

## JURISDICTIONAL COUNTERMEASURES VERSUS EXTRATERRITORIALITY IN INTERNATIONAL LAW

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*Sovereignty is the reason why States seek to apply their jurisdictions. All States like to extend their jurisdictions as far as they can, so some of them have adopted extraterritorial policies in exercising their jurisdictions. In this manner the United States has approved several extraterritorial Laws in respect of competition law and sanctions, causing some coercion to non-target states. In response to this long-arm jurisdiction by the U.S., some countries, such as the U.K., Canada, Australia, Mexico etc., as well as the E.U., took actions of their own in order to nullify these extraterritorial laws. These measures, which are mostly applied to the jurisdictional field, could be described as jurisdictional countermeasures. They can be divided into prescriptive, adjudicative and executive measures, which include blocking statutes, claw-back statutes, non-recognition, procedural restrictions, non-execution and retaliatory measures. Not all of these measures are prohibited by international law and some can be viewed as a just retorsion against that State. However, where the application of these measures is prohibited by international law – in cases such as the non-recognition of foreign judgments and other jurisdictional regulations in international treaties like mutual judicial assistance agreements – they are countermeasures. If these actions are in response to an illegal extraterritorial law, they should comply with the conditions for countermeasures as cited in the Draft Articles on Responsibility of States for Internationally Wrongful Acts 2001 as approved by the International Law Commission.*

*Keywords: jurisdiction; countermeasures; international law; extraterritoriality; blocking statute; claw-back statute.*

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### 1. Introduction

Although “international law of jurisdiction” is not yet recognized as a field of public international law, it is true that a lot of the principles relating to jurisdiction can be drawn from public international sources. Principles like the comity of nations, reasonableness, the balance of interests, non-interference in the internal affairs of States, legality, principles of due process (consisting of *non bis in idem* and access to Justice) and other principles exist in jurisdictional conventions like the “Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters – Brussels Convention” and the “Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters – Lugano Convention.” Any breach of these principles when applying jurisdiction by a State can lead to that State being held responsible.

States act improperly in the field of long-arm jurisdiction when they apply that jurisdiction without respecting the above-mentioned rules. The most commonplace examples of long-arm jurisdictions are extraterritorial legislations, most of which were implemented by the United States of America. States which have been targeted by U.S. extraterritorial sanctions include Iran, Iraq, Libya, North Korea, China, Cuba, Sudan, the Soviet Union and now Russia. The U.S. government enforces embargo regulations through criminal and administrative sanctions. For example, under the Trading with the Enemy Act and other measures, punishment for willful violations of the embargoes of Cuba and North Korea can include fines of \$250,000 and imprisonment for 10 years for individuals (including officers, directors, and agents of corporate offenders). Fines against companies can reach \$1 million. There are some

administrative sanctions against violators that can be treated as “denial orders.”<sup>1</sup> There may be also executive sanctions like Title IV of the Helms-Burton Act that directs the executive branch to deny entrance into the United States for aliens who traffic in confiscated property that is subject to a claim by a U.S. person.

If it appears that the application of a jurisdiction by a State is illegal, other States may be able to implement their own acts against it. Chapter II of Draft Articles on Responsibility of States for Internationally Wrongful Acts describes these acts as “international Countermeasures.” Article 49.1 mentions that “an injured State may only take countermeasures against a State which is responsible for an internationally wrongful act in order to induce that State to comply with its obligations.” Countermeasure acts shouldn’t breach principles of the non-use of force, human rights provisions, humanitarian law, diplomatic and consular law and other peremptory norms of general international law (Article 50), and they should be an appropriate response to a wrongful act of State (Article 51). In addition, they should call upon the responsible State to fulfill its obligations with the injured State offering to negotiate with the responsible State and suspending all countermeasure acts if the wrongful act has ceased or the dispute is pending before a court or tribunal (Article 52).

In response to the illegal application of jurisdiction by States, injured States usually resort to various acts within a jurisdictional framework. This may include the refusal to extradite individuals, non-recognition of judicial, legislative and executive decisions, and other appropriate domestic acts to combat the illegal application of jurisdiction, such as blocking statutes, claw-back measures, retaliatory legislation and procedural limitations. In other words, States facing an illegal application of jurisdiction principally act in the jurisdictional field. While the object of countermeasures is to induce other States to comply with its obligations, the purpose of jurisdictional countermeasures is to frustrate any illegal exercise of jurisdiction by another State.

The typology of these jurisdictional countermeasures has an important role in assessing their legality. Without seeking to prove any specific breach of international obligations or attribute them to any State, this paper assesses different kinds of jurisdictional countermeasures and State practice in this matter. To date, most jurisdictional countermeasures have been applied against U.S. extraterritorial laws, so the present paper emphasizes measures against U.S. extraterritoriality.

## **2. Typology of Jurisdictional Countermeasures**

### **2.1. Prescriptive Countermeasures**

One aspect of the application of jurisdiction by States relates to the enactment of regulations by legislative powers. These regulations can be based on different types of

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<sup>1</sup> Harry L. Clark, *Dealing with U.S. Extraterritorial Sanctions and Foreign Countermeasures*, 25(1) The University of Pennsylvania Journal of International Law 466 (2004).

jurisdiction, such as territorial jurisdiction, personal jurisdiction, protective jurisdiction and universal jurisdiction. Recent legislative jurisdiction has been based on newer criteria of jurisdiction, such as effect doctrine, and punitive policy, such as secondary sanctions. If a State believes that a foreign law or award is illegal and extraterritorial, it may impede the application of that law in its territory and in relation to its nationals by way of a prescriptive countermeasure. The most frequent of these are as follows.

