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Extraterritoriality and Territorial Extension in EU Law†

This paper examines the global reach of EU law in the context of current debates about the rise of the EU as a global regulatory power. Challenging recent claims to the contrary, its findings are that the enactment of extraterritorial legislation by the EU is extremely rare. Nevertheless, the EU makes frequent recourse to a legislative technique that I term territorial extension, in order to gain regulatory traction over activities that take place abroad. This technique not only leads to the EU governing transactions that are not centered upon the territory of the EU, but it also enables the EU to influence the nature and content of third country and international law. Nevertheless, it is inaccurate to say that the EU thereby seeks to export its own norms. EU legislation which engages in territorial extension is generally characterized by an international orientation revealing the EU to be engaged in action-forcing contingent unilateralism rather than the exportation of norms. The EU seeks to galvanize third country or global action to tackle transboundary problems and to pursue objectives that have been internationally agreed upon. The importance to the EU of this international orientation is clear from the criticisms that the EU has made of extraterritoriality and territorial extension in United States law.

I. INTRODUCTION

Scholars in both law and political science have been joined by media commentators in charting the rise of the EU as a global regula-
tory power. The EU has succeeded in using market access as a tool to leverage the “migration” of its frequently demanding norms abroad. The EU is said to be engaging in “unilateral regulatory globalization” known more colloquially as “The Brussels Effect.” The picture that is beginning to emerge is of an EU that is unilateralist, hegemonic and where the direction of regulatory travel is all one way, namely from the EU to the rest of the world.

This focus on the EU as a global regulatory power has been accompanied by a shift in perspective on extraterritoriality in EU law. Whereas the enactment of extraterritorial legislation was once viewed as the preserve of the United States and as provoking the wrath of the EU; today—so the argument goes—extraterritoriality is a phenomenon that is both tolerated by the EU and that is increasingly practiced in its name. This shift in the EU’s perspective on extraterritoriality is said to have occurred across different policy domains. While this is attributed to a variety of factors, the growth of the EU as an international economic actor is said to have mitigated EU fears of being “overwhelmed” by the United States and to have augmented the EU’s interest in regulating foreign behavior that generates EU market effects.

1. See, for a focus upon the multilateralisation of EU norms, R. Daniel Keleman & David Vogel, Trading Places: The US and the EU in International Environmental Politics, 43 COMP. POL. STUDIES 427 (2010) and, for a focus upon the sideways migration of EU norms, Anu Bradford, The Brussels Effect, 107 N.W. U. L. REV. 1 (2013). For a media account, see Charlemagne, Brussels Rules OK: How the EU is Becoming the World’s Chief Regulator, THE ECONOMIST (Sept. 20, 2007). For a different, more dynamic and collaborative perspective that has much in common with the one presented here, see Christine Overdevest & Jonathan Zeitlin, Assembling an Experimentalist Regime: EU FLEGT and Transnational Governance Interactions in the Forest Sector, 8 REGULATION & GOVERNANCE 1 (2012) and Gráinne de Búrca, EU External Relations: The Governance Mode of Foreign Policy, in THE LEGAL DIMENSION OF GLOBAL GOVERNANCE: WHAT ROLE FOR THE EU? (Bart van Vlooren et al. eds., 2013).


3. Bradford, supra note 1. This standard setting role is presented as being of central importance in driving negotiations for an EU-U.S. Trade and Investment Partnership agreement.


6. Id., at 1255.
It is against this background that this paper explores the global reach of EU law and its role in shaping the nature and extent of the EU’s global regulatory power. The paper argues that while the EU only very rarely enacts extraterritorial legislation, it makes frequent recourse to a mechanism that may be labeled “territorial extension.” The practice of territorial extension enables the EU to govern activities that are not centered upon the territory of the EU and to shape the focus and content of third country and international law. Consequently, the EU’s global regulatory power is often hard-wired into the design of specific legislative instruments adopted by the EU.

The paper begins by distinguishing between the familiar but contested concept of extraterritoriality and the new concept of territorial extension (Part II). It then uses these concepts to examine the territorial reach of EU law (Part III). Having exemplified the phenomenon of territorial extension by reference to ten specific examples, the paper analyses this concept as it operates in EU law (Part IV). The final substantive section of the paper (Part V) argues that while many EU measures giving rise to territorial extension are unilateral, they are characterized by an international orientation nonetheless. The normative weight that the EU attaches to this international orientation is apparent from the nature of the EU’s criticisms of extraterritoriality and territorial extension in U.S. law. Contrary to the impression that is sometimes given, the EU does not condemn extraterritoriality or territorial extension in U.S. law per se. Rather, it insists that the relevant U.S. measures should be characterized by the kind of international orientation that underpins EU measures of this kind.

II. The Concepts of Extraterritoriality and Territorial Extension

There is uncertainty and disagreement about what counts, and what should count, as a territorial connection for the purpose of distinguishing between the exercise of territorial and extraterritorial jurisdiction. This reflects the fact that notions of territoriality and extraterritoriality are legal constructs that are used, as Hannah Buxbaum has observed, to reinforce or resist claims to authority.7 Thus, while labels and categories can help to map the legal landscape, it is crucial to look beneath the surface of labels and categories.

In this paper, a measure will be regarded as extraterritorial when it imposes obligations on persons who do not enjoy a relevant

territorial connection with the regulating state. By contrast, a measure will be regarded as giving rise to territorial extension when its application depends upon the existence of a relevant territorial connection, but where the relevant regulatory determination will be shaped as a matter of law, by conduct or circumstances abroad.

**Table I: Extraterritoriality and Territorial Extension**

<table>
<thead>
<tr>
<th>Concept</th>
<th>Definition</th>
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<tr>
<td>Extraterritoriality</td>
<td>The application of a measure triggered by something other than a territorial connection with the regulating state.</td>
</tr>
<tr>
<td>Territorial Extension</td>
<td>The application of a measure is triggered by a territorial connection but in applying the measure the regulator is required, as a matter of law, to take into account conduct or circumstances abroad.</td>
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It is generally accepted that conduct that occurs within a state can form the basis for the exercise of territorial jurisdiction.\(^8\) There have been some attempts to formulate thresholds that this conduct must meet to ground the exercise of territorial jurisdiction, thus reflecting the fact that territorial connections are a matter of degree. For example, the Third Restatement of Foreign Relations Law of the United States provides that states may exercise territorial jurisdiction over conduct that occurs “wholly or in substantial part” within the territory of that state.\(^9\) Similarly, Christopher Brummer treats jurisdiction that is grounded on “the most inconsequential contact with a state” as being extraterritorial rather than territorial in form.\(^10\)

In one of its most famous judgments concerning extraterritoriality, the U.S. Supreme Court was confronted with the question of which conduct should be considered relevant in assessing whether legislation is being applied extraterritorially.\(^11\) Writing for the majority, Justice Scalia set out a novel approach, arguing that it is necessary to have regard to the “focus” of a statute to ascertain which conduct should be regarded as relevant in assessing whether a statute is being applied extraterritorially or not. If the focus of a statute is on the location of a transaction, and if the transaction took place

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9. Section 402(1) (a).
abroad, then the conduct is extraterritorial and the presumption against extraterritoriality in U.S. law will apply. This would remain the case even when other types of conduct relating to the transaction in question do take place within the territory of the United States.\(^{12}\)

It is also widely accepted that states can exercise territorial jurisdiction over persons who are present within their territory.\(^{13}\) As Vaughan Lowe and Christopher Staker put it: “States may impose the entirety of their laws—economic, social, cultural or whatever, upon everyone within their territories.”\(^{14}\) They may also make access to their territory, or the enjoyment of a given status within their territory,\(^{15}\) conditional upon compliance with the entirety of their laws. The consequences of this are important but are often ignored. If the presence of a person within a state is capable of constituting an autonomous basis for the exercise of territorial jurisdiction, this means that territorial jurisdiction may be exercised over natural or legal persons who are present even where the conduct in question takes place abroad.

While this paper views the regulation of the foreign conduct of persons present in the EU as implying the exercise of territorial jurisdiction, it acknowledges that this is not an uncontroversial view.\(^{16}\)

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12. This case concerned the Securities Exchange Act 1934. The Supreme Court found that the focus of this statute was on the location of the transaction. Because the transaction in question had taken place outside the United States, it considered the application of the statute to be extraterritorial, even though fraudulent activity relating to this transaction had taken place within the territory of the United States.

13. International Bar Association, Report of the Task Force on Extraterritorial Jurisdiction (2009) at 11. However, see the recent judgment of the U.S. Supreme Court in the Kiobel case where it determined that “mere corporate presence” is not enough to displace the presumption against extraterritoriality. The defendants in the case were foreign corporations whose shares were traded on the New York Stock Exchange. Their only presence in the United States (apart from this U.S. listing) consisted of an office in New York that was owned by a separate but affiliated company that helped to explain their business to potential investors. See Kiobel v. Royal Dutch Petroleum Co., No. 10-1491, 2013 BL 103044 (U.S. Apr. 17, 2013).

14. See also Vaughan Lowe & Christopher Staker, Jurisdiction, in INTERNATIONAL LAW 320 (Malcolm D. Evans ed., 2010).

15. The Restatement (Third) Of Foreign Law of the United States accepts that territorial jurisdiction confers authority on a state to prescribe laws with respect to the status of persons, or interests of things, present within its territory. See §402(1) (b).

16. This is not an uncontroversial position. See, for example, Jennifer Zerk, Extraterritorial Jurisdiction: Lessons for the Business and Human Rights Sphere from Six Regulatory Areas (Harvard Corporate Social Responsibility Initiative Working Paper No. 59, June 2010), available at http://www.bks.harvard.edu/trchg/CSR/workingpaper_59_zerk.pdf, at e.g., 15, where she defines extraterritoriality as involving assertions of jurisdiction over the foreign conduct of individuals and companies, and where she concludes that where conduct spans more than one state, it will be territorial only in relation to those elements of the conduct taking place within the territory of the regulating state. Parrish, supra note 8, would agree with Zerk. Some commentators (see, e.g., International Bar Association, supra note 13, at 147) choose to equate presence-based tests such as habitual residence or domicile with nationality, hence regarding this form of jurisdiction as extraterritorial but acceptable as a matter of international law. However, it seems to me that this not only stretches
Thus, in recognition of the importance of looking behind labels, it will signal when EU measures take presence as opposed to conduct as their jurisdictional base and especially when measures of this kind serve to regulate conduct that takes place abroad. While the line between conduct and presence will not always be easy to draw, where the application of EU law rests upon a requirement that the person in question is, or wishes to be, resident, established or domiciled in the EU, this will be treated as a territorially-grounded, presence-based, test. When EU law applies to those who are authorized or recognized by the EU to offer specified services within its territory, these natural or legal persons may either be regarded as being present within the EU or as engaging in EU conduct on the basis that they are offering the services concerned.

