitting between classical territoriality and extraterritoriality as such.¹⁰¹ These extensions

⁹³ For a critical account, see, e.g., Parrish, ‘The Effects Test: Extraterritoriality’s Fifth Business’, 61 *Vanderbilt Law Review* (2008) 1453.

⁹⁴ For a similar observation, see also A. Bradford, *The Brussels Effect: How the European Union Rules the World* (2020), at 68.

⁹⁵ See also Vatanparast, *supra* note 89; Ryngaert, *supra* note 58, at 210.

⁹⁶ See also Ryngaert, *supra* note 29, at 65–68; Szigeti, *supra* note 18, at 394–398.

⁹⁷ Convention on Combating Bribery, *supra* note 48, at 13.

⁹⁸ Pieth, ‘Jurisdiction’, in L.A. Low, M. Pieth and N. Bonucci (eds), *The OECD Convention on Bribery: A Commentary*, vol. 2 (2013) 322, at 333.

⁹⁹ I regard this as an extension of the active personality principle because it pertains to the actor (and all its operations, even outside territorial boundaries), not just particular activities that might have effects on a given territory (as would be the case in effects-based jurisdiction).

¹⁰⁰ Michaels, *supra* note 33, at 174.

¹⁰¹ Scott, *supra* note 54, at 90.

are characterized by the fact that the exercise of jurisdiction rests on a territorial trigger, but the measures applied require the consideration of behaviour or circumstances beyond territorial boundaries. In the most typical case, regulators require companies seeking market access to comply with certain standards – for environmental protection, financial market stability and so on – even for their activities abroad. The consequences are far-reaching because weak territorial links can give rise to far-reaching jurisdictional claims, as we have observed in the port state example where a ship's arrival in port was seen to allow the port state to exercise jurisdiction over parts of the ship's voyage lying far outside its territorial waters.¹⁰² The CJEU has used the same argument in the case of aviation emissions, finding that an aircraft landing at an EU airport submits to the 'unlimited' jurisdiction of the EU, thus permitting the Union to establish rules also for emissions produced during the parts of a flight that take place outside EU airspace.¹⁰³ This decision has met with considerable resistance (and the rules were eventually suspended),¹⁰⁴ but, in many contexts, territorial extensions are widely accepted.¹⁰⁵ The price to be paid for access – to a territory or market – is submission to jurisdiction of a much wider scope.

B Territory in Flux

The conceptual fluidity evoked by these extensions reminds us that 'territory' is not a fixed entity but, rather, a historical and social construct – an insight that has found increasing attention in recent years, especially among historians, political philosophers and critical geographers. Stuart Elden's *Birth of Territory* has made this point perhaps most prominently, noting that territory is a historically contingent notion and not necessarily associated with the idea of a delimited, definable space.¹⁰⁶ For Elden, territory instead represents a 'political technology' – or, rather, a bundle of technologies – that relate state and space, relying on the measuring of land and control of terrain.¹⁰⁷ 'Territory' then is not a natural feature but an outcome of political attempts at demarcating and dominating.¹⁰⁸

¹⁰² See section 3.C. See also the survey in Zerk, 'Extraterritorial Jurisdiction: Lessons for the Business and Human Rights Sphere from Six Regulatory Areas', Harvard Corporate Social Responsibility Initiative Working Paper no. 59 (2010), available at www.hks.harvard.edu/sites/default/files/centers/mrcbg/programs/crri/files/workingpaper_59_zerk.pdf.

¹⁰³ C-366/10, *Air Transport Association of America and Others* (EU:C:2011:864), para. 125.

¹⁰⁴ See section 4.C.

¹⁰⁵ On anti-corruption measures, see also, Davis, *supra* note 48, at 10.

¹⁰⁶ S. Elden, *The Birth of Territory* (2013); see also Agnew, 'The Territorial Trap: The Geographical Assumptions of International Relations Theory', 1 *Review of International Political Economy* (1994) 53; Painter, 'Rethinking Territory', 42 *Antipode* (2010) 1090; R.D. Sack, *Human Territoriality: Its Theory and History* (1986); Sassen, *supra* note 15.

¹⁰⁷ Elden, 'Land, Terrain, Territory', 34 *Progress in Human Geography* (2010) 799; Elden, *supra* note 106.

¹⁰⁸ For uptakes of this understanding in law, see, e.g., Ford, 'Law's Territory (A History of Jurisdiction)', 97 *Michigan Law Review* (1999) 843; Kaushal, *supra* note 31; Ryngaert, *supra* note 29; Michaels, 'Notes on Territory', in J. d'Aspremont and J. Haskell (eds), *Tipping Points in International Law* (2021) 332.

In this sense, we can understand the expansive tendencies of the jurisdictional regime as a reorientation of this political technology, one that transcends the classical, physical demarcation through an attempt to control a broader space. This space – functionally, rather than physically, connected to the state – is not subjected to exclusive control, the aim being instead one of enabling access in case of need. This creates a subsidiary, non-primary territoriality, and also one that can coexist with other (primary or subsidiary) territorialities. The extensions of jurisdiction would then be a step towards a reconfiguration of territory, territoriality and jurisdiction in the conditions of a globalized world.¹⁰⁹ This raises the question whether jurisdictional limits are defined by reference to territory or whether territory is instead defined by jurisdictional limits. Elden expresses this ambiguity nicely when he points out that the modern idea of territory not only shapes the state but is also produced by it. Territory then expresses the spatial dimension of the state – it designates ‘the extent of state power’.¹¹⁰ Understood in this way, a territorially focused jurisdiction would no longer have much of a limiting function; it would largely follow the extent of state power.

The adaptation of norms and their meanings through practice (and the violation of old rules) is, of course, not new to an international legal order that often merely traces what is possible for, and desired by, states. In terms of jurisdiction, the equation of the extent of the territorial sea with the range of a cannon shot through the three-mile rule is the most prominent historical example.¹¹¹ The assertion of jurisdiction today seems to follow similar principles. In our vignettes, jurisdictional claims seem to depend to a large extent on whether a state is factually in a position to control an actor – a ship, an aircraft, a hedge fund or a social media company – in its own port or on its own market. Rules can be effectively enforced against a bank that operates on the domestic market or a company that wants to sell products on this market, not least by threatening to exclude them from the market in the event of non-compliance.¹¹²

The transformation of the jurisdictional regime might not be complete – inconsistencies and instances of contestation remain. Yet the reconstruction of territory and territoriality that we have observed leads to a relatively ‘unbound’ jurisdiction – states face few limits other than those of factual control. Discursively, the practice may continue to follow traditional categories, but it has redefined them in such a way as to practically deprive them of their limiting and orienting effect. Whether we uphold the classical regime, with its delimited jurisdictional grounds or, instead, focus on

¹⁰⁹ See also Kuijer and Werner, ‘The Paradoxical Place of Territory in International Law’, 47 *NYIL* (2016) 3; see also Buxbaum, *supra* note 14.