### 2.1.1. Blocking Statutes

Since the 1970s, some States have adopted blocking statutes in order to reduce the extraterritorial effects of antitrust regulations in their territories. The purpose of these measures is to make it hard for a foreign State to apply its regulations to nationals of other States. In relation to these measures the legislating State prevents its nationals of recognition and execution of specific foreign laws. For instance, the U.K.'s Protection of Trading Interests Act 1980, Canada's Foreign Extraterritorial Measures Act 1996,<sup>2</sup> Mexico's Law of Protection of Commerce and Investments from Foreign Policies that Contravene International Law 1996<sup>3</sup> and Australia's Foreign Antitrust Judgment (Restriction of Enforcement) Act 1979,<sup>4</sup> prevent their nationals from being obligated under some laws and orders of foreign authorities.<sup>5</sup>

One of the most prominent blocking statutes is E.U. Regulation 2271/96 of 1996 which "provides protection against and counteracts the effects of the extraterritorial application"<sup>6</sup> of specified laws,<sup>7</sup> listed in an annex to the regulation.<sup>8</sup> The aim of this

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<sup>2</sup> In the Canadian Attorney General Order in relation to this Act 1992 "[n]o Canadian corporation and no director, officer, manager or employee in a position of authority of a Canadian corporation shall, in respect of any trade or commerce between Canada and Cuba, comply with an extraterritorial measure of the United States."

<sup>3</sup> Mexican parties and foreign persons are forbidden "to engage in acts that affect trade and investment when such acts are the consequence of the extraterritorial effects of foreign statutes." Ley de Protección al Comercio y la Inversión de Normas Extranjeras que Contravengan el Derecho Internacional, D.O., 22 de Octubre de 1996.

<sup>4</sup> This Act was passed because of US antitrust laws which caused to conviction of four Australian Uranium Firms in US courts.

<sup>5</sup> Jennifer A. Zerk, *Extraterritorial Jurisdiction: Lessons for the Business and Human Rights Sphere from Six Regulatory Areas*, Corporate Social Responsibility Initiative Working Paper No. 59 (Cambridge, MA: John F. Kennedy School of Government, Harvard University, 2010), at 104.

See Alan V. Lowe, *Blocking Extraterritorial Jurisdiction: The British Protection of Trading Interests Act, 1980*, 75(2) *The American Journal of International Law* 257 (1981).

<sup>6</sup> Council Reg. (EC) 2271/96, Art. 1.

<sup>7</sup> It consists of Helms-Burton Act, sanctions provisions of the Cuban Democracy Act, the prohibitions, licensing provisions and penalty provisions of the Cuban Assets Control Regulations (CACR), and the Iran and Libya Sanctions Act

<sup>8</sup> Alan V. Lowe, *US Extraterritorial Jurisdiction: The Helms-Burton and D'Amato Acts*, 46(2) *The International and Comparative Law Quarterly* 386 (1997).

regulation is to counteract secondary sanctions of the U.S. such as the 1996 Sanctions against Iran and Cuba (Helms-Burton Act) and Iran and Libya Sanctions Act of 1996 (ILSA).

Blocking Statutes may oblige individuals and legal persons to report to the governmental bodies responsible for applying the Statute. For example, the E.U. Regulation requires European persons to report to the E.U. Commission within 30 days of discovering that their economic and/or financial interests are directly or indirectly affected by the sanctions specified in the E.U. Regulation.<sup>9</sup> Breaching the European blocking statute could lead to “effective, proportional and dissuasive” penalties against European nationals.<sup>10</sup>

Retributive sanctions in extraterritorial laws and their countermeasure regulations always pose a dilemma for merchants. For example, in March 1997, United States authorities demanded that a Canadian subsidiary of Wal-Mart Stores Inc. comply with U.S. sanctions regulations by ceasing to sell Cuban-manufactured clothing in Canada. At the same time, Canadian authorities insisted that Wal-Mart Canada Ltd. should continue to carry the products of Cuban origin or face fines of up to C\$1.5 million for noncompliance with countermeasures designed to neutralize the impact of U.S. sanctions.<sup>11</sup>

Blocking statutes can be passed against three types of foreign laws: legitimate and obligatory foreign regulations (like regulations based on universal jurisdiction), legitimate and non-obligatory foreign regulations (like regulations based on personal jurisdiction) and illegitimate foreign regulations (like secondary sanctions). While it is impermissible to approve a blocking statute against “legitimate foreign regulations,” approving a blocking statute against “illegitimate foreign regulations” could be justified within a framework of jurisdictional countermeasures and would waive the international responsibilities of the legislating State.

Also we may encounter “blocking decrees” instead of “blocking statutes,” in which a court, rather than a legislative body, prohibits the application of a foreign extraterritorial law. For example, in the *Fruehauf* case,<sup>12</sup> a French court appointed an administrator to the French subsidiary of the US-based Corporation in order to prevent that the controllers of the Corporation from damaging the interests of the subsidiary by forcing it to comply with a U.S. embargo on trade with China.<sup>13</sup>

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<sup>9</sup> Council Regulation, 2271/96, Art. 2.

<sup>10</sup> Lowe 1997, 385.

<sup>11</sup> Clark 2004, 456.

<sup>12</sup> U.S. Treasury Department directed Fruehauf, a U.S. vehicle manufacturer, to prevent a shipment of buses by its French subsidiary to the Peoples’ Republic of China, subject to a comprehensive U.S. embargo. See Clark 2004, 466.

<sup>13</sup> Alan V. Lowe, *The Problems of Extraterritorial Jurisdiction: Economic Sovereignty and the Search For a Solution*, 34(4) *The International and Comparative Law Quarterly* 727 (1985).