Leaving presence aside, there is also pronounced disagreement about the jurisdictional salience of effects, and about whether a measure whose application is triggered by a finding that foreign conduct is capable of generating domestic effects should be regarded as extra-territorial or not. While most U.S. courts and commentators treat effects-based jurisdiction as extra-territorial, there are commentators and courts who disagree.

Thus, the Third Restatement of the Foreign Relations Law of the United States treats as territorial the exercise of prescriptive jurisdiction over foreign conduct that has or is intended to have substantial effects within the territory of the United States. Also, in one recent judgment, the D.C. Circuit laid aside the presumption against extraterritoriality on the basis that the regulation of foreign conduct is not extraterritorial when the application of the law rests upon there being evidence that substantial effects are felt within the territory of the United States.

The EU’s attitude toward the jurisdictional status of effects is also equivocal. It considers effects-based jurisdiction to be controver-

the concept of nationality to the breaking point, but also, that by equating presence with nationality in this way, these commentators come to regard jurisdiction exercised on this basis as uncontroversial. Thus, counter-intuitively, by viewing presence as a possible basis for the exercise of territorial jurisdiction and measures triggered by presence as giving rise to territorial extension when they regulate conduct abroad, we will be forced to examine and evaluate the measures more carefully from a jurisdictional point of view.

17. Zerk, supra note 16, at 7, and Parrish, supra note 8, are unequivocal about treating effects-based jurisdiction as extra-territorial and Parrish points out that this is almost invariably the attitude adopted by U.S. courts.

18. §402(1) (c), supra note 15.

19. Parrish, supra note 8, discussing Philip Morris 566 F.3d 1095 (2009), at 1130. The presence of effects has been viewed by U.S. courts as salient in different ways. It has been used to determine the boundary of congressional authority, to reverse the presumption against extraterritoriality, and now in this case, to make this presumption inapplicable in the first place.
sial as a matter of international law, but acknowledges that the territoriality principle has been expanded in some jurisdictions to include extraterritorial conduct that has or is intended to have substantial effects. In view of the ambiguity that characterizes the jurisdictional salience of effects, the exercise of effects-based jurisdiction by the EU will be treated as a separate category below.

The topic of extraterritoriality has been examined very frequently by U.S. commentators and by U.S. courts. While U.S. courts have been willing to accommodate extraterritoriality in the exercise of prescriptive jurisdiction, including recourse to effects-based jurisdiction, they have done so within the framework of a presumption that operates against it and have developed a number of comity-driven constraints.

Extraterritoriality has not formed a topic for detailed analysis in the EU in the same way. The discussion has tended to focus on extraterritoriality in EU competition law, and on the lawfulness of extraterritorial legislation enacted by the United States. Outside of the field of competition law, there has been virtually no careful analysis of the territorial reach of EU law by either academic commentators or, at least until recently, by the European Court of Justice. It is with elucidating the distinction between extraterritoriality

20. Amicus Curiae Brief by the European Commission on Behalf of the European Commission on Behalf of the European Union in Support of Neither Part in Kiobel et al. v. Royal Dutch Petroleum et al. n.28. But, note that the Court of First Instance (now the General Court) seems to accept that effects-based jurisdiction is consistent with public international law where foreign conduct creates immediate and substantial effects within the EU (Case T-102/96 Gencor [1999] ECR II-753, at para. 90).

21. Id.

22. For a discussion of recent developments in U.S. courts, see Parrish, supra note 8. For a very interesting academic discussion, see Kal. Rastiala, Does the Constitution Follow the Flag? The Evolution of Territoriality in U.S. Law (2009).

23. The strength of the presumption against extraterritoriality waxes and wanes. The Supreme Court’s judgment in Morrison v. National Australia Bank (supra note 11, at 2877-78) set the bar for rebutting this presumption rather high, requiring affirmative evidence of a Congressional intention to legislate extraterritorially. The recent Supreme Court judgment in Kiobel (supra note 13) confirms this trend.

24. This is not to say that there has been no discussion. See supra note 4, and for a recent example of an article addressing this theme, see Laurens Ankersmit et al., Diverging EU and WTO Perspectives on Extraterritorial Process Regulation 21 MINN. J. INT. L. 14 (2012).


27. See the recent discussion by the European Court and the Advocate General in Case C-377/10 Air Transport Association of America and others v. Secretary of State for Energy and Climate Change (AG Opinion of Oct. 6, 2011; and Judgment of the Court (Grand Chamber) of Dec. 21, 2011). The stance adopted by both the AG and the European Court of Justice is consistent with the distinction between extraterritoriality and territorial extension put forward here. While the Court placed primary emphasis upon the territorial connection, constituted by the fact that the aircraft in
aliety and territorial extension, and with beginning to map the territorial reach of EU law, that the next two sections of this paper are concerned.

III. Extraterritoriality and Territorial Extension in EU Law

Against the backdrop of this distinction between extraterritoriality and territorial extension, this section will examine the territorial reach of EU law. I will argue that the EU only exceptionally engages in extraterritoriality except where this is nationality-based. And it only exceptionally rests its jurisdiction exclusively on a finding that foreign conduct may generate EU-felt effects. I will demonstrate that, by contrast, the EU engages very frequently in the practice of territorial extension.

A. Extraterritoriality

While it is relatively common for the EU to exercise jurisdiction over the foreign conduct of its own nationals, it is virtually unknown for the EU to exercise jurisdiction over the foreign conduct of non-EU nationals, except where the persons in question may be considered present—for example, resident, domiciled or established—within the territory of the EU. In short, with the exception of nationality-based jurisdiction, instances of extraterritoriality are exceptionally rare. In the regulation of financial services, we see the emergence of an entirely novel (to the EU) and as yet untested extraterritorial anti-evasion clause. For example, the EU’s new Derivatives Regulation imposes obligations on contracts concluded between two entities established in one or more third (non-EU) countries, where the imposition of the obligation is necessary or appropriate to prevent the evasion of the provisions contained in the Regulation.28

It is notable that while the EU has not condemned the extraterritoriality inherent in the most recent U.S. sanctions against Iran,29 the EU has resisted adopting non-nationality based extraterritorial measures of its own even in the area of common foreign and security policy.30 The EU’s Iran sanctions regime applies only within the ter-

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28. Arts. 4(1)(a)(iv) and 11(4) of Reg. 648/2012 (European Market Infrastructure Regulation: EMIR) 2012 O.J. (L201) 1. Art. 24 of the Commission’s proposal on markets in financial instruments (MiFIR) in COM(2011) 653 contains a similar clause. See also Dir. 2005/25 on ship source pollution 2005 O.J. (L90) 1, which seems to prescribe behavior extraterritorially, by regulating ship-source pollution even in relation to non-EU ships operating outside EU waters, whether in the Exclusive Economic Zone, International Straits, or on the High Seas.
29. For a discussion, see Note, HARV. L. REV., supra note 4, at 1226.
30. For the latest iteration, see Reg. 267/2012 concerning restrictive measures against Iran 2012 O.J. (L88) 1.
rioty of the EU and to natural and legal persons who enjoy the nationality of an EU Member State.\footnote{This flows from id., art. 49, which states that the Regulation applies (a) within the territory of the Union, including its airspace; (b) on board any aircraft or any vessel under the jurisdiction of a Member State; (c) to any person inside or outside the territory of the Union who is a national of a Member State; (d) to any legal person, entity or body, inside or outside the territory of the Union, which is incorporated or constituted under the law of a Member State; (e) to any legal person, entity or body in respect of any business done in whole or in part within the Union.}

B. Effects-Based Jurisdiction

The EU’s aversion to extraterritoriality is not countered by a strong reliance on effects-based jurisdiction. Effects has reared its head quite recently, though as yet tentatively, in EU financial services regulation. The EU Derivatives Regulation will impose obligations on contracting parties’ contracts concluded between two entities in third countries where the contract in question has a direct, substantial and foreseeable effect within the EU.\footnote{(EMIR), supra note 28, arts. 4(1)(a)(iv) and 11(4). The European Securities Market Authority (ESMA) is charged with drafting regulatory technical standards specifying which contracts may be considered to have effects of this kind. Draft Regulatory Standards were published on July 17th, 2013 at: http://www.esma.europa.eu/consultation/Draft-Regulatory-Technical-Standards-contracts-having-direct-substantial-and-foreseeable (last visited on Oct. 28, 2013).} Nonetheless, it is virtually unprecedented for the EU to found its jurisdiction exclusively on a finding of EU-felt effects.

Even in the area of merger control,\footnote{This is regulated by the EU Merger Regulation, Reg. 139/2004 on the control of concentrations between undertakings 2004 O.J. (L24) 1.} for a merger to have a “Community dimension” something more than a finding of effects is required.\footnote{Art. 1(2-3), Reg. 139/2004, id.} The Merger Regulation makes EU jurisdiction over a merger conditional upon the undertakings in question exceeding both the worldwide and EU turnover thresholds that it lays down.\footnote{Id.} The EU turnover threshold will only be met when the undertakings sell the requisite level of goods or provide the requisite level of services within the EU.\footnote{Direct sales within the EU are also considered to be relevant by the Commission in establishing the presence of the necessary EU effects. Turnover is calculated in accordance with the rules laid down in art. 5(4) of the EU Merger Regulation (supra note 33) and this involves the EU in adopting a broad understanding of the boundaries of the undertakings concerned, combining the turnover of all affiliated entities.} The application of the EU Merger Regulation is thus only triggered by EU conduct even though where sufficient sales within the EU do occur, the EU will also appraise “foreign to foreign transactions” (mergers) that take place abroad.\footnote{Wagner-von-Papp, supra note 25, at 32.} Thus, while the General Court considers that application of the EU’s Merger Regulation can be justified as a matter of public international law when it is
foreseeable that a proposed concentration will have an immediate and substantial effect within the EU, in order for the jurisdictional threshold laid down in the Merger Regulation to be satisfied, a certain volume of EU sales is nonetheless required.