¹¹⁰ Elden, *supra* note 106, at 322; Liste, *supra* note 81, at 224 (who formulates this cogently: ‘They [states] make territory while, at the same time, are made through territory’).

¹¹¹ On the history (and contested origins) of the rule, see Walker, ‘Territorial Waters: The Cannon Shot Rule’, 22 *BYIL* (1945) 210.

¹¹² On the effects and limits of such strategies, see Kalyanpur and Newman, ‘Mobilizing Market Power: Jurisdictional Expansion as Economic Statecraft’, 73 *International Organization* (2019) 1; Katzenstein, ‘Dollar Unilateralism: The New Frontline of National Security’, 90 *Indiana Law Journal* (2015) 293; Verdier, *supra* note 50, at 27–33.

‘genuine connections’ or ‘contacts’ as the main criterion, both approaches have become almost congruent.

C Remaining Limits

If the territorial nexus has little constraining effect, the focus shifts to other potential jurisdictional limits, and this is also because, especially in the case of the USA, a more restrictive practice has taken hold over the past 15 years. The US Supreme Court’s turn since the *Kiobel* case follows a broader tendency in US jurisprudence in other fields, such as competition and securities law, and consolidates a restrictive approach to extraterritoriality across the board.¹¹³ Broader conclusions on international jurisdictional boundaries, however, can hardly be drawn from this case law. International law is not directly at issue – the Supreme Court bases its decisions mainly on domestic US law, and the principle of comity is also portrayed less as a legal limit than as a (political) inspiration for US legislation.¹¹⁴ Moreover, the restrictive approach concerns primarily private law suits, whereas extraterritoriality is more easily admitted for executive action and criminal prosecution.¹¹⁵

Still, US Supreme Court cases also provide a glimpse into other states’ positions. In the *Empagran* case, for example, Germany, Canada and Japan intervened to argue that an extensive interpretation of US law would undermine their ability to establish and enforce their own competition rules.¹¹⁶ In *Morrison*, Australia, France and the UK pointed out that US law should not go so far as to counteract their own political decisions in corporate and financial law.¹¹⁷ These criticisms mainly concerned the manner in which US courts approached the issues – especially, the extent to which they took the interests of other states into account – rather than the question of whether there was any basis for jurisdiction at all.

The latter point was addressed more directly in interventions in the *Kiobel* litigation. Especially, the UK, the Netherlands (home countries of the respondent, Shell) and Germany saw the exercise of jurisdiction as unjustified in cases that lacked a ‘sufficient nexus’ or had ‘little, or no, connection to the United States’. Argentina took the contrary position, depicting the use of the ATCA as an ‘important contribution by the United States to the cause of international human rights’.¹¹⁸ These reactions mirror interventions in earlier cases under the Act. While some voices were positive, most statements were critical, with contestation strongest for ‘f-cubed’ cases – cases with a foreign plaintiff and a foreign respondent concerning foreign activity – except,

¹¹³ See Parrish, ‘Fading Extraterritoriality and Isolationism: Developments in the United States’, 24 *Indiana Journal of Global Legal Studies* (2017) 207. On *Kiobel*, *supra* note 68, see section 3.D.

¹¹⁴ See, e.g., *E. Hoffmann-La Roche, Ltd. v. Empagran S.A.*, 542 U.S. 155 (2004), at 164, 169.

¹¹⁵ See, e.g., *RJR Nabisco v. European Community*, 579 U.S. 325 (2016); see also Buxbaum, ‘Extraterritoriality in the Public and Private Enforcement of U.S. Regulatory Law’, in F. Ferrari and Diego P. Fernandez Arroyo (eds), *Private International Law: Contemporary Challenges and Continuing Relevance* (2019) 236.

¹¹⁶ See Verdier, *supra* note 50, at 167–168; *Empagran*, *supra* note 114.

¹¹⁷ *Morrison v. National Australia Bank Ltd.*, 561 U.S. 247, at 269–270 (2010).

¹¹⁸ See Liste, *supra* note 81, at 228, 229.

in the view of some countries, if particularly serious human rights violations were at stake.¹¹⁹ Apart from such ‘f-cubed’ constellations, not many clear and fixed jurisdictional boundaries emerge from these positions, and they are also difficult to identify otherwise. Extensive protests against the exercise of jurisdiction as such are rare, and the principles they follow often remain under-specified, as becomes clear in the two perhaps most prominent cases of such protests in recent years.

One of these cases is the protest against the inclusion of flights from third countries in the European Emissions Trading Scheme. As already mentioned, the CJEU endorsed this inclusion based on the argument that an aircraft, after landing in the EU, is ‘subject on that basis to the unlimited jurisdiction of the European Union’.¹²⁰ The Court’s advocate-general had come to the same conclusion, albeit emphasizing the effects of aviation emissions on all countries.¹²¹ Even though both lines of argument are not uncommon, the decision provoked a vehement reaction.¹²² More than 20 states, among them Russia, China, India and the USA, expressed their protest through joint declarations,¹²³ and the USA went so far as to enact a blocking statute.¹²⁴ But the principles on which the protest rested remained vague. The USA complained about the violation of its sovereignty by the extraterritorial measures of the EU but mainly referred to a violation of treaty obligations.¹²⁵ Most declarations do not contain clear legal arguments but instead underscore the importance of multilateral action within the framework of the International Civil Aviation Organization (ICAO) or gesture towards ‘applicable international law’ without further specification.¹²⁶ The EU eventually suspended the contested measures, urging a solution within the ICAO but on pragmatic grounds alone.

The best-known case of protests against extraterritorial action concerns US secondary sanctions. The EU and other countries have been protesting for decades against US rules that prohibit companies from third countries from trading with sanctioned countries such as Cuba and Iran.¹²⁷ The EU has issued its own blocking regulation, protesting against the violation of international law through the regulation

¹¹⁹ See United Nations Office of the High Commissioner for Human Rights (OHCHR), *State Positions on the Use of Extraterritorial Jurisdiction in Cases of Allegations of Business Involvement in Severe Human Rights Abuses: A Survey of Amicus Curiae Briefs Filed by States and State Agencies in ATS Cases (2000–2015)* (2015), available at www.ohchr.org/Documents/Issues/Business/DomesticLawRemedies/StateamicusATS-cases.pdf.

¹²⁰ *Air Transport Association*, *supra* note 103.

¹²¹ *Ibid.*, para. 154. Opinion of the Advocate General.