### 2.1.2. Claw-Back Measures

Another way of combatting the illegal extraterritorial jurisdiction of States is by resorting to claw-back measures. The objective of claw-back legislation is to allow an entity that is subject to a foreign judgment executed against its foreign assets, to recover the judgment sum against any assets of the plaintiff in the foreign judgment that may be situated in the local jurisdiction.<sup>14</sup> For example, Britain's Protection of Trading Interests Act 1980 authorizes citizens to seek and recover extra-compensatory damages paid to plaintiffs that have prevailed in foreign litigations against U.K. citizens that were prosecuted by the U.S.<sup>15</sup> In cases involving multiple damages,<sup>16</sup> there are two conditions that must be fulfilled before any action of recompense. First, the defendant must bear a sufficient territorial relationship with the U.K., typically not being resident or carrying out business in the foreign state, and second, the defendant must be adequately disconnected from the forum which rendered the multiple damage judgment.<sup>17</sup>

Article 6 of the E.U. Regulation in relation to the U.S. Helms-Burton and D'Amato laws stipulates that any European person is entitled to "recover any damages, including legal costs, caused to that person by the application of the laws specified in the Annex," or by actions based upon them. This provision enables European defendants to recover any damages awarded against them from the plaintiff in the U.S. action, as well as their associated legal costs. Recovery may take the form of the seizure of assets of the U.S. plaintiff, or of persons acting on the plaintiff's behalf (including shares held in a company incorporated in the E.U.), anywhere in the E.U.<sup>18</sup>

The Canadian Act (FEMA) has same measures in relation to trans-boundary laws. Under the terms of this Act, if a non-recognition order cannot be issued because the judgment was satisfied outside Canada or the judgment is under the Helms-Burton Act, the Canadian Attorney General can issue an order declaring that a Canadian person has claw-back rights with respect to the judgment.<sup>19</sup> Before the 1996 FEMA amendments, non-recognition and claw-back provisions related only to antitrust actions,<sup>20</sup> and subsequently it included extraterritorial laws.

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<sup>14</sup> Deborah Senz and Hilary Charlesworth, *Building Blocks: Australia's Response To Foreign Extraterritorial Legislation: Australia's Response to Foreign Extraterritorial Legislation*, 2(1) Melbourne Journal of International Law 112 (2001).

<sup>15</sup> Frederick A. Mann, *The Doctrine of Jurisdiction Revisited after Twenty Years*, 186 Recueil des Cours de l'Academie de Droit International 98 (1984).

<sup>16</sup> Judgment for multiple damages means a judgment for an amount arrived at by doubling, trebling or otherwise multiplying a sum assessed as compensation for the loss or damage sustained by the person in whose favor the judgment is given (Protection of Trading Interests Act 1980, ch. 11, sec. 5(3)).

<sup>17</sup> Donald J. Curotto, *Extraterritorial Application of the Antitrust Laws and Retaliatory Legislation by Foreign Countries*, 11(2) Golden Gate University Law Review 597 (1981).

<sup>18</sup> Lowe 1997, 387.

<sup>19</sup> FEMA, § 8(1)(b).

<sup>20</sup> See Clark 2004, 478.

Although the United States of America has been the main target of claw-back measures, the U.S. itself has resorted to this kind of countermeasure in its international relations. The U.S. Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, which was approved after the financial crisis in 2008, passed with the aim of significantly changing U.S. financial regulation. One of proposals of the Securities and Exchange Commission (SEC) in this regard was a requirement for all companies listed on a national securities exchange to have a policy to recover compensation erroneously awarded abroad.<sup>21</sup>

In contrast, French courts believe that recovering sums in compensation for foreign judgments is against international law. In fact, the French Tribunal De Commerce argued as long ago as 1885 that it is against the equal sovereignty of States that a court retrieves compensation for a payment ruled by a foreign court.<sup>22</sup>

It should be noted that the most important restriction on claw-back measures is the principle of immunity of State properties. So if a countersuit is launched against a claim in which one claimant is a foreign State, it is not easily possible for a defendant to gain access to the properties of a foreign State in the forum State. But there is no bar to prevent a defendant using claw-back regulations against the property of a private individual. Generally claw-back measures are harsher than blocking statutes because they render to reprisal actions rather than prevent the application of a foreign regulation therein. Some authors believe claw-back measures can cause public relations problems and destabilize international transactions.<sup>23</sup>

## **2.2. Adjudicative Countermeasures**

Sometimes the nullification of extraterritorial foreign Acts remains within the judicial process. In this way judicial authorities can invoke two methods: non-recognition and procedural restrictions. These are kinds of adjudicative countermeasures against extraterritorial regulations which the Forum State believes are illegal.

### *2.2.1. Non-Recognition*

All recognition of legislative, adjudicatory and executive decisions emanates from the "principle of comity of nations." Regarding this principle "in international practice, the laws of each nation exercised within its territory, are effective everywhere, insofar as the interests of another State or its citizens are not prejudiced."<sup>24</sup> In accordance with this principle, all lawful decisions of foreign States should be binding in other

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<sup>21</sup> Available at: <http://www.sec.gov/rules/proposed/2015/33-9861.pdf>.

<sup>22</sup> Michael Akehurst, *Jurisdiction in International Law*, 46 British Yearbook of International Law 233 (1974).

<sup>23</sup> Steve Coughlan et al., *Law Beyond Borders: Extraterritorial Jurisdiction in an Age of Globalization* 60 (Toronto: Irwin Law, 2014) and Clark 2004, 487.

<sup>24</sup> Hessel E. Yntema, *The Comity Doctrine*, 65(1) Michigan Law Review 26 (1966).

States. The international comity principle contrasts with the reciprocity principle, by which recognition of foreign judgments depends on a reciprocal act by the forum country. In any case, recognition merely indicates the 'recognizing of legislative and adjudicative foreign decisions' and will not necessarily result in the execution of foreign decisions.