In competition law more generally, outside of the area of merger control, the European Court of Justice has favored an “implementation” test which enables the EU to exercise jurisdiction when an anticompetitive agreement, decision, or concerned practice has been implemented within the EU. In the famous Woodpulp I case it was clear that this was the case as the quarterly price announcements in question made reference to products sold within the EU. The European Court of Justice has not yet clarified what position it would take where there is no clear evidence of EU-based implementation, but merely evidence of (direct, substantial and foreseeable) EU-felt effects. The European Court of Justice’s current preference for implementation over effects is consistent with the EU’s widespread practice of territorial extension as set out below.

C. Territorial Extension

This section sets out ten examples of territorial extension in EU law, operating across five diverse policy domains: climate change, environment, maritime transport, air transport, and financial services regulation. While each of these areas of regulation operates against a backdrop of strong interdependence between states, there is considerable variation in terms of the degree and type of international cooperation that has been achieved.

1. Climate Change
   a. Aviation in the European Emissions Trading Scheme

In 2005, the EU launched its greenhouse gas emissions trading scheme with a view to achieving a cost-effective reduction in such emissions within the EU. Extending in the first instance to power plants and energy-intensive industrial sectors, it was subsequently

38. Gencor, supra note 20, at para. 90. In this judgment the Court seems to use the effects doctrine to circumscribe rather than to expand EU jurisdiction under the Merger Regulation. At the time of the judgment, what is now the General Court was the Court of First Instance.
39. See esp. Joined Cases 89/85, 104/85, 114/85, 116/85, 117/85 and 125/85 to 129/85 Ahlström Osakeyhtiö and Others v. Commission (Woodpulp I) [1988] ECR 5193 at paras. 16-18. In this case, the European Commission pushed for recognition of the effects doctrine whereas the Advocate General pushed for recognition of a qualified form of effects, requiring evidence of direct, substantial and foreseeable effects. The ECJ has also developed a “single economic entity” test that allows it to use the EU presence of one undertaking to establish jurisdiction over related firms abroad. See Case 48/69 ICI v. Commission [1972] ECR 619.
40. Dir. 2003/87 establishing a scheme for greenhouse gas emission trading allowances within the Community 2003 O.J. (L275) 32.
broadened to include airline operators flying within, as well as to and from, the EU. While there have been suggestions that the EU’s Aviation Directive is extraterritorial, it actually rests upon a territorial trigger as it only applies to flights arriving at or departing from an EU airport. However, in keeping with the concept of territorial extension, in applying the Aviation Directive, the regulator is required as a matter of law to take account of conduct and circumstances abroad. The regulator is required to do so in three different ways.

First, in determining the number of allowances to be surrendered by an airline, the EU is required to include the volume of emissions generated during the entire flight, including the sections that take place abroad. Second, the EU may decide to exempt flights departing from third countries from being included in its Emissions Trading Scheme when the third country in question has adopted its own measures to reduce the climate change impact of these flights. Thus, the EU is required to take into account the content of third country law. Third, the EU is required to consider amending the Aviation Directive if agreement on global measures to reduce aviation emissions was reached. Thus, the EU is also required to be responsive to developments in the international domain.

This can be summarized as follows:

41. Dir. 2008/101 so as to include aviation activities in the scheme for greenhouse gas emission allowance trading within the Community 2008 O.J. (L327) 9.
43. See the discussion in Case C-377/10, supra note 27.
44. Art. 25a(2), Dir. 2003/87, supra note 40. Events have moved rapidly during the period in which this article was pending for publication. As things stand, the European Commission has recently proposed some quite radical amendments to the Aviation Directive, as a result of progress towards the goal of achieving a global market for aviation emissions in ICAO. In view of the qualified nature of this progress, the Commission has not proposed that the scheme should be entirely ‘disapplied’ but rather that, from 1 January 2014, its scope should be limited to emissions that occur within European (EEA) airspace. For the text of this proposal, an overview of the outcome of the ICAO Assembly meeting in Autumn 2013, and for news of up-to-date developments, see: http://ec.europa.eu/clima/news/articles/news_2013101601_en.htm (last visited Oct. 28, 2013).
b. Clean Development Mechanism (CDM) offsets in the Emissions Trading Scheme

Member States and companies may use certified emission reductions (CERs or offsets) emanating from the Kyoto Protocol’s Clean Development Mechanism towards attaining compliance with their emission reduction obligations under the European Emissions Trading Scheme (ETS). In order to be used in this way, offsets must comply with the qualitative and quantitative conditions imposed by EU law.

While the application of these conditions is triggered by a territorial connection with the EU (the surrendering of offsets for compliance purposes under the EU emissions market), EU law gives rise to territorial extension because it requires the EU regulator to take into account behavior or circumstances abroad. Most prominently, in deciding whether offsets from new projects may be used for compliance purposes, the EU regulator is required to take into account whether the third country in which the project takes place has concluded a bilateral agreement with the EU and whether a relevant international agreement has been put in place. Except for projects based in Least-Developed-Countries, the absence of either a bilateral or an international agreement will result in a ban on offsets from new projects being used.

2. Environment

a. Importing timber and timber products from outside the EU

The EU prohibits the placing of illegally harvested timber or timber products (timber) on its market, with illegality being judged by

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45. See arts. 11a and 11b, Dir. 2003/87, supra note 40.
46. “New projects” refers to projects commenced after the start of 2013.
47. Art. 11a, Dir. 2003/87, supra note 40.
reference to third country law. Timber from species covered by the EU’s regulation implementing the Convention on International Trade in Endangered Species may be imported into the EU subject to it being licensed in accordance with this regulation. For other species, timber may be imported into the EU where it meets the standards laid down in the EU’s Due Diligence Regulation. These due diligence standards regulate the foreign conduct of third country operators marketing timber in the EU, obliging them to ensure supply chain transparency and to make use of a due diligence system maintained by a monitoring organization that has been recognized by the EU. Importers may escape these due diligence requirements where the timber conforms to standards laid down in a Voluntary Partnership Agreement (VPA) concluded between the third country in question and the EU.

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<tr>
<th>Instrument</th>
<th>Trigger</th>
<th>Territorial Extension</th>
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<tbody>
<tr>
<td>Reg. 995/2010 Due Diligence</td>
<td>Placing timber products on EU market for the first time (conduct)</td>
<td>Take into account: Conclusion of bilateral agreement (VPA); whether third country exporters meet EU due diligence requirements in activities abroad.</td>
</tr>
</tbody>
</table>

b. Exports of electrical and electronic waste

In a bid to contribute to sustainable production and consumption, the EU imposes obligations on producers of electrical and electronic waste. Among the different obligations laid down are provisions regulating the proper treatment of waste and establishing recovering targets for producers. These obligations apply to businesses established in the EU and to third country businesses that sell

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50. For details, see the EU’s “FLEG” Regulation, Reg. 2173/2005 on the establishment of the FLEG licensing scheme for imports of timber into the European Community 2005 O.J. (L347) 1. FLEG stands for Forest Law Enforcement, Governance and Trade. Art. 2(g) defines illegally harvested timber as timber harvested in contravention of the applicable legislation in the country of harvest. Recall Overdevest & Zeitlin, supra note 1.
51. Recognition may be granted to a monitoring organization where it is established in the EU and where it meets the conditions laid down relating to the expertise of its technically competent personnel, its capacity and its objectivity and impartiality.
52. Dir. 2012/19 2012 O.J. (L197) 38 which is to be transposed by Member States by Aug. 2014.
53. Id., art. 8, in respect of treatment and Article 11 and Annex V in respect of recovery targets.
electrical and electronic equipment to private households or other users inside the EU. Treatment operations in relation to EU-generated waste undertaken outside the EU may still count towards the producer's recovery target if the waste treatment operation takes place in conditions that are equivalent to those required by EU law.

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<tr>
<th>Instrument</th>
<th>Trigger</th>
<th>Territorial Extension</th>
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<tbody>
<tr>
<td>Dir. 2012/19 Electrical and</td>
<td>Export of waste from EU (conduct)</td>
<td>Take into account:</td>
</tr>
<tr>
<td>Electronic Waste (WEEE)</td>
<td></td>
<td>Whether third country waste treatment operation meets standards equivalent to those of EU.</td>
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3. Maritime Transport
   a. Minimum training for seafarers

Member States are required to ensure that only seafarers properly trained and certified in accordance with the relevant international standards may serve on ships that are registered in EU Member States. Where seafarers do not hold a certificate issued by a Member State, they must be trained in a third country whose training and certification system has been recognized by the EU as meeting all the requirements laid down in the Seafarers’ Training, Watchkeeping and Certification Convention (STWC Convention).

The Seafarers Directive rests upon a territorial trigger in that it applies only when seafarers not certified in the EU wish to work on an EU ship. However, it gives rise to territorial extension in that the EU regulator is obliged to take into account the quality of the training and certification system in place in the third country in which a seafarer was trained.

54. Id., art. 3(f)(iv).
55. See esp. id., art. 10. Shipments of waste abroad are also required to comply with the EU’s general regime regulating exports of waste. This prohibits the export of waste for disposal and the export of hazardous waste for recovery to non-OECD countries. See Regulations 1013/2006 2006 O.J. (L190) 1 and 1418/2007 2007 O.J. (L316) 6.
56. Art. 19, Dir. 2008/106 on the minimum level of training of seafarers (recast) 2008 O.J. (L323) 33. Where a third country has obtained EU recognition, Member States may choose to endorse the certificates issued by it.
Instrument | Trigger | Territorial Extension
--- | --- | ---
Dir. 2008/106 Minimum Level of Training for Seafarers | Seafarers serving on EU (MS) ship (conduct) | Take into account: Quality of third country training and certification system for seafarers.

b. Ship inspection and survey organizations (class societies)

Ship Inspection and Survey Organizations (class societies or recognized organizations) are private bodies that play an important role in ensuring ship safety. Lloyds Register is an example of a class society. Among other tasks, these bodies issue certificates in order to prove compliance with international conventions on safety at sea and marine pollution, and class certificates that prove the fitness of a ship for a particular use or service in accordance with the rules of the organization. Class societies can only perform these statutory and classification functions in the EU if they have been recognized by the EU and authorized by a Member State. The granting of recognition will depend upon the class society in question being organized and governed in accordance with requirements imposed by EU law and upon the class society achieving a level of overall performance that is not considered to constitute an unacceptable threat to ship safety or the environment on the basis of criteria that the EU sets down. As a matter of EU law, class societies are required to attain this level of performance in relation to “their” classed ships, including in relation to ships that are inspected outside of the EU on behalf of non-EU flag states.