¹²² Scott and Rajamani, ‘EU Climate Change Unilateralism’, 23 *EJIL* (2012) 469, at 473; Bradford, *supra* note 94, at 219–221.

¹²³ See Joint Declaration of the Moscow Meeting on Inclusion of International Civil Aviation in the EU-ETS, 22 February 2012, available at www.ruaviation.com/docs/1/2012/2/22/50.

¹²⁴ European Union Emissions Trading Scheme Prohibition Act of 2011, 27 November 2011, 126 Stat. 1477.

¹²⁵ See US House Committee on the Judiciary, European Union Emissions Trading Scheme Prohibition Act of 2011 (House Report 112-232, pt. 1), 15 October 2011, available at www.congress.gov/congressional-report/112th-congress/house-report/232/1?overview=closed.

¹²⁶ *Ibid.*

¹²⁷ See, e.g., Lowe, ‘US Extraterritorial Jurisdiction: The Helms-Burton and D’Amato Acts’, 46 *International and Comparative Law Quarterly* (1997) 378; Ruys and Rynjaert, *supra* note 56.

by the USA of ‘activities of natural and legal persons under the jurisdiction of the [EU] Member States’.¹²⁸ EU contestation of US secondary sanctions has flared up again in recent years in the wake of the increased use of the instrument in the context of sanctions against Iran and Russia. Many other countries – including Russia, China and India – have likewise protested against such measures imposed by the USA,¹²⁹ with China recently enacting its own rules to block and counter foreign sanctions.¹³⁰ Where they go beyond market access restrictions, secondary sanctions are widely seen as highly problematic not only politically but also as a matter of international law.¹³¹

Only a few firm limits emerge from these cases.¹³² First, there is very little acceptance of a regulation of actors and situations that have no concrete connection to the regulating state (except for universal jurisdiction situations); the protective principle does not seem to help here either.¹³³ Apart from this, the discourse suggests that jurisdictional claims lie on a spectrum of acceptability¹³⁴ – the weaker the link with the actors or facts of a case, the more other factors come into play. Measures are more contested if important policy decisions of other states are counteracted by extraterritorial action. In contrast, they are more widely accepted if measures are linked to international standards or consultations with affected states¹³⁵ or if they are of limited intensity – reporting obligations are easier to justify than criminal sanctions. At the same time, there appear to be specific principles of exclusion from jurisdiction that are difficult to touch; the freedom of the high seas would be an example, as seen above in the *Torres Strait* case.

D An Assemblage

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

¹²⁸ Council Regulation 2271/96, OJ 1996 L 309/1; Commission Delegated Regulation 2018/1100, OJ 2018 L 199/1.

¹²⁹ See Ryngaert, *supra* note 4, at 118–119.

¹³⁰ See Rules on Counteracting Unjustified Extra-territorial Application of Foreign Legislation and Other Measures, MOFCOM Order no. 1 (2021), available at <http://english.mofcom.gov.cn/article/policy-release/questions/202101/20210103029708.shtml>; Chen Qingqing and Liu Xin, ‘China’s Newly Passed Anti-Foreign Sanctions Law to Bring Deterrent Effect against Western Hegemony’, *Global Times* (10 June 2021), available at www.globaltimes.cn/page/202106/1225911.shtml.

¹³¹ Ruys and Ryngaert, *supra* note 56.

¹³² For a similar picture, see, e.g., Crawford, *supra* note 1, at 486; Szigeti, *supra* note 18, at 396–398.

¹³³ See also Meyer, ‘Second Thoughts on Secondary Sanctions’, 30 *University of Pennsylvania Journal of International Law* (2009) 905; Szigeti, *supra* note 18, at 397; Ruys and Ryngaert, *supra* note 56.

¹³⁴ See also OHCHR, *supra* note 119, at 16.

¹³⁵ See, e.g., C. Ryngaert, *Unilateral Jurisdiction and Global Values* (2015), at 122–137; Ryngaert, *supra* note 58, at 212–215. See, e.g., the notion of a ‘contingent unilateralism’ in Scott and Rajamani, *supra* note 122.

The result is a jurisdictional assemblage – it is not a regime of demarcated spheres, but one of overlaps and interaction. The contours of this assemblage vary according to subject area and problem – in some contexts, especially in highly integrated markets, a multitude of states may be entitled to regulate; in others, there may be only two or three. The jurisdictional spheres of different states are also not equally extensive. In some areas, one country's market may be so dominant that all relevant participants are present and many essential transactions are performed there – US financial markets have long held such a position, allowing US authorities to establish effective rules worldwide.¹³⁶ Other areas are less unipolar, and the current changes in the global economy are likely to lead to a greater variety of key sites over time. Yet most contexts are characterized by differences between countries – between strong and weak and more and less integrated ones – and, as a result, characterized by wider and narrower jurisdictional spheres.

Using the term 'assemblage' to describe this situation draws on the work of Saskia Sassen who uses it to point out how territory, authority and rights are brought into new relations and how these new relations characterize the political structure of the contemporary world.¹³⁷ Sassen is particularly interested in the emergence of a variety of new authorities and their complex interactions with the state.¹³⁸ This could also be exploited by thinking beyond the jurisdiction of states to that of other actors – for example, international organizations and companies¹³⁹ – an endeavour, however, that would take us too far away from the international legal regime of jurisdiction to be fruitfully included in this article. For our purposes, the concept of assemblage is helpful because it not only points to a multitude of interacting spheres (of states) but also suggests that these spheres stand in relatively undefined relations as there are practically no legal rules on how competing jurisdictional spheres relate to one another.¹⁴⁰

Jurisdictional 'conflict rules' were much debated in the past, with different authors postulating a hierarchy of different jurisdictional claims.¹⁴¹ Today, however, most observers find that state practice offers little indication of such rules to resolve conflicts, instead treating different grounds of jurisdiction on an equal footing.¹⁴² Even the principle that for a long time seemed to hold the greatest promise for resolving jurisdictional conflicts has recently been called into further question. 'Reasonableness' was

¹³⁶ See Brummer, *supra* note 38.

¹³⁷ Sassen, *supra* note 91. The term 'jurisdictional assemblage' is also used by Mariana Valverde, but, for her, the term appears to connote more stable constellations of practices with exclusive attributions of powers. See Valverde, 'Jurisdiction and Scale: Legal Technicalities as Resources for Theory', 18 *Social and Legal Studies* (2009) 139.

¹³⁸ For these other authorities, the concept of jurisdiction might also be employed fruitfully. See Szigeti, *supra* note 18, at 394.