Decisions that need to be recognized in other States can be divided into two categories: governmental acts of State (*jure imperii*) and private/commercial acts of State (*jure gestionis*). Judicial decrees related to public law, such as criminal law, tax law, administrative law, civil procedural law, criminal procedural law and laws governing immovable properties, as well as all executive decisions, are known as governmental acts of State (*jure imperii*).<sup>25</sup> These acts originate in the sovereign rights of States and are not principally recognized in other sovereign States because it would breach the equity of States.<sup>26</sup> But private/commercial decisions may be recognized in other States and the recognizing State, under the principle of the comity of nations, does not evaluate the substance of the decision and may not absolutely respect these foreign decisions.

Recognition of non-governmental judgments is based on the 'act of State' doctrine, upon which the State is not allowed to inquire into the legality of the acts of a foreign government when the action in question takes place within the territory of the foreign State. But traditionally there are four categories of restrictions on recognizing a non-public foreign judgment: 1) fraud (e.g. forum shopping), 2) unfair justice (including non-competent jurisdiction or unjust procedure), 3) public order and 4) corollary jurisdiction. Insofar as it relates to the present essay, and as a further exception, non-recognition also can be invoked against judgments based on an extraterritorial law. For example, E.U. regulation 2271/96 prohibits the recognition of judgments and administrative determinations that give effect, "directly or indirectly," to the extraterritorial sanction laws annexed to the Regulation, "or to actions based thereon or resulting therefrom." Also, Mexico's Law of Protection of Commerce and Investments from Foreign Policies that Contravene International Law of 1996 provides for the non-recognition and non-enforcement of foreign judgments issued under such laws. Contrary to the E.U. and Mexico, which stipulate illegal sanctions and laws in text of their Acts, Canada's FEMA amendments authorize the Canadian Attorney General to determine foreign trade laws that "adversely affect" Canadian interests and to order the non-recognition and non-enforcement of judgments by foreign tribunals under those laws. A U.S. court may also deny recognition or enforcement

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<sup>25</sup> See Frederick A. Mann, *The International Enforcement of Public Rights*, 19(3) *New York International Journal Law in Politics* 603 (1987); Curotto 1981, 593.

<sup>26</sup> This is the reason why courts in the United States have tried to describe the word "penal" in order to help determine when they should not apply foreign laws or execute foreign judgments which conceivably might be characterized as penal. See Mark W. Janis, *The Recognition and Enforcement of Foreign Law: The Antelope's Penal Law Exception*, 20(1) *International Lawyer* 303-308 (1986).

of a foreign judgment if the rendering court did not have proper subject matter jurisdiction over the dispute. Thus, for example, a U.S. court could deny recognition of a foreign judgment involving real estate located in the United States.<sup>27</sup>

### 2.2.2. Procedural Restrictions

One of the mechanisms that legislative authorities may approve to combat extraterritoriality is "overriding regulations." These provisions, which are mandatory, assist the claimant to sue before the courts and upon the law of legislating State, even though the claimant and defendant have chosen another forum or governing law in their contract. An example is the Marine Liability Act, by which Canadian shippers/exporters and importers/consignees of goods by sea may be given (i) the choice of a Canadian court or arbitration regardless of the terms of any choice of forum clause, and (ii) the benefit of Canadian law irrespective of any contracted choice of foreign law.<sup>28</sup> This power is rarely exercised, given common law's reluctance to interfere with contractual relations any more than necessary.<sup>29</sup>

Another form of procedural restriction against extraterritorial laws is evidence exchange restriction. Legislative/judicial authorities may prohibit parties from transferring evidence, records and information to a foreign court. For example, Canada's Foreign Extraterritorial Measures Act of 1996 prohibits or restricts the production of records and the giving of information in respect of proceedings related to the enforcement of the Helms-Burton Act. FEMA authorizes courts to issue warrants for the temporary seizure of any records if there is reason to believe that the Canadian Attorney General's blocking order [against extraterritorial laws] will be disobeyed, and the records are likely to be turned over to foreign authorities.<sup>30</sup>

The Mexican Act of 1996 forbids Mexican nationals to issue responses to inquiries from foreign countries under extraterritorial measures. The Mexican government must be notified of any such inquiry or any activity that may be impeded by the foreign laws. In regard to U.K. practice, when an American tribunal ordered some British petroleum companies to produce evidence in 1952, the British government of the time sent a letter to the Anglo-Iranian Oil Company requiring it not to produce documents requested by foreign court, stating "Her Majesty's Government considers it contrary to international comity" because these documents related neither to America nor to business in that country.<sup>31</sup>

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<sup>27</sup> Stacie I. Strong, *Recognition and Enforcement of Foreign Judgments in U.S. Courts: Problems and Possibilities*, 33 *Review of Litigation* 116 (2014).

<sup>28</sup> Marine Liability Act, S.C. 2001, c. 6, s. 46 (plus Part 5 & schedule 3).

<sup>29</sup> Linda S. Mullenix, *Another Choice of Forum, Another Choice of Law: Consensual Adjudicatory Procedure in Federal Court*, 57(3) *Fordham Law Review* 309 (1988).

<sup>30</sup> Clark 2004, 477.

<sup>31</sup> Zerk 2010, 103. See Lowe 1980, 259.

There are other forms of procedural restrictions in judicial process. For example, the Arresting State can stop the extradition of a suspect in an international criminal case to an Applicant State that doesn't respect substantial human rights like fair justice.<sup>32</sup> These restrictions do not relate to extraterritorial laws and are thus outside the present assessment.

Blocking statutes differ from procedural restrictions primarily in that the former prohibit parties from complying with extraterritorial laws while the latter do not prohibit the application of the law but restrict its procedural process by imposing limitations on the forum/law choice of contractors or restrictions on document exchanges with foreign judicial or administrative body. It is a useful method for States that do not wish to announce their express conflict with a foreign Act.