58. Reg. 391/2009 on common rules and standards for ship inspection and survey organizations 2009 O.J. (L131) 11, Arts. 3(3) and 14. The Reg. defines an organization unusually broadly as including a legal entity, its subsidiaries and any other entities under its control, which jointly or separately carry out tasks falling under the scope of the Regulation (art. 2(c)).

59. Id., arts 14(1)(1) and 2(c). As the European Commission puts it: “. . . the recognition is provided for the worldwide activity of the classification society. The list of minimum criteria and obligations as provided in the Regulation (many of which are of a structural nature) concern the entire activity of the organization, regardless of flag” (COM(2013) 208 final) on the position to be adopted, on behalf of the EU, at the International Maritime Organization with regard to the adoption of certain Codes and related amendments to Conventions.
4. Air Transport

a. Aviation security for third country air cargo and mail

Following the discovery in the United Kingdom of a package containing plastic explosives and a detonating mechanism on a U.S. bound cargo plane, the EU has taken steps to strengthen aviation security standards for third country originating cargo and mail. An air carrier bringing cargo or mail into the EU from a third country must be “designated” (recognized) by the EU, unless the cargo or mail originates in a country that is exempt from this requirement or which has been recognized by the EU as applying security standards that are equivalent to those of the EU. Designated air carriers are required to screen each and every item of cargo or mail, initially in accordance with international standards, although from 2014 stricter EU standards will apply. Air carriers can escape this onerous obligation if supply-chain security controls have been applied by an entity that has been validated by the EU or where the cargo has been rendered exempt.

b. EU law imposing operating ban on air carriers

In 2005, the EU assumed primary responsibility for drawing up a list of air carriers subject to an operating ban in the EU. An operat-
ing ban may apply to some or all of the fleet of a particular air carrier or to all air carriers certified by the regulatory authorities of a third state.\(^{64}\) In considering whether an air carrier should be totally or partially banned, the EU is required to ascertain whether the air carrier in question meets the relevant safety standards, taking account the existence of verified evidence of serious safety deficiencies and the lack of ability or willingness of the air carrier or the relevant third country regulatory authority to address these deficiencies.\(^{65}\) Thus, the EU’s decision is predicated not only upon the safety performance of aircrafts during specific EU-arriving or EU-departing flights, but upon the worldwide safety profile and performance of an air carrier and upon the regulatory capacity of its home state.

<table>
<thead>
<tr>
<th>Instrument</th>
<th>Trigger</th>
<th>Territorial Extension</th>
</tr>
</thead>
<tbody>
<tr>
<td>Reg. 2111/2005 Air Carriers Subject to EU Operating Ban</td>
<td>Aircraft operating in the EU (conduct)</td>
<td>Take into account: Worldwide safety profile and performance of air carriers; regulatory capacity of third country.</td>
</tr>
</tbody>
</table>

5. Financial Services Regulation

a. Credit Rating Agencies

Credit Rating Agencies (CRAs) are private bodies that provide credit ratings that are used by investors, issuers, financial institutions and governments. Financial institutions are sometimes legally required by EU regulation to use credit ratings for the purpose of calculating capital for solvency purposes and to calculate investment risks. The reliability of the credit ratings issued by CRAs has been called into question as a result of the financial crisis and has provoked a strong regulatory response in both the EU and the United States.\(^{66}\)

For credit ratings to be relied upon by EU financial institutions for the specific purpose of complying with EU law it must, subject to exceptions, be issued by a CRA that is established in the EU and registered in accordance with the relevant EU regulation.\(^{67}\) A credit rating issued by a third country CRA may only be relied upon in two circumstances: where the specific credit rating has been endorsed by

\(^{64}\) To illustrate these different options, see the current list in Commission Imp. Reg. 1146/2012 2012 O.J. (L333) 7.

\(^{65}\) See the Annex to Reg. 2111/2005, supra note 63.


\(^{67}\) Art. 4(1), Reg. 1060/2009 on Credit Rating Agencies 2009 O.J. (L.02) 1.
an EU-CRA or where the third country CRA has been *certified* by the EU.

In order for a specific credit rating to receive an endorsement, the conduct of the CRA that results in the issuing of the credit rating must meet the standards laid down by EU law, and an appropriate cooperation arrangement between the regulatory authorities of the EU and the third country of origin must be in place. 68 In order for a foreign CRA to be certified it must be authorized or registered in a country that has been recognized by the EU as having a legal and supervisory framework that is equivalent to that of the EU. 69

<table>
<thead>
<tr>
<th>Instrument</th>
<th>Trigger</th>
<th>Territorial Extension</th>
</tr>
</thead>
<tbody>
<tr>
<td>Reg. 1060/2009 Credit Rating Agencies (CRAs)</td>
<td>Use of third country credit ratings for the purpose of complying with EU law (conduct)</td>
<td>Take into account: Conduct of third country CRA; cooperation arrangements with third countries; third country legal and supervisory framework.</td>
</tr>
</tbody>
</table>

b. Alternative investment fund managers

The Alternative Investment Funds Directive regulates the management and marketing of Alternative Investment Funds (AIFs). 70 This includes categories of funds that are thought to pose significant risks to financial stability and integrity in European financial markets and which were subject to inadequate regulation during the financial crisis in 2007/8. 71 This includes funds that do not invest in stocks, bonds or cash including, most conspicuously, hedge funds, private equity funds, and commodity funds. 72

This directive regulates the management and marketing of EU and non-EU funds by EU and non-EU fund managers. 73 It makes ac-

68. See art. 4(3), Reg. 1060/2009, id. Art. 4(3)(e) provides that there must be an objective reason for the credit rating to be elaborated in a third country for endorsement to take place.

69. The certification route can only provide an escape for credit ratings that are related to third country entities or financial instruments according to Article 5(1), Reg. 1060/2009, id.


71. This includes funds not covered by Directive 2009/65 relating to undertakings for collective investment in transferable securities (UCITS) 2009 O.J. (L302) 32. This sector covered around €2 trillion at the end of 2008.


73. There has to be an EU element to trigger the application of the EU law, and hence it does not apply to non-EU fund managers managing non-EU funds, unless they market these funds inside the EU. See recital 13, Dir. 2011/61, supra note 70, for a quick summary of the scope of the directive.
cess to the EU market for non-EU fund managers contingent not only upon their conduct in relation to individual investment decisions or transactions, but also upon the firm and the firm’s country of origin meeting the non-transaction-specific conditions laid down.\textsuperscript{74} Non-EU fund managers (firms) are required to meet conditions relating to capitalization and liquidity, remuneration, conflicts of interest, risk management, and the like.\textsuperscript{75} The third countries in which the firms originate are required to have appropriate cooperation arrangements with the EU in place and to avoid being listed as a Non-Cooperative Country and Territory by the Financial Action Task Force (FATF).

Significantly, the directive contains what may be termed a “conflict equivalence” clause.\textsuperscript{77} Non-EU AIFMs may be released from requirements under the directive to the extent that it would be impossible for them to combine compliance with EU and non-EU law. This is subject to the requirement that the conflicting foreign law must provide for an equivalent rule having the same regulatory purpose and offering the same level of protection to investors in the relevant fund. In this sense, the scope of the fund manager’s obligations to comply with the demands of EU law will depend upon the content of the third country law that also applies to firms and transactions of this kind.

<table>
<thead>
<tr>
<th>Instrument</th>
<th>Trigger</th>
<th>Territorial Extension</th>
</tr>
</thead>
<tbody>
<tr>
<td>Dir. 2011/61 Alternative Investment Fund Managers</td>
<td>Managing/Marketing funds in EU; Managing EU funds abroad* (conduct/presence)</td>
<td>Take into account: Governance etc. of foreign firm; cooperation arrangements with third countries; third country compliance with international standards.</td>
</tr>
</tbody>
</table>

IV. UNDERSTANDING TERRITORIAL EXTENSION IN EU LAW

EU legislation that gives rise to territorial extension serves to construct a number of concentric spheres of regulatory intervention.

\textsuperscript{74} See esp. art. 37(2) which requires non-EU AIFMs to comply with the terms of the Directive except Chap VI which applies only to EU firms. This includes firm-level as opposed to transaction-level conditions, such as the remuneration requirements laid down in Article 13 and Annex II of Dir. 2011/61, supra note 70.

\textsuperscript{75} See, for example, the obligations imposed by arts. 8-20, Dir. 2011/61, supra note 70.

\textsuperscript{76} See, e.g., art. 40(1) in relation to non-EU fund managers managing non-EU funds. This also sets out a third condition which requires that the country in question has signed a tax agreement complying with the standards laid down in Article 26 of the OECD Model Tax Convention and which ensures an effective exchange of information in tax matters. The FATF is an inter-governmental body concerned to combat money laundering, terrorist financing and the proliferation of weapons of mass destruction. See http://www.fatf-gafi.org/pages/aboutus/.

\textsuperscript{77} Article 37(2), Dir. 2011/61, supra note 70. For a more conventional equivalence provision, see art. 9(6) of the directive regarding own funds.
which are delimited by the boundaries of an individual transaction, a
firm, a country, or the globe. Depending upon which sphere(s) of reg-
ulatory intervention are constructed by the EU measure in question,
the regulatory perimeter demarcated by this measure will be differ-
ently, and more or less broadly, drawn.

Where the sphere of regulatory intervention constituted by a
measure is defined by the boundaries of an individual transaction,
the EU regulator will be required to take into account conduct or cir-
cumstances outside of the EU that relate exclusively to that
transaction. For example, in assessing whether a product originating
in a third country may be imported into the EU, the EU regulator
may be obligated to take into account the manner in which a specific
EU-bound shipment of that product is harvested or produced.\textsuperscript{78} When
EU measures construct a broader sphere of regulatory intervention,
the EU regulator will be required to look beyond the confines of an
individual transaction and to examine conduct or circumstances
outside the EU that relate more broadly to a firm, a third country or
the globe.

As has already been noted, the EU’s Aviation Directive con-
structs three different spheres of regulatory intervention. It
constructs a transaction-specific sphere of regulatory intervention be-
cause the EU regulator is required, at least in the Aviation
Directive’s original form to take into account the worldwide volume of
emissions generated by a single EU-departing or landing flight.\textsuperscript{79} It
constructs a countrywide sphere of regulatory intervention because
the EU regulator is required to take into account whether a third
country has adopted its own measures to reduce the climate change
impact of flights. And it constructs a global sphere of regulatory inter-
vention because the EU regulator must consider amending the
Directive if a global agreement to regulate the climate impact of avia-
tion emissions is reached. Where territorial extension constructs a
sphere of regulatory intervention that extends beyond the level of an
individual transaction, this will be labeled “higher level territorial ex-
tension” in the remainder of this piece.