¹³⁹ See, e.g., Backer, 'Governance without Government: An Overview', in G. Handl, J. Zekoll and P. Zumbansen (eds), *Beyond Territoriality: Transnational Legal Authority in an Age of Globalization* (2012) 87.

¹⁴⁰ On the genealogy and use of the term assemblage, see M. DeLanda, *Assemblage Theory* (2016).

¹⁴¹ See, e.g., Jennings, 'Extraterritorial Jurisdiction and the United States Antitrust Laws', 33 *BYIL* (1957) 146, at 151; Mann, *supra* note 12, at 90.

¹⁴² For further references, see Ryngaert, *supra* note 4, at 143–144.

developed by US courts in competition law and led to a balancing of interests, in which it was decisive ‘whether the interests of, and links to, the United States – including the magnitude of the effect on American foreign commerce – are sufficiently strong, *vis-à-vis* those of other nations, to justify an assertion of extraterritorial authority’.¹⁴³ The principle, interpreted as a rule of international law, was included in the *Restatement (Third)* in 1987.¹⁴⁴ But subsequent jurisprudence in the USA remained inconsistent in the weight and form it gave to reasonableness,¹⁴⁵ and the *Restatement (Fourth)* distanced itself from its predecessor by portraying the principle as an aspect of comity, not as an obligation under international law.¹⁴⁶ This appears plausible as the practice of other states varies considerably, and many courts seem to see no reason for restraint once they have found a basis for a jurisdictional claim.¹⁴⁷ Yet the shift away from reasonableness has left the jurisdictional assemblage with yet less structure and the rules in it in an unorganized entanglement.¹⁴⁸

5 Jurisdiction as (Global) Governance

Jurisdiction in international law is usually presented as one of the tools to regulate the coexistence of equal sovereigns – as we saw at the outset, it is typically portrayed as a horizontal device employed to delimit spheres between states, balancing their respective interests to draw lines and define overlaps.¹⁴⁹ This focus on boundaries and delimitation has become unhelpful to characterize the jurisdictional regime, and with the emergence of the jurisdictional assemblage traced in the previous section, it is time to also interrogate the continued use of horizontality as the key imagery for jurisdictional relations between states, particularly in the economic realm. If states’ jurisdictional spheres are no longer placed next to each other, but are instead increasingly overlapping and interacting, the image of lines drawn between states and their territories becomes inadequate, and jurisdiction is better understood as a matter of scope and scale.¹⁵⁰ But then jurisdiction moves away from the idea of a relation of equals and takes on a different – and often hierarchical – character.

¹⁴³ *Timberlane Lumber Co v. Bank of America*, 549 F.2d 597 at 613 (9th Cir., 1976).

¹⁴⁴ *Restatement of the Law (Third): Foreign Relations Law of the United States* (1987), at 244–254.

¹⁴⁵ See also Buxbaum, *supra* note 14, at 649.

¹⁴⁶ *Restatement (Fourth)*, *supra* note 20, at 151–153, 181–185.

¹⁴⁷ See also the position of the Joined Cases C-89/95, C-104/85, C-114/85, C-116/85, C-117/85, C-125/85, C-126/85, C-127/85, C-128/85 and C-129/85, *Ahlström Osakeyhtiö and Others* (EU:C:1988:447). See Ryngaert, *supra* note 4, at 182–184 (who understands reasonableness, in spite of inconsistent practice, as a general principle of international law).

¹⁴⁸ On legal entanglements, see Krisch, *supra* note 80; Krisch, ‘Entangled Legalities in the Postnational Space’, *International Journal of Constitutional Law* (forthcoming 2022).

¹⁴⁹ See section 2.

¹⁵⁰ See Valverde, *supra* note 137.

A From Horizontality to Oligarchy

As an aspect of jurisdiction, hierarchy is most obviously at play in the relation with individual legal subjects. An authority holds jurisdiction ‘over’ a range of actors, with an implication that the latter have to obey her or his orders or judgments. In that sense, jurisdiction is closely linked to the very notion of government (and internal sovereignty) – it establishes the legal preconditions for the validity of laws, rules and decisions *vis-à-vis* their addressees, and it provides the ‘governance of legal governance’ in keeping authorities from clashing.¹⁵¹ If jurisdiction is intimately bound up with hierarchy over subjects, these hierarchical relations are pushed into the transnational sphere through the broader jurisdictional practices traced above. As we have seen in our vignettes, states use their regulatory and judicial institutions very effectively to govern activities of companies abroad, and this establishes hierarchies not only over those companies but also over other states whose ability to define their own policy is thereby curtailed. This is most obvious with respect to sanctions, especially secondary sanctions, but it goes well beyond that context.

As previously noted, governments have intervened in US court proceedings – from competition and securities law to transnational human rights litigation – to assert their own legislative and regulatory space. Canada, for example, has emphasized that the treble damages awarded in US antitrust litigation ‘would supersede [Canada’s] national policy decision’.¹⁵² The concern was expressed yet more vividly by South Africa:

[W]e consider it completely unacceptable that matters that are central to the future of our country should be adjudicated in foreign courts which bear no responsibility for the well-being of our country and the observance of the perspective contained in our constitution of the promotion of national reconciliation. ... It remains the right of the government to define and finalise issues of reparations, both nationally and internationally.¹⁵³

The hierarchical character of extraterritoriality comes into clearer view from a historical perspective. Especially the system of capitulations, which granted European powers exclusive consular jurisdiction over affairs concerning their citizens abroad, has long been regarded as a form of ‘legal imperialism’.¹⁵⁴ It is unsurprising then that, especially for developing countries, broad jurisdictional claims appear as attempts to govern not only individuals or companies but also the countries themselves.¹⁵⁵

Seen in light of these different aspects of hierarchy, the broad practice of jurisdiction in the economic realm thus easily appears as a form of (global) governance,

¹⁵¹ *Ibid.*, at 141.

¹⁵² See *Empagran*, *supra* note 114, at 168.

¹⁵³ Department of Justice and Constitutional Development, Republic of South Africa, Submission in the South African Apartheid litigation in the US District Court, 11 July 2003, at 3, 6, available at www.nftc.org/default/ussabc/Maduna%20Declaration.pdf.

¹⁵⁴ See T. Kayaoglu, *Legal Imperialism: Sovereignty and Extraterritoriality in Japan, the Ottoman Empire, and China* (2010); D.S. Margolies *et al.* (eds), *The Extraterritoriality of Law: History, Theory, Politics* (2019), at 4–7; Szigeti, *supra* note 18, at 393–394.