### **2.3. Executive Countermeasures**

If State measures against the extraterritorial motivations of other States via regulatory or adjudicatory processes are not sufficient, a State may resort to some enforcement measures against foreign laws in the executive stage. These can be categorized in two forms: non-execution and retaliatory measures.

#### *2.3.1. Non-Execution*

Even though there is no doubt that international law obliges States to recognize foreign legislative, adjudicatory and executive decisions, it is accepted that execution of these decisions depends on a unilateral or bilateral obligation. For instance, while the Netherlands and Sweden recognize foreign decrees they do not execute them unless there is a treaty or a special regulation.<sup>33</sup> However approved State practice accepts that there is no tendency for the execution of public law issues like criminal law and tax law unless they can conclude a special treaty. For instance, insolvency decrees have not been executed in Germany, Switzerland, the Netherlands and the United States.<sup>34</sup> Some States, such as Austria, Spain, Japan, Colombia, Poland, Lebanon, Hungary, Lichtenstein, Romania and Turkey, have made the execution of foreign decrees dependent on mutual practice.<sup>35</sup> Other States, such as Iran, have excluded judgments related to domestic real estate and those that jeopardize internal public order.<sup>36</sup>

Non-execution could be regarded as a jurisdictional countermeasure if the execution of a decision was obligatory. But present conventions on the recognition and execution of foreign decisions, such as the Brussels convention or the Lugano

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<sup>32</sup> See John Dugard & Christine Van den Wyngaert, *Reconciling Extradition with Human Rights*, 92(2) American Journal of International Law 187–212 (1998).

<sup>33</sup> Akehurst 1974, 234.

<sup>34</sup> *Id.* at 235.

<sup>35</sup> *Id.* at 236.

<sup>36</sup> Enforcement of Civil Judgments Acts, 1978, Iran, Art. 169.

Convention, concentrate solely on private law. In the field of public law, there are some treaties such as universal jurisdiction-based conventions, conventions on double taxation, transnational insolvencies, and mutual legal/judicial assistance or cooperation agreements which require State Parties to recognize and execute foreign decisions and extradite suspects or properties to the Applicant State.

The execution of foreign decisions sometimes becomes the focal point of the contradiction between two principles: the principle of respect for sovereignty and the principle of State immunity. The clearest example of this clash can be seen in extraterritorial confiscation orders,<sup>37</sup> in which a State has to deal with the confiscated assets of a corporation in its territory. If the State accepts an extraterritorial order it breaches its own sovereignty by accepting the transformation of part of its land into the property of a foreign government. If it does not accept the order, it breaches the act of State doctrine and, by extension, the principle of State immunity that could lead to calls on the State's international responsibilities.<sup>38</sup> If the confiscation was illegal, there is no obligation to recognize or execute it and consequently no worry about international responsibility. In this situation non-execution would not be accounted as a countermeasure.

### 2.3.2. Retaliatory Measures

Some authors regard all kinds of jurisdictional countermeasures – blocking legislation, claw-back statute, non-recognition, procedural restrictions and non-execution – as retaliatory measures,<sup>39</sup> yet it seems that there are some reprisal acts which differ from other forms of jurisdictional countermeasures. While those countermeasures are based on legislative or judicial decisions in the jurisdictional field, retaliatory measures can be based on administrative or executive orders and applied in a non-jurisdictional form.

For example, when the U.S. imposed an energy embargo against the Soviet Union in 1982, the United Kingdom, France and Italy took a retaliatory measure against this extraterritorial sanction which affected some of their nationals' contracts. The U.K. compelled several British-based subsidiaries of U.S. corporations to respect their existing contracts in the Yamal Pipeline Project.<sup>40</sup> Similarly, the French Ministry

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<sup>37</sup> See Edwin Borchar, *Extraterritorial Confiscations*, 36(2) *The American Journal of International Law* 275–282 (1942). It's possible that a State assume right of legality assessment of confiscations abroad before allowing that confiscated assets come in its territory. See Ignaz Seidl-Hohenvelden, *Extraterritorial Effects of Confiscations and Expropriations*, 49(6) *Michigan Law Review* 862 (1951).

<sup>38</sup> Edwin Borchar, *Confiscations: Extraterritorial and Domestic*, 31(4) *The American Journal of International Law* 676 (1937).

<sup>39</sup> Curotto 1981, 579.

<sup>40</sup> The Yamal Pipeline project was designed to supply West Germany, France and Italy with more than 30 percent of their natural gas needs, and involved lucrative construction contracts with European countries, such as West Germany, Great Britain, France and Italy. Leslie Gelb, *U.S. Hardens Curbs on Soviet Gas Line*, *N.Y. Times*, June 19, 1982, at A-1.

of Research and Industry ordered a French subsidiary of a U.S. Company to fulfill its contract for the project. The Italian Foreign Ministry issued a statement that all Italian contracts established with respect to the Yamal Pipeline Project “must be honored.” It is notable that in response the U.S. barred foreign companies from receiving any exports of U.S. oil and gas-related equipment<sup>41</sup> if they abided by their countries’ orders and defied the U.S. embargo. Although these orders may be based on a blocking statute, the purpose of this legislation goes beyond blocking because executive power is used to oblige its nationals to honor their contracts. Therefore these orders can be regarded as retaliatory measures.