These different spheres of regulatory intervention constituted by
the practice of territorial extension are set out in Table 2, below.
The EU engages in the practice of territorial extension to prompt or
provoke different types of legal or behavioral change. Most obviously,

\textsuperscript{78} This is a classic production process method (PPM) of the kind that is much
discussed in international trade law. \textit{See} Robert Howse & Don Regan, \textit{The Product/
Process Distinction: An Illusory Basis for Disciplining ‘Unilateralism’ in Trade Policy}

\textsuperscript{79} Each flight is equated with an individual transaction here, although the lan-
guage is a little clunky in relation to this example. Recall reference to recent
developments, including the Commission’s proposal to limit the geographical scope of
this measure, at \textit{supra} note 44.
TABLE 2: THE DIFFERENT SPHERES OF REGULATORY INTERVENTION CONSTITUTED BY TERRITORIAL EXTENSION

<table>
<thead>
<tr>
<th>Sphere</th>
<th>Definition</th>
</tr>
</thead>
<tbody>
<tr>
<td>Transaction</td>
<td>The EU regulator is required to take into account conduct or circumstances taking place or prevailing outside the EU in so far as these pertain to a specific transaction.</td>
</tr>
<tr>
<td>Firm</td>
<td>The EU regulator is required to take into account conduct or circumstances taking place or prevailing outside the EU in so far as these pertain to a specific firm.</td>
</tr>
<tr>
<td>Country</td>
<td>The EU regulator is required to take into account conduct or circumstances taking place or prevailing in a third country.</td>
</tr>
<tr>
<td>Globe</td>
<td>The EU regulator is required to take into account conduct or circumstances taking place or prevailing across the entire globe.</td>
</tr>
</tbody>
</table>

territorial extension is used by the EU to incentivize a high level of performance on the part of third country actors, with their performance being judged by reference to an individual transaction or by reference to a group of transactions, aggregated at the level of a third country or firm. The “bundling together” of transactions, only some of which are centered on the territory of the EU, is a key characteristic of territorial extension in EU law. It serves to create legal interdependence between transactions, some of which the EU would find it difficult to “touch” if it were to seek to regulate these transactions alone.

The EU also deploys territorial extension to shape the organization, operation and governance of firms, including foreign firms wishing to provide services within the EU. This is most pronounced in the area of financial services, but we see it also elsewhere. In the area of financial regulation, firm-level territorial extension may be exemplified by reference to the Directive regulating Alternative Investment Fund Managers, which imposes far-reaching obligations on non-EU fund managers including in relation to capitalization and liquidity, remuneration, conflicts of interests, risk management, and the like. Outside of the area of financial regulation, EU regulation of maritime class societies provides a good example, with the firms in question being required to comply with the far-reaching governance obligations set out in Annex I.

Territorial extension is also frequently deployed in a bid to prompt the adoption of third country laws. Here, the EU is playing the role of a norm catalyst, with the EU measure in question serving

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80. See, for example, the obligations imposed by arts. 8-20, Dir. 2011/61, supra note 70.
to alter the regulatory baseline against which third countries assess the costs and benefits of taking action to address the problem concerned. EU measures may also serve to promote the effective enforcement of existing third country norms and, in keeping with this, EU measures often emphasize the importance of a third country’s regulatory capacity to monitor compliance with domestic norms.

The EU also uses territorial extension both to prompt the emergence of international (bilateral or multilateral) agreements,\textsuperscript{82} and to encourage states to sign up to and comply with existing international norms.\textsuperscript{83} This is widespread in EU law and it is a key characteristic of many of the examples set out above. Even where this is not a stated objective of EU legislation, EU measures can nonetheless influence the evolution of international law.\textsuperscript{84}

On occasion the EU uses territorial extension as a means of leveraging improved third country market access for EU firms. While this is less clear from the examples set out above, it is widespread in financial services regulation and evident also elsewhere. For example, EU market access for third country firms wishing to provide services to those concluding derivatives contracts is contingent upon that firm’s country of origin providing an effective equivalent system for the recognition of foreign firms that wish to provide corresponding services there.\textsuperscript{85} We see further evidence of territorial extension being used to prise open third country markets in a current Commission proposal concerning public procurement.\textsuperscript{86} If adopted, this regulation would allow the EU to restrict access to EU procurement markets for goods and services that originate in a third country that engages in restrictive public procurement practices that result in a lack of substantial reciprocity in market opening between the third country concerned and the EU. This proposal also seeks to promote fidelity to international law, in that the EU regulator will take into account the level of a third country’s international commitments

\textsuperscript{82}. We see this in the timber, air security and CDM examples in so far as bilateral agreements are concerned and in the two climate change examples as far as multilateral agreements are concerned.

\textsuperscript{83}. We see this especially in relation to the two maritime examples and the air safety example.

\textsuperscript{84}. To give just one example: the EU’s Directive on electronic and electrical waste has influenced developments in the Basel Convention, leading to the adoption of draft technical guidance on transboundary movements of e-waste and used electrical and electronic equipment.

\textsuperscript{85}. Art. 25 Reg. 648/2012 on central counterparties and trade repositories EMIR, \textit{supra} note 28.

\textsuperscript{86}. COM(2012) 124 final setting out a proposal for a regulation on access of third-country goods and services to the Union’s internal market in public procurement and procedures supporting negotiations on access of Union goods and services to the public procurement markets of third countries.
in the area of public procurement in determining whether restrictive measures should be introduced or maintained.\footnote{87. See arts. 9(5) and 11(1), \textit{id}. Relevant international commitments would include accession to the WTO Agreement on Government Procurement or the conclusion of a bilateral agreement with the EU which includes market access commitments in the field of public procurement.}

While in the vast majority of cases, territorial extension is used to condition access to the EU market for imported goods or services, occasionally it will be used in respect of \textit{exports} from the EU market as well. This is clearest in relation to EU measures governing the exportation of various kinds of waste products, including electrical and electronic waste.\footnote{88. Dir. 2012/19, \textit{supra} note 52. For an example outside of the area of waste exports, see Reg. 1236/2005 concerning trade in goods that can be used for capital punishment 2005 O.J. (L200) 1.} Measures regulating exports of waste are intended to prevent EU undertakings from colluding in activities that pose risks to the environment or to human health, to encourage the development of better third country disposal facilities and/or laws, and to prevent EU undertakings from evading obligations imposed by EU law by exporting waste products to less strictly regulated, and cheaper, treatment destinations abroad.

Some measures that give rise to territorial extension preclude undertakings seeking access to the EU market from meeting the requirements imposed by EU law at the level of an individual transaction, for example in relation to an individual shipment of goods or an individual flight. By contrast, because EU measures with territorial extension carve out a broader sphere of regulatory intervention, compliance with EU law can only be assessed by looking at a bundle of transactions, at the governance or organization of a firm or at a third country’s regulatory capacity or laws.

Other measures mark out a number of distinct pathways to achieve compliance with EU law, allowing compliance to be achieved either at the level of an individual transaction or at a higher level relating in particular to a third country or a firm. In this situation, EU legislation frequently creates incentives for compliance to be achieved at a higher level, be it in relation to a firm, a third country or across the globe. EU law confers additional advantages, over and above “mere” EU market access, or imposes fewer disadvantages when higher level, or more systemic, compliance is achieved.

EU law comprises a variety of incentives in favor of recourse to a compliance pathway that is embedded in a broader sphere of regulatory intervention. For example, the EU will often reward firm or countrywide compliance by diluting the intensity of its regulatory demands. We saw this in many of the examples set out above, where especially onerous conditions for achieving transaction-by-transac-
tion compliance have been put in place. Similarly, in the AIFM Directive the inclusion of a “conflict equivalence” clause serves to encourage compliance at the level of a third country rather than at the level of a firm. The adoption of equivalent measures by a third country serves to release a third country firm from being obliged to comply with mutually incompatible EU and third country regulatory demands.

EU measures will often reward countrywide compliance by injecting greater substantive flexibility into the conditions that a third country must meet. We see a clear example of this enhanced flexibility in relation to the EU’s Aviation Directive. Here, as noted, an airline is able to achieve compliance at the level of an individual flight arriving in or departing from the EU. However, an airline may be exempted from the requirement to surrender emission allowances in relation to an EU-arriving flight in so far as this begins its journey in a third country that has taken steps to reduce the climate change impact of flights or if an international agreement regulating aviation emissions has been reached. While the terms governing transaction-level compliance are precisely defined, the level of flexibility inherent in this instrument increases as it moves from a transaction-level compliance pathway to a one that is framed in terms of the content of third country or international law. While third countries would be required to adopt measures to reduce the climate change impact of flights that are equivalent in their environmental effect to those of the EU, the terms of any future global agreement remain in essence undefined.

More subtle incentives may also be put in place by EU law in a bid to promote broader regulatory change. For example, country-level, as opposed to transaction-level compliance, may be rewarded with one-stop-shop access to the EU’s internal market, thus obviating the need to seek permission twenty-seven times from the relevant authorities of individual Member States.

The different spheres of regulatory intervention constituted by EU measures giving rise to territorial extension and the different types of legal or behavior change that these measures seek to provoke are set out in Table 3 below.

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89. We see this particularly in relation to the timber (due diligence) and air security (screening) examples set out above.
90. We see this particularly in Dir. 2008/101, supra note 41, where a shift from transaction level compliance to country and then global level compliance results in significantly enhanced flexibility in terms of what it is that the EU requires.
91. Where a third country chooses to introduce its own emissions trading scheme, it would also gain the added advantage that it would be able to retain the revenues generated by the auctioning of emission allowances. Where, by contrast, an airline participates in the EU scheme, these revenues accrue to the EU Member States.
92. We see this in relation to Dir. 2011/61, supra note 70.
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TABLE 3: SPHERES OF REGULATORY INTERVENTION AND THE TYPES OF LEGAL OR BEHAVIORAL CHANGE INCENTIVIZED BY EU LAW

<table>
<thead>
<tr>
<th>Sphere</th>
<th>Type of Legal or Behavioral Change</th>
</tr>
</thead>
<tbody>
<tr>
<td>Transaction</td>
<td>Improved Performance</td>
</tr>
<tr>
<td>Firm</td>
<td>Improved Performance Organization/Operation/Governance</td>
</tr>
<tr>
<td>Country</td>
<td>Improved Performance Norm Catalyst</td>
</tr>
<tr>
<td></td>
<td>Norm Catalyst</td>
</tr>
<tr>
<td></td>
<td>Market Access</td>
</tr>
<tr>
<td>Globe</td>
<td>Improved Performance Norm Catalyst</td>
</tr>
</tbody>
</table>

It is then clear that one of the most striking features of territorial extension in EU law is the manner in which the EU uses the existence of a territorial connection to leverage legal or behavioral change in spheres that are so widely drawn that they can encompass activities that have only a weak and indirect territorial connection with the EU.