¹⁵⁵ Seck, ‘Unilateral Home State Regulation: Imperialism or Tool for Subaltern Resistance?’, 46 *Osgoode Hall Law Journal* (2008) 565; Chimni, *supra* note 36, at 42–48.

regulating global markets in lieu of the decentralized state system and (often weak or non-existent) multilateral organizations.¹⁵⁶ The capacity to exercise this form of global governance is very unevenly distributed – the USA and the EU are by far the most active users of regulation with extraterritorial reach.¹⁵⁷ Russia and China employ it in some cases and within much narrower limits, though this may well change with China's rise in power.¹⁵⁸ Asymmetrical capacity makes it easier for powerful countries to make broad jurisdictional claims as they typically do not need to fear reciprocity, and we may thus expect such claims to be most pronounced in a unipolar (or at least oligopolistic) environment.¹⁵⁹

The extended jurisdictional spheres in the emerging assemblage are not the same then for all states – extraterritoriality is a viable path only for those states that possess sufficient market power and regulatory and monitoring capacities.¹⁶⁰ This is a small circle, and so unbound jurisdiction easily turns into a new form of oligarchical governance in the international order.¹⁶¹

B Governance and Legitimacy

Understanding unbound jurisdiction as (global) governance shifts our attention from the coordination of state spheres – a key concern of much of the literature on jurisdiction – towards broader questions of power, authority, effects and legitimacy. Governing others triggers demands for justification, and this brings into starker relief normative issues of legitimacy, democracy, accountability and the degree to which governance actually contributes to providing public goods.¹⁶² In the following, we begin to explore questions of legitimacy and accountability that typically remain out of view in discussions on jurisdiction in its global dimension. Even if the oligarchical governance retraced above will hardly ever be seen as legitimate *tout court*, the degree and kind of

¹⁵⁶ See Krisch, 'The Decay of Consent: International Law in an Age of Global Public Goods', 108 *AJIL* (2014) 1; Klabbers, *supra* note 3, at 117; Ryngaert, *supra* note 58, at 220; see also Kingsbury, Krisch and Stewart, 'The Emergence of Global Administrative Law', 68 *Law and Contemporary Problems (LCP)* (2005) 15, at 21–22.

¹⁵⁷ See also Putnam, *supra* note 67; M. Cremona and J. Scott (eds), *EU Law beyond EU Borders: The Extraterritorial Reach of EU Law* (2019); Bradford, *supra* note 94.

¹⁵⁸ On the extraterritorial application of Chinese competition law, see, e.g., Faure and Zhang, 'Towards an Extraterritorial Application of the Chinese Anti-Monopoly Law That Avoids Trade Conflicts', 45 *George Washington International Law Review* (2013) 501. On the Chinese reterritorialization of the Internet as a regulatory alternative, see Vatanparast, *supra* note 89.

¹⁵⁹ See also Krisch, *supra* note 156.

¹⁶⁰ See, e.g., Bradford, *supra* note 94, at 25–37; Kalyanpur and Newman, *supra* note 112.

¹⁶¹ See also Krisch, *supra* note 156. On different forms of hierarchy in the international order, see D.A. Lake, *Hierarchy in International Relations* (2009).

¹⁶² See Avant, Finnemore and Sell, 'Conclusion: Authority, Legitimacy, and Accountability in Global Politics', in Deborah D. Avant, Martha Finnemore and Susan K. Sell (eds), *Who Governs the Globe?* (2010) 356, at 359–367; see also Krisch, 'Liquid Authority in Global Governance', 9 *International Theory (IT)* (2017) 237.

legitimacy problems associated with it become clearer if we unpack different dimensions of legitimacy, especially those relating to ‘input’ and ‘output’.¹⁶³

Justifications of extraterritorial action often focus on the output side, stressing the beneficial effects it may have, especially in regard to the provision of (global) public goods in a politically fragmented world.¹⁶⁴ The institutions that could contribute to solving public goods problems – especially international organizations and states in their territory (narrowly understood) – are often weak or have limited room for manoeuvre, and the expansion of jurisdictional spheres of states with sufficient capacity for regulation and enforcement, so the argument goes, can help by removing or mitigating such limitations and in turn unleash significant potential for action in the global interest.¹⁶⁵

A more permissive jurisdictional regime might indeed contribute to solving collective action problems, especially by reducing the risk of free-riding and avoiding regulatory races to the bottom. Even in contexts in which no single country is capable of enforcing its rules worldwide, wider jurisdictional boundaries can allow smaller groups of key players to implement their ‘minilateral’ agreements themselves.¹⁶⁶ To be sure, such beneficial effects cannot be taken for granted – in a decentralized setting, states will often fail to take action, let alone action effective to further broader, global goals, and we will rarely observe ‘selfless intervention’.¹⁶⁷ In any event, even if states act with good intentions, problems of divergent strategies and over-enforcement remain in place in the absence of institutional mechanisms of coordination.¹⁶⁸ And even where coordination can be achieved, far-reaching extraterritorial measures will often fail to produce legitimate output if they are unable to generate a clear and unbiased definition of the ‘global public interest’ that they pursue.¹⁶⁹

This shifts the focus to questions of input legitimacy – central in debates around the legitimacy of governance institutions, but typically downplayed in the context of jurisdiction. When governance is at issue, output alone will typically be insufficient without a strong complement of input – the actual participation of citizens

¹⁶³ See F.W. Scharpf, *Governing in Europe: Effective and Democratic?* (1999).

¹⁶⁴ See Fabre, *supra* note 33; Michaels, *supra* note 33; Reinisch, *supra* note 33; Ryngaert, *supra* note 58; Verdier, *supra* note 50, at 33–39.

¹⁶⁵ See, e.g., Bodansky, *supra* note 33; Ryngaert, *supra* note 58, at 219. On global public goods, see S. Barrett, *Why Cooperate?: The Incentive to Supply Global Public Goods* (2007); I. Kaul, I. Grunberg and M.A. Stern (eds), *Global Public Goods: International Cooperation in the 21st Century* (1999). On public goods in international law, see Bodansky, ‘What’s in a Concept? Global Public Goods, International Law, and Legitimacy’, 23 *EJIL* (2012) 651.

¹⁶⁶ On minilateralism in the provision of public goods, see, e.g., Eckersley, ‘Moving Forward in the Climate Negotiations: Multilateralism or Minilateralism?’, 12 *Global Environmental Politics* (2012) 24; Naim, ‘Minilateralism: The Magic Number to Get Real International Action’, 173 *Foreign Policy* (2009) 135; D.G. Victor, *Global Warming Gridlock: Creating More Effective Strategies for Protecting the Planet* (2011).

¹⁶⁷ Ryngaert concedes that, in spite of the title of his book, ‘ultimately, selfless intervention remains somewhat of a mirage’. Ryngaert, *supra* note 58, at 220.

¹⁶⁸ For the issue of corruption, see Davis, *supra* note 48, at 225–229.