Later, as a consequence of the approval of the Helms-Burton sanctions against Iran and Cuba by the U.S., the European Council in 1996 identified a list of options for counter-action, including a WTO dispute panel, visa restrictions, a watch list of U.S. companies, filing law suits against European firms and anti-boycott legislation.<sup>42</sup> Among these, visa restrictions and the watch list of U.S. companies can be accounted as retaliatory measures. As a first step the Commission decided to publish a notice in the Official Journal inviting parties to submit any information which they consider relevant to the compilation of a watch list of U.S. companies or citizens filing actions against Europeans.<sup>43</sup> Ultimately no action was taken to draw up a watch list following successful negotiation between the E.U. and the U.S., but the proposal was preparation for retaliatory measures against the jurisdictional conduct of the U.S.

As Steve Coughlan mentions: “These tit-for-tat ripostes are not helpful. Indeed, they are destructive of international trade and the commercial confidence on which transnational transactions depend, a negation of international order amongst nation States, and denial of the comity between governments that is so essential to the smooth functioning of international relations.”<sup>44</sup>

### 3. Assessment of Jurisdictional Countermeasures

Article 22 of the Draft Articles on Responsibility of States for Internationally Wrongful Acts adopted by the International Law Commission (ILC) of 2001 set forth: “The wrongfulness of an act of a State not in conformity with an international obligation towards another State is precluded if and to the extent that the act constitutes a countermeasure taken against the latter State in accordance with chapter II of Part

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<sup>41</sup> Harry L. Clark & Lisa W. Wang, *Foreign Sanctions Countermeasures and Other Responses to U.S. Extraterritorial Sanctions*, Report of National Foreign Trade Council, August 2007, at 15.

<sup>42</sup> Francesco Giumelli, *The Success of Sanctions Lessons Learned from the EU Experience* 69 (Farnham: Ashgate, 2013).

<sup>43</sup> Available at: [http://europa.eu/rapid/press-release\\_IP-96-732\\_en.htm?locale=en](http://europa.eu/rapid/press-release_IP-96-732_en.htm?locale=en).

<sup>44</sup> Steve Coughlan et al., *Global Reach, Local Grasp: Constructing Extraterritorial Jurisdiction in the Age of Globalization*, 6 Canadian Journal of Law and Technology 49 (2007).

Three.” The conditions of a legitimate countermeasure are stipulated in Articles 49–54 of Draft, which abstractly consist of: 1 – act against an international obligation; 2 – reversibility of the obligation; 3 – temporality of the measure (in the event of the responsible State complying with its international obligations or the application of a dispute settlement procedure by both States); 4 – respect for the peremptory norms of general international law (e.g. human rights and humanitarian law, diplomatic immunities); 5 – proportionality; 6 – notification and offers of negotiation.

If jurisdictional countermeasures are accounted as legitimate countermeasures under international law, this can preclude any wrongfulness in the relations between the injured State and the responsible State. Measures taken against extraterritorial laws are countermeasures when illegality of that extraterritorial law is recognized. As many extraterritorial laws breach the principles of international law regarding the law of jurisdiction, they are assumed to be illegal.<sup>45</sup> But whereas most counteracts are not in themselves illegal, they cannot be accounted as countermeasures in a legal context. As the ILC emphasizes, countermeasures are to be contrasted with retorsion, i.e. “unfriendly” conduct which is not inconsistent with any international obligation of the State engaging in it, even though it may be a response to an internationally wrongful act.<sup>46</sup>

Measures which are inherently unjustified, such as the non-recognition of foreign judgments, can be accounted as countermeasures if imposed they are against an illegal extraterritorial law like U.S. secondary sanctions. However, while international law does not require States to recognize illegal jurisdictions, it does not violate international comity and the act of State doctrine. In any event, recognition will be obligatory if there is a mutual legal or judicial assistance or cooperation agreement between two States or both States are party to international conventions with jurisdictional aspects.<sup>47</sup> For example, in ICSID it is necessary for State parties to recognize and exercise foreign State arbitration awards, even if they run contrary to the internal public order of the State. In this circumstance execution may only be suspended, not halted altogether.

The legitimacy of extraterritorial laws can be challenged because the jurisdictional linkage between the subject-matter and legislating State is weak. The scope of these laws extends to the persons, nationals or companies of other States, and sometimes

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<sup>45</sup> Steve Coughlan et al. 2007, at 11.

<sup>46</sup> Draft Articles on Responsibility of States for Internationally Wrongful Acts of 2001, ILC Commentaries, ch. II, no. 3.

<sup>47</sup> There are some multilateral treaties like the Convention on Jurisdiction, Applicable Law and Recognition of Decrees Relating To Adoptions 1965, the Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters 1971, the Convention of February 1, 1971 on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters 1988, the Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-Operation In Respect of Parental Responsibility and Measures For The Protection of Children 1996.

extends to subsidiary companies with a foreign nationality.<sup>48</sup> Some of them oblige parent companies to force their foreign subsidiaries to comply with the Legislating State. In international law, this is an unacceptable way of exercising jurisdiction.

Some believe that under international law of jurisdiction, which often sets forth only vague standards, the legality of a particular jurisdictional assertion is ordinarily not only dependent upon an objective assessment of jurisdictional criteria being fulfilled, but also upon the foreign reactions with which the assertion is met.<sup>49</sup> In the title of its act, Mexico cited "*Foreign Policies that Contravene International Law*"; Canada's Foreign Extraterritorial Measures Act (FEMA) states that the provision will apply to non-Canadian trade laws which are "*contrary to international law or international comity*."<sup>50</sup> Although the prohibitive ruling in the *Lotus Case* allowed any form of the application of jurisdiction, the persistent opposition of some States and the enactment of Acts against them indicates illegality of this kind of provision.<sup>51</sup> In these situations, the application of countermeasures is allowed and in this context some States, such as Canada, Mexico, the U.K., Australia, Belgium, Denmark, Finland, France, Germany, the Netherlands, Sweden and the E.U. have enacted provisions to prevent the effects of illegal extraterritorial foreign laws.<sup>52</sup>