We see this in the seafarers training example set out above.\(^93\) Foreign-trained seafarers are only able to access employment opportunities aboard EU ships if they have been trained in a country that has an EU-approved training system for all seafarers. If a country wants seafarers trained within it to be able to access the EU employment market, it is required to train all seafarers in accordance with EU rules. Consequently, seafarers who have no intention of ever seeking employment in the EU or indeed of sailing on a ship that will enter EU territorial waters will still find themselves being trained in a manner that accords with the demands imposed by EU law. Equally, if a third country does not have an EU-compliant training system in place, no seafarer trained in that country will be able to work on board an EU ship, regardless of the quality of the training that he or she has received as an individual.

The EU’s Regulation concerning maritime class societies offers us another example, although here the sphere of regulatory intervention is drawn in a different way. This measure constructs a sphere of regulatory intervention that is demarcated by the boundaries of an “entity” or firm. In assessing whether a class society may provide services in the EU, the EU regulator will appraise the worldwide activities of the relevant firm. EU recognition will depend upon a class society attaining an overall level of performance that is not considered to constitute an unacceptable threat to safety or the environment on the basis of criteria that EU law sets out. A class

\(^{93}\) Dir. 2008/106, supra note 56.
society is required to attain this level of performance in relation to “their classed ships,” including ships which are inspected outside of the territory of the EU on behalf of non-EU flag states. Here, the boundaries of the firm are noticeably broadly drawn to include the foreign subsidiaries and other entities under the control of the organization seeking recognition in so far as these subsidiaries or other entities jointly or separately carry out ship inspection tasks that fall within the scope of the EU Regulation. Thus, the provision of services by a parent company is used as a territorial lever to influence the foreign behavior of affiliated companies that have been incorporated abroad.

Before concluding this discussion, it is necessary to consider the origin of the norms included in EU measures giving rise to territorial extension. Frequently, the EU engages in the practice of territorial extension with a view to enforcing internationally agreed standards of conduct (international standards). Admittedly, it occasionally does so before the relevant international standards have entered into force, when the international standards are in a form that is not binding, and where they have been ratified by only a small number of states. There are nonetheless occasions when the EU self-consciously desists from extending the territorial reach of its measures because there are no corresponding international standards in place.

At the same time, however, there are many EU measures that may be considered unilateral in the sense that they create autonomous EU obligations in the absence of international standards, because they create EU obligations that are considerably more detailed and/or stricter than the corresponding international measures, or because they carve out a role for the EU in enforcing international

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94. Reg. 391/2009, supra note 58, arts. 14(1) and 2(c).
95. Art. 2(c), Reg. 391/2009, id.
96. The term international standards is used loosely to cover standards laid down in international agreements as well as non-binding standards drawn up by inter-governmental organizations. Less often, the EU will use territorial extension to promote respect for third country norms. We see this in the timber example set out above.
97. For example, the EU accepted the “Ban Amendment” adopted pursuant to the Basel Convention on Transboundary Movements of Hazardous Wastes and their Disposal on Sept. 30, 1997, transposing it into EU law via Reg. 1013/2006 on shipments of waste (supra note 56), although the Ban Amendment has not yet entered into force.
98. We see this, for example, in the area of maritime transport.
99. For example, Reg. 1999/95 concerning seafarers’ working hours 1999 O.J. (L14) 29.
100. Compare Dir. 99/63 1999 O.J. (L167) 33 and Dir. 99/95, id., on seafarers working hours, the former imposing additional obligations in relation to seafarers on EU ships, while the latter sticks closely to the international standards in relation to non-EU ships entering EU ports. See also Reg. 782/2003 on the prohibition of organotin compounds on ships 2003 O.J. (L115) 6, which makes the prohibition on the application of the relevant substances (as opposed to the bearing of these substances on ships) contingent upon the entry into force of the Anti-Fouling Substances Convention.
standards in circumstances in which that role is not recognized by the international standards themselves.\textsuperscript{101}

Also, even when an EU measure does seek to enforce international standards, it may nonetheless contain autonomous EU obligations that go beyond the international instruments, including additional obligations that serve to enhance the effective enforcement of the international instruments concerned.\textsuperscript{102} We see this in the EU Regulation on class societies in maritime transport.\textsuperscript{103} While the EU Regulation is largely intended to ensure that class societies perform their functions in such a way that respect for international ship safety and pollution standards is achieved, it nonetheless sets out a wide-ranging obligations that class societies must meet. Several of these go beyond the requirements laid down in the international Code on Recognized Organizations currently being negotiated within the International Maritime Organization.

Not only are there substantive differences between the EU Regulation on class societies and the RO Code,\textsuperscript{104} but significantly for the purpose of this paper, the EU Regulation’s scope of application is much broader than the scope of application envisaged in the RO Code. As was previously noted, the EU measure regulates the worldwide activities of EU-recognized class societies and not just their activities in relation to EU registered ships. The EU justifies this broad application in part by arguing that a class society remains free to choose whether or not to seek recognition in the EU and in part by pointing out the negative environmental impact that third country ships can generate in the waters of the EU.\textsuperscript{105}

The relationship between the ten EU measures set out above and international standards is summarized in Table 4 on page 114.

V. Territorial Extension in EU Law: Double Standards?

We have seen that while the EU only rarely engages in extraterritoriality and that, while EU reliance on effects is not widespread,
TABLE 4: TERRITORIAL EXTENSION IN EU LAW AND INTERNATIONAL STANDARDS

<table>
<thead>
<tr>
<th>Instrument</th>
<th>Relationship with International Standards</th>
</tr>
</thead>
<tbody>
<tr>
<td>Dir. 2008/101 Aviation Directive</td>
<td>Unilateral</td>
</tr>
<tr>
<td>Dir. 2003/87 Emissions Trading</td>
<td>Unilateral</td>
</tr>
<tr>
<td>(CDM projects)</td>
<td></td>
</tr>
<tr>
<td>Reg. 995/2010 Timber Due Diligence</td>
<td>Enforcing 3rd country standards</td>
</tr>
<tr>
<td></td>
<td>Unilateral</td>
</tr>
<tr>
<td>Dir. 2012/19 Electrical and</td>
<td>Unilateral</td>
</tr>
<tr>
<td>Electronic Waste</td>
<td></td>
</tr>
<tr>
<td>Dir. 2008/106 Minimum Level of</td>
<td>Enforcing international standards</td>
</tr>
<tr>
<td>Training for Seafarers</td>
<td></td>
</tr>
<tr>
<td>Reg. 391/2009 Ship Classification</td>
<td>Enforcing international standards</td>
</tr>
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the practice of territorial extension is pervasive. Here, I will argue that territorial extension in EU law is imbued with a strong international orientation; some of its elements are highlighted below. While the EU has sometimes criticized extraterritoriality and even territorial extension in U.S. law, the real focus of its concerns has been the absence of a comparable international orientation in the relevant U.S. laws.

An international orientation is inherent in the EU’s very preference for territorial extension. This preference reflects the EU’s often repeated conviction that prescriptive jurisdiction must be exercised in a manner that is consistent with public international law,106 and

106. For a recent statement to this effect, see Brief of Amicus Curiae by the European Commission on Behalf of the European Commission on Behalf of the European Union in Support of Neither Part in Kiobel et al. v. Royal Dutch Petroleum et al, supra note 20 at 10. See also the Commission’s recent proposal for a Financial Transaction Tax (FTT or Tobin tax) where the Commission states that

[all in all, through the connecting factors chosen in combination with the above mentioned general rule, it is ensured that taxation can only take place in the presence of a sufficient link between the transaction and the territory of the FTT jurisdiction. As in existing EU legislation in the area of indirect taxes, territoriality principles are fully respected.}
its belief that territorial extension complies with this standard.\textsuperscript{107} While the EU sometimes does exercise extraterritorial jurisdiction, it does so—with very few exceptions—only when a clear, internationally recognized, alternative to territory provides the jurisdictional basis. While the EU accepts that four alternative bases exist,\textsuperscript{108} in practice, extraterritoriality in EU law is almost invariably nationality-based. In keeping with this, the EU desists from frequent reliance on effects-based jurisdiction because it considers that such jurisdiction remains controversial as a matter of international law.\textsuperscript{109}

While the compatibility of territorial extension with the territoriality principle in international law has not been definitively proclaimed, it is clear that the European Court considers territorial extension to be consistent with customary international law.\textsuperscript{110} Importantly, the WTO’s Appellate Body appears to agree. It accepts that measures that condition importation upon the content of third country law or policy may be WTO-compatible provided that certain conditions are met.\textsuperscript{111} Although there is some ambiguity as regards the Appellate Body’s attitude to country-level territorial extension, it seems to accept that even this can be lawful provided that the measure does not require the adoption by a third country of “essentially the same regulatory program.” The measure in question must leave room for an inquiry into the appropriateness of the regulatory program in view of the conditions prevailing in the third country concerned.\textsuperscript{112} Thus, subject to an obligation to ensure that measures

\textsuperscript{107} See the discussion of the EU’s attitude to U.S. extraterritoriality below.

\textsuperscript{108} See Kiobel Brief, supra note 20. The EU considers that the nationality principle supplies jurisdiction to regulate the activities, status or relations of its nationals outside of its territory (at 11), the passive personality principle supplies jurisdiction where the victim is a national of that state (at 10); the protective principle allows a state to exercise jurisdiction over acts abroad that threaten the security of the state or the integrity of governmental functions (at 11) and that the universality principle allows states to prosecute or to provide civil remedies to the victims of the most serious, heinous, crimes recognized by international law, at 11) subject to the requirement that local remedies must first be exhausted or unable to provide relief (at 30).

\textsuperscript{109} Kiobel Brief, supra note 20, at n.28.

\textsuperscript{110} Supra note 27. While the ECJ does contextualize its conclusions by reference to the circumstances of this case, and in particular by reference to the existence of an international treaty on climate change and to effects of climate change within the territory of the EU, it does not seem to intend to set out preconditions for assessing the legality of measures giving rise to territorial extension (see paras. 128 and 129).