¹⁶⁹ See Steffek, ‘The Output Legitimacy of International Organizations and the Global Public Interest’, 7 *IT* (2015) 263.

in the decision-making process. A core element of input legitimacy is accountability. Accountability deficits in global governance have been widely discussed over the past two decades, mostly in relation to international organizations or other global regulatory institutions, such as international courts, trans-governmental networks or global private regulators.¹⁷⁰ The particular accountability challenges of states' extra-territorial action have been noted early on, including in the global administrative law context,¹⁷¹ but they have long found less structured attention. And where they have been discussed in greater detail,¹⁷² a full consideration of accountability issues has remained hampered by a continuing horizontal framing.

Employing a governance perspective, with a focus on vertical, hierarchical relations, helps to establish a different set of normative expectations. The exercise of unbound jurisdiction to tackle transboundary problems does not merely affect other countries tangentially but also seeks to supersede their own policies and thus engages self-government claims directly. As a form of governance, it thus triggers demands for a public accountability that involves a direct accountability to citizens rather than narrower forms of stakeholder participation or thin requirements of consideration.¹⁷³

This frame puts into starker relief the limitations of tools often suggested to moderate extraterritorial regulation¹⁷⁴ – tools that tend to remain in a horizontal frame, falling short of the public accountability demands in a situation of governance. Especially the reasonableness principle, or comity considerations more generally, appear as highly deficient – they weigh other countries' interest in regulating a given issue in the abstract and from afar. While this might befit a horizontal relationship of equals, it easily turns paternalistic when inscribed into a hierarchical setting. Similar concerns arise with respect to suggestions to introduce a subsidiarity principle – a principle according to which the state that has the closest relationship to the situation should take precedence, and only if this state is unwilling or unable to address the problem will extraterritorial action by another state be considered.¹⁷⁵ Such an approach runs into difficulties when the states involved have different policy preferences – for example, when the primarily affected state sees no need to tackle environmental pollution by a company and another state seeks to act in its stead. Subsidiarity hardly

¹⁷⁰ See, e.g., Keohane, 'Global Governance and Democratic Accountability', in D. Held and M. Koenig-Archibugi (eds), *Taming Globalization: Frontiers of Governance* (2002) 1; J.G. Koppell, *World Rule: Accountability, Legitimacy, and the Design of Global Governance* (2010).

¹⁷¹ Grant and Keohane, 'Accountability and Abuses of Power in World Politics', 99 *American Political Science Review* (2005) 29, at 39–40; Kingsbury, Krisch and Stewart, *supra* note 156, at 21–22.

¹⁷² Benvenisti, 'Sovereigns as Trustees of Humanity: On the Accountability of States to Foreign Stakeholders', 107 *AJIL* (2013) 295.

¹⁷³ See Steffek, 'Public Accountability and the Public Sphere of International Governance', 24 *Ethics and International Affairs* (2010) 45.

¹⁷⁴ On such tools, see, e.g., Benvenisti, *supra* note 172, at 313–325; Ryngaert, *supra* note 4, at 6. On the human rights field, see also Chambers, *supra* note 71, at 36–38; UN Special Representative on Business and Human Rights, *Exploring Extraterritoriality in Business and Human Rights*, available at www.business-humanrights.org/sites/default/files/media/documents/ruggie-extraterritoriality-14-sep-2010.pdf.

¹⁷⁵ Reinisch, *supra* note 33, at 411; Ryngaert, *supra* note 4, at 215–230.

helps in situations in which political aims diverge.¹⁷⁶ And its application can also remain abstract and paternalistic if a foreign government assesses whether another country's response is sufficient.

In contrast, procedural participation requirements – such as consultation mechanisms in competition law or environmental law¹⁷⁷ – give affected countries or populations a direct voice.¹⁷⁸ Yet they fall short of giving them an actual say: often linked with a commitment to take the position of the other state 'fully and benevolently' into account, they provide no guarantee that the participatory input will influence the decisions of the regulating country. This might be mitigated when regulation with transboundary effects is conditioned upon the implementation of common standards – standards all countries concerned have subscribed to.¹⁷⁹ This point has been raised by intervenors – including the EU – in proceedings under the ATCA,¹⁸⁰ and it is emphasized in the commentary on the *Guiding Principles on Business and Human Rights*.¹⁸¹ However, while the use of common standards might reduce the risk of an imposition of policies and preferences,¹⁸² it falls short of eliminating this risk as long as the interpretation of the respective (often vague) standards is left to the acting state.¹⁸³

Most suggestions for improving accountability thus leave the state exercising extra-territorial jurisdiction wide discretion and raise doubts as to their prospects in ensuring the self-government of those (citizens and states) subject to it.¹⁸⁴ Even proposals from a critical perspective often do not go much further than to 'inculcate ideals of tolerance, dialogue, and mutual accommodation in our adjudicatory and regulatory institutions'¹⁸⁵ – an important aim, but one that is unlikely to keep power differentials

¹⁷⁶ See Jachtenfuchs and Krisch, 'Subsidiarity in Global Governance', 79 *LCP* (2016) 1, at 11–14.

¹⁷⁷ On competition law, see Organisation for Economic Co-operation and Development (OECD), Recommendation of the OECD Council Concerning International Co-operation on Competition Investigations and Proceedings, Doc. OECD/LEGAL/0408, 16 September 2014, available at <https://legalinstruments.oecd.org/en/instruments/OECD-LEGAL-0408>; OECD, Competition Co-operation and Enforcement: Inventory of Co-Operation Agreements: Provisions on Positive Comity (2021), available at www.oecd.org/daf/competition/competition-inventory-provisions-positive-comity.pdf. On environmental law, see, e.g., Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters 1998, 2161 UNTS 447. On foreign participation in EU rule making, see Bradford, *supra* note 94, at 254–256.

¹⁷⁸ See also Benvenisti, *supra* note 172, at 318–320; Ryngaert, *supra* note 58, at 108–125.

¹⁷⁹ See Ryngaert, *supra* note 4, at 228–230.

¹⁸⁰ See OHCHR, *State Positions on the Use of Extraterritorial Jurisdiction in Cases of Allegations of Business Involvement in Severe Human Rights Abuses: A Survey of Amicus Curiae Briefs Filed by States and State Agencies in ATS Cases (2000–2015)*, April 2015, available at www.ohchr.org/Documents/Issues/Business/DomesticLawRemedies/StateamicusATS-cases.pdf.

¹⁸¹ *Guiding Principles*, *supra* note 72, at 4.

¹⁸² See Reinisch, *supra* note 33, at 408–412.

¹⁸³ Chimni describes this as 'putting the fox in charge of the chickens'. Chimni, *supra* note 36, at 50.