In any event, jurisdictional countermeasures should fulfill the necessary conditions to be lawful. These conditions consist of reversibility, temporality, proportionality, respect for peremptory norms, notification and an offer of negotiation. Sometimes there are some preliminary negotiations any countermeasure against extraterritorial sanctions; For example, there might be a familiar flurry of diplomatic activity, including "megaphone diplomacy" and a variety of press releases by the European Union condemning extraterritoriality generally and the Helms-Burton and D'Amato Acts in particular.<sup>53</sup>

<sup>48</sup> Cuban Democracy Act of 1992, 22 U.S.C. § 6001–6010 (1996). The CDA strengthened the U.S. economic embargo against Cuba by, among other things, prohibiting foreign subsidiaries of U.S. corporations from conducting business in Cuba. Anthony M. Solis, *The Long Arm of U.S. Law: The Helms-Burton Act*, 19(3) *Loyola of Los Angeles International and Comparative Law Journal* 714–715 (1997).

<sup>49</sup> Cedric Ryngaert, *Jurisdiction in International Law* 467 (Oxford: Oxford University Press, 2008).

<sup>50</sup> There are some trends in domestic arguments in the U.S. about the illegality of some sanctions. The U.S. State Department pointed out during the congressional hearings, to no avail, that the exercise of jurisdiction under the Act would violate international law: "The Libertad Bill [the Helms-Burton Act] would represent an unprecedented application of U.S. Law... The principles behind Title III are not consistent with the traditions of the international system... Under international law and established state practice, there are widely-accepted limits on the jurisdictional authority of a state to 'prescribe', i.e., to make its law applicable to the [extraterritorial] conduct of persons." Legal Considerations on Title III of Libertad Act, 141 Cong. Rec., S 15106-8, October 12, 1995, cited in Ryngaert 2008, 467.

<sup>51</sup> For the opposite view see Lowe 1981, 263.

<sup>52</sup> Edward R. Price, *Foreign Blocking Statutes and the GATT: State Sovereignty and the Enforcement of U.S. Economic Laws Abroad*, 28 *George Washington Journal of International Law and Economics* 315–317 (1995).

<sup>53</sup> Alexander Layton and Angharad M. Parry, *Extraterritorial Jurisdiction: European Responses*, 26(2) *Houston Journal of International Law* 314 (2004).

As Article 50 of the Draft states, “a State taking countermeasures is not relieved from fulfilling its obligations: (a) under any dispute settlement procedure applicable between it and the responsible State.” The E.U. invoked the WTO settlement process while simultaneously imposing most available countermeasures against the U.S. for its alleged illegal sanctions. Under the WTO’s dispute settlement system, the prior authorization of the Dispute Settlement Body is required before a member can suspend concessions or other obligations under the WTO agreements in response to a failure of another member to comply with the recommendations and rulings of a WTO panel or the Appellate Body. This has been construed both as an “exclusive dispute resolution clause” and as a clause “preventing WTO members from unilaterally resolving their disputes in respect of WTO rights and obligations.”<sup>54</sup>

The European Union initiated WTO proceedings against the United States in October 1996, on the basis that the Helms-Burton Act resulted in an infringement of E.U. members’ rights under the General Agreement on Tariffs and Trade (GATT) and the General Agreement on Trade in Services (GATS). Negotiations began between the European Union and the United States, leading to the Memorandum of Understanding Concerning the U.S. Helms-Burton Act and the U.S. Iran and Libya Sanctions Act on April 11, 1997. Finally, in May 1998, the United States and the European Union concluded a Transatlantic Partnership on Political Cooperation and an Understanding with Respect to Disciplines for Strengthening of Investment Protection upon which European Union agreed to the suspension of the WTO proceedings. In return for the European Union stepping up its commitment to democracy in Cuba, Title III of the Helms-Burton Act would continue to be suspended.<sup>55</sup>

In this situation, where a dispute process resulted in a *compromise*, any continuation of the E.U.’s blocking and claw-back statutes is doubtful as it is against the provisions for negotiations (Art. 52 – paragraph a (b)) and temporality (Art. 52 – paragraph c (b)). These violations only restrict the non-recognition section of E.U. Regulations where it violates the principles of international law, but other methods of confronting U.S. sanctions do not breach international law and could be accounted as retorsions.

Also in 1998, Japan and the E.U. requested the establishment of a WTO panel to examine a Massachusetts law that disallowed the granting of government procurement contracts to any U.S. or foreign company doing business in or with Burma (Myanmar). Japan and the E.U. challenged U.S. law based on an alleged violation of the WTO Agreement on Government Procurement. The WTO panel was suspended in February 1999 pending the National Foreign Trade Council’s challenge against Massachusetts’s sanctions in U.S. courts. In June 2000, the U.S. Supreme

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<sup>54</sup> Draft Articles on Responsibility of States for Internationally Wrongful Acts of 2001, ILC Commentaries, Art. 50, no. 10.

<sup>55</sup> Layton & Parry 2004, 314.

Court invalidated Massachusetts's embargo on the grounds that it was preempted by federal law. Consequently, the WTO challenge expired on February 11, 2000.<sup>56</sup>

Article 54 of the Draft sets forth "this chapter does not prejudice the right of any State... to invoke the responsibility of another State, to take lawful measures against that State to ensure cessation of the breach and reparation in the interest of the injured State or of the beneficiaries of the obligation breached." So it is not necessary to prove any breach of State interests when imposing blocking or claw-back statutes. Indeed all States could, although typically it does not happen, apply jurisdictional restrictions against an unlawful extraterritorial sanction.<sup>57</sup> It should be noted that while the object of countermeasures is to induce the responsible State to comply with its obligations, as mentioned in Article 49.1 of Draft, the purpose of jurisdictional countermeasures is to nullify the illegal exercise of jurisdiction by another State.