\textsuperscript{111} See US—Import Restrictions on Shrimp and Shrimp Products (DS/58/AB/R). The conditions set out by the AB align quite closely with the arguments presented by the EU in this case. For example, the measures must be sufficiently flexible and the regulating state must engage in serious across-the-board negotiations with other countries before introducing unilateral measures.

\textsuperscript{112} Ambiguity is introduced by para. 165 of the Appellate Body’s Report (\textit{id.}) where it expresses unease about the fact that shrimp coming from a country that has not been certified as in compliance by the United States cannot be imported even where the shrimp in question have been caught using methods identical to those used
that construct a countrywide sphere of regulatory intervention are sufficiently flexible, even territorial extension of this kind may be permitted by the WTO.

An international orientation is also reflected in the EU practice of territorial extension in that it is oriented towards the enforcement of international standards and/or towards contributing to the attainment of objectives that have been internationally agreed. In relation to the ten examples set out above, eight may be considered unilateral in that they fill gaps in, or go further than, the international standards already in place. Of the eight measures that are unilateral in this sense, however, each one addresses a global or transboundary problem in relation to which international agreement on the importance of the underlying objective has been achieved.\textsuperscript{113}

The international orientation inherent in the EUs’ practice of territorial extension is further reflected in the design of the legal instruments concerned. Where the relevant EU measures are not based directly on existing international standards, they tend to be characterized by a contingent quality that renders them responsive to international developments and to diverse and changing circumstances elsewhere. This responsiveness is reflected in the high degree of provisionality and flexibility that characterizes measures of this kind.\textsuperscript{114}

Provisionality is injected into EU measures with extended territorial reach in a variety of different ways. The EU may be formally required to consider “disapplying” its norms if third country measures are adopted or if bilateral or multilateral agreement is reached.\textsuperscript{115} Less formally, provisionality may be reflected in the EU’s
commitment to continue to work with international partners and to review relevant EU instruments in the event that international standards are agreed.116 We see a compelling example of this in relation to the EU’s Aviation Directive. The EU decided to suspend its application for a period of one year pending the outcome of negotiations in the International Civil Aviation Organization (ICAO), and has subsequently proposed to limit the geographical scope of this instrument as a result of the qualified progress achieved in the ICAO Assembly meeting in Autumn 2013.117 This decision was adopted in view of the “constructive engagement” of the EU’s international partners in the negotiations and the “encouraging results” that this was said to have achieved.118 “Stopping the clock” was intended to create space for political negotiation, while maintaining the threat of EU unilateralism if concrete progress was not achieved.119

Flexibility is injected into EU measures through recourse to open-ended framework standards or through the inclusion of an equivalence clause. Flexibility is a pervasive feature of the examples set out above, except to the extent that the EU measures are based upon pre-existing international norms. Equivalence is a key component of five of the examples,120 and elsewhere the EU is seen to desist from setting out in any detail the terms that a bilateral or multilateral agreement must meet to permit a third country to “escape” the application of the default EU norm.121

The provisionality and flexibility inherent in EU measures are intended to set in train a dialogue about what compliance with EU law means and requires. This dialogue is contextual rather than ab-

116. We see this, for example, in the Credit Ratings Agencies Reg. (Reg. 1060/2009, recital 2 and Article 27, supra note 70) and the AIFM Directive (Dir. 2011/61, Article 69(3), supra note 73). We also see it in the Tobin Tax proposal referred to in supra note 109. This provides for a five year review in Article 19 at which point the Commission will be required to examine the impact of the FTT on the proper functioning of the internal market, the financial markets and the real economy and to take into account the progress on taxation of the financial sector in the international context.


119. A further legislation enactment based on Article 192 TFEU would be required to suspend the application of the Aviation Directive for a longer period. The Commission is required to report to the European Parliament and Council on progress made at the 38th session of the ICAO Assembly and to propose measures in line with these results.

120. This is the case in relation to the emissions trading example, the two financial services examples, the air security example and the electronic waste example.

121. We see this in relation to the Clean Development Mechanism example and in relation to the timber example.
stract, having regard to particular, concrete initiatives at the international level and in the third countries concerned.

Thus, while the EU is willing to make the availability of an advantage (typically EU market access) conditional upon compliance with unilateral EU norms, the EU’s unilateralism would appear to be of a particular kind. It is characterized by a contingent quality that distinguishes it from the more “doctrinal” form of unilateralism sometimes associated with the contemporary United States. This is due in significant part to the international orientation that pervades the measures concerned. It is entirely consistent that the EU’s evaluation of U.S. extraterritoriality is strongly influenced by evidence of an international orientation of this kind. We see this in the EU’s attitude towards instances of both extraterritoriality and territorial extension in U.S. law.

In keeping with the EU’s insistence that jurisdiction must be exercised in a manner that is consistent with international law, it has criticized the United States for adopting measures that do not appear to be predicated upon an internationally recognized jurisdictional base. We see this, for example, in the EU’s condemnation of U.S. legislation that purported to regulate the foreign conduct of foreign firms in order to prevent these firms from trading with the Soviet Union in U.S. technology or goods. The EU argued that the legislation was unacceptable as a matter of international law because it infringed the territoriality principle, could not be justified under the nationality principle, because the protective principle had not been invoked and because it considered the effects doctrine inapplicable.

This is also reflected in the EU’s willingness to accommodate U.S. extraterritoriality in the context of the Alien Tort Statute (ATS). Here, the EU has argued that the ATS should be interpreted by reference to both the substantive and jurisdictional limits set out by international law. It further expressed the belief that


124. Id., at 3.

125. Id., at 5.

126. Id., at 7.

127. See Kiobel Brief, supra note 20, and also the Amicus Brief of the European Commission on Behalf of Neither Party in Sosa v. Alvarez-Machain (2004). Recall supra note 13, concerning the judgment of the U.S. Supreme Court in Kiobel.

128. Kiobel Brief, supra note 20, at 3.
the U.S. Supreme Court’s reading of this statute in the *Sosa* case served to restrict “the facially expansive ATS to comply with substantive norms of international law.” The EU went on to add that for universal civil jurisdiction to be consistent with the substantive and procedural limits imposed by international law, the nature of the tort must rise to the level of the most serious (heinous) crimes recognized by international law and the plaintiff must be required to demonstrate that “local remedies have been exhausted or that the local forum is unwilling or unable to provide relief.” It argued that exhaustion of local remedies must be mandatory for universal civil jurisdiction to be consistent with established notions of comity and sovereign equality in that it allows states an opportunity first to remedy international law violations that occur within their territory. As such, the EU emphasized that universal civil jurisdiction be viewed as a form of contingent, or second-best, relief.

There are additional factors that seem to exacerbate U.S. extraterritorial jurisdiction in the EU’s eyes. The EU has expressed particular concern about the extraterritorial application of U.S. legislation which seeks “to force” persons or companies outside of the United States to follow U.S. laws or policies, “to the extent that [this] serves only to protect US trade or political interests.” Here, the absence of an internationally agreed objective underpinning U.S. extraterritoriality would seem to be central to the EU’s concerns.

It has been argued that recent U.S. measures imposing sanctions on Iran are characterized by an international orientation that distinguishes them from earlier U.S. sanctions regimes. While these recent measures are said to be “at least as provocative” as previous U.S. legislation that had triggered a robustly critical EU response, the EU has been willing to endorse this more recent U.S. initiative by adopting comparable legislation of its own. A number of explanations have been put forward for this, two of which speak to the

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129. *Id.*, at 21.
130. *Id.*, at 26.
131. *Id.*, at 32. The Commission set out some additional advantages that flow from the exhaustion requirement at 32-33.
134. Referring to the Comprehensive Iran Sanctions, Accountability, and Divestment Act of 2010 (CISADA).
135. Reg. 2271/96 protecting against the effects of the extraterritorial application of legislation adopted by a third country, and actions based thereon or resulting therefrom 1996 O.J. (L309) 1. The Helms-Burton Act is the Cuban Liberty and Democratic Solidarity Act of 1996 and the Iran-Libya Sanctions Act also dates from 1996.
137. Including the economic consequences, security calculations, and the emergence of a unitary foreign policy structure in the EU that makes it more likely that the United States will consider EU’s interests before enacting such laws.
international orientation underpinning the U.S. measure at hand. First, the signing into law of the U.S. measures was preceded by the adoption of a United Nations Security Council Resolution. While the U.S. measures went further than this Resolution, it was at any rate underpinned by the existence of a multilaterally agreed objective or goal. Second, whereas in the past the United States had promoted its extraterritorial measures “aggressively,”\(^\text{138}\) on this occasion it is said to have “shepherded CISADA through Congress in accordance with the EU political timetable” with a view to making its actions “compatible with a renewed transatlantic partnership.”\(^\text{139}\) This was consistent with the approach of the European Parliament which had recently asked President Obama to avoid “enacting legislation having an extraterritorial impact without prior consultation and agreement.”\(^\text{140}\)

The EU’s attitude toward U.S. extraterritoriality becomes clearer still when the EU’s position vis-a-vis territorial extension in U.S. law is considered. There are countless U.S. measures that give rise to territorial extension. While the EU frequently registers complaints about these, it only very occasionally does so on jurisdictional grounds. To give just one example: while the EU was outspoken in its criticisms of a decision by the United States to require 100% scanning at foreign ports of all U.S. bound containers carried by ship, the focus of its criticisms was on the negative impact that this would have on transatlantic trade.\(^\text{141}\) There is no hint in the relevant documentation of the EU having raised jurisdictional concerns.

However, on a small number of occasions the EU has wrongly characterized U.S. measures giving rise to territorial extension as extraterritorial. We see this particularly in relation to U.S. “environmentally driven embargoes”\(^\text{142}\) and to U.S. financial services law.\(^\text{143}\) Still, the EU’s criticisms do not tend to be based on allegations...
tions of jurisdictional excess. Instead, the complaints focus on the lack of a sufficient international orientation of the measures concerned. To bear out this claim, the EU’s reaction to territorial extension in U.S. law is illustrated by two examples.

The EU intervened as a third party in the Shrimp-Turtle case, in the context of a challenge to a U.S. measure creating territorial extension but wrongly labeled by the EU as extraterritorial instead. The U.S. measure in question rendered the importation of shrimp conditional upon whether the country in which the shrimp was caught had U.S. approved turtle protection policies and practices in place. It is striking that the EU did not condemn this U.S. measure out of hand. The EU did emphasize that international cooperation is the most effective means of addressing global or transboundary environmental problems, and that as a matter of general international law it is not normally open to states to apply their legislation “so as to coerce other states into taking certain actions, including modifying their own domestic standards.”