¹⁸⁴ See, e.g., Ryngaert, *supra* note 58, at 113–114, 125. Despite his allowance for discretion, however, Ryngaert's discussion in this recent work points to more far-reaching requirements, based on demands for democratic participation, than he had previously advocated and thus pursues a similar direction to the one suggested here.

¹⁸⁵ Chimni, *supra* note 36, at 52, quoting Schiff Berman, 'Global Legal Pluralism', 80 *Southern California Law Review* (2007) 1155, at 1237.

and competing interests in check. Proper public accountability would require firmer institutional mechanisms of inclusion for the protection of self-government. Giving affected populations an actual say should typically involve public consultations and co-decision mechanisms on the standards to be applied – international organizations may be the most obvious instrument here, but where they are lacking or have insufficient powers, other ad hoc or informal modes of co-decision making might suffice if they succeed in protecting weaker parties.

Yet standard setting alone will not remedy the accountability problems in implementation – many concerns, whether in antitrust or in the area of business and human rights, stem not from the standards themselves but, rather, from the ways in which they are interpreted and applied. Joint institutions of home and host states might be best suited to coping with the challenges involved; short of that, regulators and courts will have to find ways of eliciting the viewpoints of their counterparts in other affected countries and to seek solutions that bridge gaps where they arise. In both respects, proper public accountability would lead us away from unilateral action towards common institutions with participation from the different publics concerned. In the current climate, such institutions are, of course, unlikely to prosper.

C *Quandaries*

As long as such accountability remains elusive, tensions around unbound jurisdiction will be fueled not only by a sense of illegitimate domination but also by a genuine quandary. This quandary – about the proper relation between governance capacity and concerns about self-government – comes to the fore especially in debates about human rights protections against multinational companies. The UN negotiations over a legally binding instrument on business and human rights, touched upon above, provide a good example. In the first two treaty drafts, the jurisdictional clause was relatively broad – states had to allow in their courts lawsuits against companies domiciled there, but domicile was understood widely as having ‘a substantial business interest’ in the country.¹⁸⁶ As we have already seen, this approach is not very different from other recent legislation,¹⁸⁷ yet it has provoked considerable criticism within the UN Working Group.¹⁸⁸

¹⁸⁶ Zero Draft Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises, 16 July 2018, Art. 5, available at www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session3/DraftLBI.pdf; Revised Draft Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and other Business Enterprises, OEIGWG Chairmanship, 16 July 2019, Art. 7, available at www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/OEIGWG_RevisedDraft_LBI.pdf. Later drafts have narrowed the scope to the ‘principal place of business’. See Third Revised Draft, *supra* note 9, Art. 9(2).

¹⁸⁷ See section 3.D.

¹⁸⁸ For the relevant documents, see Human Rights Council, Fourth Session of the Open-Ended Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises with Respect to Human Rights (2020), available at www.ohchr.org/EN/HRBodies/HRC/WGTransCorp/Session4/Pages/Session4.aspx.

This criticism, however, did not stem from weaker states – almost all countries from the global South issued rather positive comments, as did human rights-focused non-governmental organizations.¹⁸⁹ Strong objections to the broader approach to adjudicative jurisdiction were instead raised by the business community. The joint business response to the zero draft, for example, stressed that the form of extraterritorial jurisdiction envisaged in the draft did ‘not respect national sovereignty and the principle of non-intervention in the domestic affairs of other States’.¹⁹⁰ This constellation is not as surprising as it might seem at first glance – Western multinationals may not usually care much about the sovereignty of developing countries, but they do, of course, have an interest in preventing strict accountability in their home countries.¹⁹¹ Human rights activists tend to have the opposite aim.

The state positions are more interesting, and they resemble the pattern of interventions in court proceedings under the ATCA. In these proceedings, some developing countries predictably voiced criticism that US court rulings could undermine important policy decisions of other countries – I already mentioned the strong objection by South Africa in 2002.¹⁹² Yet South Africa later dropped its opposition,¹⁹³ and a few other countries emphasized the positive effects on human rights protection.¹⁹⁴ This position certainly has to do with the fact that the human rights in question are considered universal and that the risk of powerful countries projecting their law abroad is therefore less pronounced.¹⁹⁵ But it is also due to the fact that many countries in the global South simply do not have the capacity to enforce human rights norms against the companies in question. Many weaker states suffer not only from the dominance of other states but also (and perhaps even more so) from the dominance of multinational companies. A recent account of the 100 economically strongest institutions in the world includes 69 companies and only 31 states,¹⁹⁶ and many of the other states are

¹⁸⁹ See, e.g., Amnesty International’s position in its intervention on Article 5: Jurisdiction, available at www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session4/AmnestyInternationalArticle5.docx. See also the comparable positions of companies and non-governmental organizations in US courts in Liste, *supra* note 81, at 230–233.

¹⁹⁰ See Business Response to the Zero Draft Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises (Zero Draft Treaty) and the Draft Optional Protocol to the Legally Binding Instrument (Draft Optional Protocol) Annex, October 2018, at 3, available at <https://media.business-humanrights.org/media/documents/92d3ed14500b62498a894c8fa613075be051e5d1.pdf>.

¹⁹¹ See Liste, *supra* note 81, at 230–232, but also the more diverse picture in Smit *et al.*, ‘Business Views on Mandatory Human Rights Due Diligence Regulation: A Comparative Analysis of Two Recent Studies’, 5 *BHRJ* (2020) 261.

¹⁹² See Department of Justice and Constitutional Development, *supra* note 153.

¹⁹³ OHCHR, *supra* note 119, at 15.

¹⁹⁴ See *ibid.*, at 4.

¹⁹⁵ See, e.g., the position of Argentina in the *Kiobel* case, *supra* note 68; OHCHR, *supra* note 119, at 11.

¹⁹⁶ See Global Justice Now, *69 of the Richest 100 Entities on the Planet Are Corporations, Not Governments, Figure Show*, 16 October 2018, available at www.globaljustice.org.uk/news/2018/oct/17/69-richest-100-entities-planet-are-corporations-not-governments-figures-show.

hardly in a position to effectively regulate such corporations.¹⁹⁷ For them, extraterritoriality can help to close a governance gap and subject large companies to a certain discipline, albeit not always in the way that the country itself considers best, as the interpretation and application of the rules lies in the hands of other countries' courts.