Although these countermeasures, at least in theory, appear to block the extra-territorial assertion of U.S. sanctions in regard to third country trade and investment with U.S.-targeted States, they have had little practical effect in insulating third country businesses from potential liability under U.S. sanctions. Consequently, some major multinational firms with operations in Canada and the European Union have entered agreements with the U.S. government that seek to reduce their liability exposure under U.S. sanctions in return for their compliance with certain requirements of U.S. sanction law.<sup>58</sup>

However, the importance of jurisdictional countermeasures should not be underestimated as sometimes it can result in big fines for transnational corporations. For example, in March 24, 2006, the Mexican government fined the Sheraton Maria Isabel Hotel in Mexico City 1.2 million pesos for expelling Cuban guests. Mexico's Foreign Ministry said the fine was imposed for the hotel's violation of Mexico's sanctions countermeasures law. The controversy led to the hotel's temporary closure for unrelated, alleged violations of the safety code.<sup>59</sup> In April 2007, Austria brought charges against its fifth-largest bank, BAWAG P.S.K. ("BAWAG"), for violating E.U. Regulation 2271/96, after the bank cancelled the accounts of approximately 100 Cuban nationals. BAWAG stated that its pending acquisition by U.S. equity firm Cerberus Capital ("Cerberus") could not be completed without the cancellation of all Cuban accounts because of compliance issues with the Helms-Burton Act. Austrian Foreign Minister Ursula Plassnik immediately denounced BAWAG's actions.<sup>60</sup>

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<sup>56</sup> Clark & Wang 2007, 17.

<sup>57</sup> Elena Katselli Proukaki, *The Problem of Enforcement in International Law: Countermeasures: The Non-Injured State and the Idea of International Community*, 60(1) *International & Comparative Law Quarterly* 284 (2011).

<sup>58</sup> Alexander 2009, 258.

<sup>59</sup> Clark & Wang 2007, 21.

<sup>60</sup> *Id.* at 23.

Furthermore, the Canadian Act (FEMA) specifies penalties for compliance with objectionable foreign laws and other violations including fines of up to C\$1,500,000 for corporations and C\$150,000 for individuals along with imprisonment of individuals for up to five years.

#### **4. Conclusion**

Notwithstanding the advantages of international transactions, the complexity of these relations causes some problems in the legal relationships between States. Basically, sanctions are imposed against an allegedly intentional wrongful act and so they are themselves categorized as international countermeasures. But countermeasures should meet the conditions stated in the Draft Articles on Responsibility of States for Internationally Wrongful Acts adopted by the International Law Commission. Some of them not only fail to fulfill these prerequisites but also run contrary to the international law of jurisdiction. In addition to them we can add competition laws (e.g. anti-trust provisions) with an extraterritorial reach that are also against the principles of international law. In response to these measures, injured States may impose types of countermeasures that mostly and similarly lie in the jurisdictional field. These could be called "jurisdictional measures."

These measures could be classified in three ways: prescriptive, adjudicative and executive. Blocking statutes as a legislative response seek to prevent nationals from complying with foreign extraterritorial law. Claw-back statutes, as another form of prescriptive countermeasure, authorize defendants of a foreign judgement based on extraterritorial law to recoup the lost sum in the Forum State. Although recognition of foreign judgments is a necessary part of international law or comity, non-recognition can be used as one form of countermeasures in the judicial process against extraterritorial laws. Procedural Restrictions are another form of countermeasures in the judicial process, in which parties are prohibited from choosing a foreign forum/law in their contracts or providing evidence for a foreign authority. In the field of execution it is possible for a State to decline to execute foreign decrees or take retaliatory measures such as visa restrictions or a symmetrical act against nationals of the responsible State. Some States have regulations that contain several types of jurisdictional countermeasures. For example, Canada's Foreign Extraterritorial Measure Act of 1985 includes blocking statutes, restrictive procedures, and non-execution and claw-back measures. E.U. Regulation 2271/96 of 1996 includes blocking statutes and claw-back measures.

It should be noted that most of these acts, with the exception of non-recognition of foreign judgments and to some extent procedural assistance, are not prohibited in international law and therefore cannot be accounted as countermeasures even if they are taken against an unlawful extraterritorial law. As the ILC mentioned they could be called retorsions, rather than countermeasures. But it is possible that some

these acts are prohibited by an obligation laid down in an international treaty. When deploying acts that are normally against international law, these countermeasures should meet the following conditions: 1 – the act comes against a breach of an international obligation, 2 – reversibility, 3 – temporality, 4 – proportionality, 5 – respect for the peremptory norms of general international law, 6 – notification and 7 – offer of negotiation.

Mostly jurisdictional countermeasures are compatible with these conditions but in some cases, such as the E.U. Regulations, the condition of temporality was breached. It seems that a compromise reached between the E.U. and the U.S. nullified the non-recognition part of the Regulations, although the other forms of countermeasures are justified because they are not against international law. The history of international law shows that States incline to jurisdictional countermeasures more often than diplomatic protests.

Extraterritorial laws were first approved by the United States in the field of competition law and then extended to other venues, specifically through sanctions. The fact that most extraterritorial laws were approved in the economic field highlights the importance of economy security in U.S. foreign policy. It seems that responding States, when confronted with U.S. extraterritorial laws, reproduced the same features of U.S. policy: extraterritorial and punitive reaction. As the main purpose of countermeasures has been to fight with the extraterritorial reach of U.S. laws, it appears that some blocking and claw-back statutes extend to foreign subsidiaries of national corporations. Also, like extraterritorial laws, countermeasures involve punitive penalties. However, jurisdictional countermeasures step in the same way of extraterritorial laws but it is a necessary step in order to eliminate earlier extraterritoriality footprints.

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