However, the EU acknowledged that “exceptionally,” measures applying “beyond usual jurisdictional boundaries” may be required in order to protect the global commons, including shared environmental resources. It appeared to accept that even measures that make market access conditional upon the content of third country laws could be justified in this way, subject to a number of conditions. First, the regulating state must have made genuine and sustained efforts to arrive at a multilateral solution before introducing unilateral measures of its own. “Such efforts [are] to go beyond the mere imposition of its own domestic standards on other Members.” Second, it is not open to a state to make importation conditional upon the third country in question having the same policies and practices as

in relation to the Bioterrorism Act but merely states that this should not be implemented in a way that gives rise to extraterritorial effects (European Commission, United States Barriers to Trade and Investment Report 2004, at 5).


145. This marks a contrast with Tuna-Dolphin (US—Restrictions on Imports of Tuna, DS29/R) where the EU had argued that states could not adopt trade restrictions to protect resources outside of their own territory. The issue of the location of the resource to be protected was dodged in the Shrimp-Turtle case by emphasizing that some of the species of turtle were migratory and would traverse the waters of the United States (id., AB at para. 133).

146. It makes this point repeatedly in its submissions at the various stages of the dispute, but see, by way of example, supra note 144, AB at para. 68.


148. Supra note 144, Panel at paras. 355 & 356. The EU reiterated this point before the AB at paras. 72 & 73. The EU accepted that sea turtles are a shared environmental resource on the basis that they are included in Annex I of CITES and are a protected species under the Convention on the Conservation of Migratory Species of Wild Animals.

149. Id., Panel at para. 356.

150. Id., Panel at para. 357.
the importing state. The measure must be sufficiently flexible, for example, by leaving space for an inquiry whether third country policies are comparable in their effectiveness.

The willingness of the EU to accept the legitimacy of U.S. measures giving rise to territorial extension, even when these measures are characterized by the EU as extraterritorial, is apparent also in relation to financial services regulation. Here, the focus of the EU’s complaints appears to be that there is insufficient space for the concept of “substituted compliance” (the U.S. version of equivalence) to apply in respect of foreign entities and transactions involving foreign firms. The EU has been outspoken on this point in relation to the Dodd-Frank Act which regulates the over-the-counter derivatives market with a view to ensuring that shared EU-U.S. (G20) objectives are achieved.

The EU has indicated its support for the concept of substituted compliance which it considers similar to the EU’s equivalence-based approach. It argues that appropriate deference to foreign regulation is the most effective means for the EU and the United States to achieve its shared goals. However, the EU considers substituted equivalence to be too narrowly applied. It is concerned that this principle cannot be relied upon in relation to many of the transaction-level requirements imposed by this statute whenever at least one U.S. person is involved. This stands in contrast to the EU’s Market Infrastructure Regulation (EMIR) which makes it possible for parties to be released from an obligation to comply with EU law when at least one of the parties to the relevant transaction is established in a

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151. *Id.*, Panel at para. 358.
152. The EU’s reference to equivalence in its submissions to the original panel is suggestive of this flexibility dimension (*supra* note 144, Panel at para. 358). However, this becomes clear as a result of the EU’s submissions to the AB in the Article 21.5 follow-up case (*supra* note 111 at paras. 55 & 56). The EU also insists that the measure in question be reasonable, consistent with general principles of public international law on prescriptive jurisdiction and be no more trade restrictive than necessary to protect the globally shared environmental resource (*supra* note 144, AB at para. 73).
153. European Commission, *United States Barriers to Trade and Investment Report for 2005* at 6, where the EU complains that no account is taken of the supervision that takes place in the home jurisdiction.
155. Letter from Jonathan Faull, DG Internal Market and Services to David Stawick, Secretary of the U.S. Commodities Futures Trading Commission (Aug. 24, 2012) and the testimony of Patrick Pearson, DG Internal Market and Services to the House of Reps. Subcomm. On General Farm Commodities and Risk Management Hearing on Dodd-Frank Derivatives Reform: Challenges Facing U.S. and International Markets (Dec. 13, 2012). See, similarly, the comments by M. Barnier in relation to recent U.S. proposals concerning capital requirements for the U.S. subsidiaries of EU banks. Barnier is said to be proposing that the implementation of the U.S. rules be adjusted “so that jurisdictions with ‘equivalent’ prudential rules, such as the EU, are exempt and can supervise a bank’s consolidated global operations from its home country” (*EU Warns US on Bank ‘Protectionism,’* financialtimes.com, Apr. 22, 2013).
156. Testimony of Patrick Pearson, *id.*, at 3.
third country that has been accepted by the EU as having an equivalent regulatory system in place.\textsuperscript{157} The EU has also made it clear that in this context, it favors a country-level, as opposed to a firm-level, compliance route. The EU has argued that it would be “duplicative” if individual entities, as opposed to third countries, were each obliged to demonstrate the adequacy of the relevant third country laws.\textsuperscript{158}

It is then clear from these examples that the EU adopts a largely accommodating attitude to territorial extension in U.S. law. The EU does not appear to contest the practice of territorial extension on jurisdictional grounds but to register criticisms that are lacking a sufficiently strong international orientation in the measures. Contrary to first impressions, therefore, the presence of territorial extension in EU law should not be allowed to fuel allegations of double-standards.

VI. CONCLUSION

The capacity of territorial boundaries to define the outer limits of the legitimate authority of a state has long been in doubt. The meek term “interdependence” hardly begins to do justice to the vulnerability experienced by states to events that take place outside of their territory. In jurisdictional terms, states have reacted to this vulnerability in different ways. The territoriality principle has been ignored, sparking allegations of jurisdictional excess, and the territoriality principle has been supplemented by alternative heads of jurisdiction. The EU has responded to this vulnerability by pushing at the boundaries of territorial jurisdiction. It has done so both by asserting that stable or transient territorial presence within the EU can, along with EU conduct, form the basis for the exercise of territorial jurisdiction, and by coupling a territorial trigger for the application of EU law with an obligation for the EU regulator to take into account conduct or circumstances abroad.

This paper has drawn a distinction between extraterritoriality and a new concept of territorial extension. It has done so in a bid to shed light on the territorial reach, ambition and modality of EU law, arguing that it is characterized both by territorial rootedness and by territorial extension. We have seen that while EU measures that create territorial extension begin from a territorial base, they construct different spheres of regulatory intervention that are demarcated variously by the boundaries of a transaction, a firm, a country, or the

\textsuperscript{157} Art. 13(3), Reg. 648/2012, supra note 28, art. 13(1) imposes an obligation on ESMA to monitor the application of the principles contained in this regulation internationally, with a view to identifying potentially conflicting requirements and to propose possible action to address conflicts of this kind.

\textsuperscript{158} Jonathan Faull letter, supra note 155, at 5.
globe. The EU is using the mechanism of territorial extension, in circumstances of inescapable interdependence, to gain regulatory traction in respect of activities that take place abroad but that also impact negatively upon the EU or upon globally shared resources.

Those measures that create territorial extension and that construct a sphere of regulatory intervention that extends beyond an individual transaction use law as an instrument to create interdependence between transactions, only some of which will be centered on the EU. Thus, while this paper has asserted the existence of a distinction between extraterritoriality and territorial extension, it has also recognized that EU measures that give rise to territorial extension allow the EU to shape behavior and regulation internationally and in other states. Thus, although it is the existence of an initial point of territorial connection that sparks EU law into life, some of the transactions governed by EU law will, when taken individually, have no territorial connection with the EU in the end.

The Seafarers Training Directive can be used to illustrate this. For a foreign-trained seafarer to gain access to employment on an EU ship, the country in which that seafarer was trained will have to ensure that its entire system of training is certified as being in accordance with EU law. This measure is characterized by a broad sphere of regulatory intervention as it insists upon compliance being assessed at the level of a third country rather than in relation to the training received by the individual seafarer concerned. The measure is characterized by a weak degree of territorial connection because, although its application rests upon an initial territorial trigger (access to employment on an EU ship), it generates a broad sphere of regulatory intervention by setting in train an appraisal of all relevant training activities in the third country concerned. Access to the EU employment market for foreign-trained seafarers is used as a tool to leverage sweeping, systemic, country-wide change. Nonetheless, this particular measure has been relatively uncontroversial because it is underpinned by the existence of widely accepted international standards which the EU is serving to enforce.

This paper has argued that the EU’s preference for territorial extension over extraterritoriality is significant because it reflects a commitment on the part of the EU to respect the limits on prescriptive jurisdiction laid down by public international law. As such, and notwithstanding the unilateral nature of many of the measures at stake, it forms part of the broader international orientation which pervades EU measures of this kind.

While many EU measures that create territorial extension are not based on pre-existing international standards, these measures nonetheless serve to address global or transboundary problems in relation to which international agreement on the importance of the
underlying objective has been reached. In addition, where EU measures are not based on international standards, they tend to be characterized by a contingent quality that flows from the provisionality and substantive openness of the measures concerned. This contingent quality injects a dynamic dimension into EU law, whereby the EU intervenes not with a view to exporting its standards but with a view to launching interactive processes to identify and evaluate the different approaches that may adopted to ensure that shared regulatory objectives can be met.

Notwithstanding this international orientation, territorial extension in EU law will be controversial. It operates at a number of contested boundaries: between responsibility and hegemony, between interdependence and protectionism, and between contingent and doctrinal unilateralism. This paper has argued that the EU is not guilty of double-standards when we compare territorial extension in EU law with the “extraterritorial” measures that the EU has criticized when these have been enacted by the United States. The EU has not condemned United States extraterritoriality or territorial extension per se. It has, however, criticized the United States for failing to ground its measures on an internationally recognized jurisdictional basis, for pursuing its own autonomous objectives rather than objectives that have been internationally agreed, for not negotiating with other countries before enacting unilateral measures and for not ensuring that its measures are sufficiently flexible to be responsive to the diverse circumstances that prevail abroad. In sum, the EU has criticized the United States for failing to ensure a sufficient international orientation when it has enacted legislation with an extended territorial reach.

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159. One issue that has not been addressed here but which is of the utmost importance is the question of how the burden of regulating is distributed between rich and poor states. This is an issue that I intend to address in detail as this project proceeds. I have been critical elsewhere of the EU’s failure to adequately accommodate the principle of common but differentiated responsibilities and respective capabilities in the EU’s Aviation Directive. See Joanne Scott & Lavanya Rajamani, *EU Climate Change Unilateralism*, 23 EURO. J. INT. L. 469 (2012).
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