Many developing countries are therefore trapped between Scylla and Charybdis – between surrendering to powerful corporations or to powerful states – largely as a result of a degree of global inequality that stands in clear contrast with any not merely formal conception of equality between states.¹⁹⁸ For most of these countries, neither one nor the other surrender follows a 'free' decision in a meaningful sense. Wide jurisdictional boundaries in the area of human rights thus do not simply 'enhance' the exercise by the host state of its sovereignty, as some commentators have argued.¹⁹⁹ They might increase overall governance capacity over companies and may at times represent 'victims' only hope for remedies',²⁰⁰ but they also establish a caretaker governance by stronger states over weaker ones and thus generate, as we have seen, serious accountability concerns. Home states should indeed be obliged to prevent human rights violations by companies domiciled in them, even if these violations take place elsewhere, as has also been stated recently by the UN Committee on Economic, Social and Cultural Rights.²⁰¹ Jurisdictional obligations of this kind can not only help to prevent impunity, but they can also support the host state in the pursuit of its own goals. However, as the committee also emphasizes, this must not lead to a violation of the sovereignty of the host state.

To foster public accountability, host states must have the space to democratically define for themselves how human rights are to be protected and how the balance between rights and other public interests is struck. They must be able to make these choices count *vis-à-vis* companies as well as other states. For regulators and courts in other countries, this means that they should take guidance from the rules in force in the host state – for example, through choice-of-law rules²⁰² – and they should practise deference to that country's views if there is a risk of foreign proceedings undermining

¹⁹⁷ On the power of these corporations, see Ruggie, 'Multinationals as Global Institution: Power, Authority and Relative Autonomy', 12 *Regulation and Governance* (2018) 317.

¹⁹⁸ On different conceptions of sovereign equality, see Krisch, 'More Equal Than the Rest? Hierarchy, Equality and US Predominance in International Law', in M. Byers and G. Nolte (eds), *United States Hegemony and the Foundations of International Law* (2003) 135.

¹⁹⁹ See, e.g., O. De Schutter, 'Sovereignty-plus in the Era of Interdependence: Towards an International Convention on Combating Human Rights Violations by Transnational Corporations', CRIDHO Working Paper no. 2010/5, 5.

²⁰⁰ Ryngaert, *supra* note 58, at 189.

²⁰¹ UN Committee on Economic, Social and Cultural Rights, General Comment no. 24 (2017) on State Obligations under the International Covenant on Economic, Social and Cultural Rights in the Context of Business Activities, UN Doc. E/C.12/GC/24, 10 August 2017, para. 26.

²⁰² See also Weller and Thomale, 'Menschenrechtsklagen gegen deutsche Unternehmen', 46 *Zeitschrift für Unternehmens- und Gesellschaftsrecht* (2017) 509. But see also Chambers, *supra* note 71, at 34–35; Fabre, *supra* note 33; Reinisch, *supra* note 33 (who want to set stronger limits to the definitional sovereignty of the host state).

its policy choices.²⁰³ Such deference is not only a negative requirement: it should also drive home state institutions – legislators, regulators, courts – to act when such action is necessary to make weaker countries' policy choices effective *vis-à-vis* multinational companies. To help these countries escape the double risk of domination in the triangle with powerful states and companies, we would need inclusive and effective institutions as outlined in the previous section – one could think of joint regulatory or adjudicatory institutions and bilateral or multilateral agreements on the standards to be applied, with proper procedures for public participation. As long as these are lacking, unbound jurisdiction will need to practise strong negative, as well as positive, deference to at least mitigate its legitimacy deficits.

6 Conclusion

Law tends towards stasis; it often lags behind the challenges of its time. This is particularly true for international law, which does not have legislative mechanisms that would allow for smooth revision. The law of jurisdiction seems to fit this pattern – despite the challenges of a globalizing world, its main elements have remained largely stable over time. Yet, as we have seen, this continuity at the level of discourse conceals a far-reaching process of change and adaptation. Traditional categories are still in use, but the constraints imposed by their focus on territory and boundaries have been increasingly diluted in practice. When it comes to the regulation of companies operating on increasingly borderless markets, states face few limitations today – jurisdiction operates less as a principle of demarcation than as 'a diverse array of strategies used by national regulators to exert regulatory authority over often mobile market participants'.²⁰⁴

Such 'unbound' jurisdiction results in a jurisdictional assemblage with overlapping claims of many different states, and its exercise depends above all on states' political, institutional and economic weight – unbound jurisdiction exacerbates power inequalities and further erodes the protections that the principles of sovereignty and non-interference once appeared to erect.²⁰⁵ Business regulation beyond a state's own borders is, in fact, the preserve of a few states (or groups of states), and the ensuing picture has little resemblance with the typical imagery of jurisdiction as separate spheres of sovereign equals in a horizontal setting. Instead, it is one of hierarchy and governance, with a small number of states governing global markets – and not only companies on those markets but also other states whose own policies are relegated to the background.

Taking the governance aspect seriously can help us to understand jurisdiction better – rather than as a natural result of territorial boundaries, jurisdiction appears

²⁰³ See also Davis, *supra* note 48, at 231.

²⁰⁴ Brummer, *supra* note 38, at 525–526.

²⁰⁵ On the limited protection they actually provided, see only A. Anghie, *Imperialism, Sovereignty and the Making of International Law* (2007), at 4; R.H. Jackson, *Quasi-States: Sovereignty, International Relations and the Third World* (1993).

more as a flexible technology through which actors pursue their goals.²⁰⁶ This insight reorients the perennial debate about the extent and limits of jurisdiction – it shifts the focus away from boundary delimitation and coordination between states’ spheres of action towards an inquiry into forms and mechanisms that can channel governance activities so as to further common goods and preserve self-government. In this article, I have begun to explore how to make debates about legitimacy, accountability and governance capacity – typically employed to assess intergovernmental organizations and regulatory bodies – fruitful in the jurisdictional context, and I have outlined some normative requirements that flow from the shift towards a governance perspective.

This reorientation is not meant to detract from the necessary critique of biases and unequal power structures in the use of wide jurisdictional claims – instead, it aims at highlighting them by stressing the vertical, hierarchical relations thus created. The governance frame should sensitize scholars, observers and practitioners better to the hierarchical aspects of jurisdiction than the traditional, horizontal frame tends to do. Yet the new focus should also help to address the real-world challenges of a form of global governance that, for better or worse, is likely to grow further in importance. Even as unipolarity gives way to a more multipolar system, new asymmetries emerge (for example, around China) into which extraterritorial regulation can be inscribed. Moreover, as multilateral forms of cooperation – through international organizations, courts and treaties – have come to stagnate, in part because of the shifting geopolitical context, actors turn to other forms of tackling global problems, and unilateral tools are often attractive as they come with fewer negotiation and sovereignty costs than some alternatives.²⁰⁷

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

²⁰⁶ See also Ford, *supra* note 108.

²⁰⁷ See also Krisch, *supra* note 156.

