EUROPEAN PARLIAMENT

DIRECTORATE-GENERAL FOR EXTERNAL POLICIES

POLICY DEPARTMENT

THE EXTRATERRITORIAL EFFECTS OF LEGISLATION AND POLICIES IN THE EU AND US

AFET

EN

2012

DIRECTORATE-GENERAL FOR EXTERNAL POLICIES OF THE UNION

DIRECTORATE B

POLICY DEPARTMENT

STUDY

THE EXTRATERRITORIAL EFFECTS OF LEGISLATION AND POLICIES IN THE EU AND US

Abstract

There is a general principle in international law that one state cannot take measures on the territory of another state by means of enforcement of national laws without the consent of the latter. It is possible – however – to observe a recent trend of a growing number of laws that aim to produce a legislative effect in third countries. The nature of the extraterritorial measures at stake and the interests involved have determined the intensity of protests against those measures, by businesses and legislators. This study explores the legal principles that sit behind extraterritoriality, and how such measures have come to be justified. It also examines how those enacting extraterritorial laws have sought to use mostly economic and diplomatic levers to seek compliance from third countries and entities registered in third countries. Finally, this study explores the impact extraterritoriality has had on the businesses and governments affected by it and outlines the defensive measures that can be taken to protect against the reach of such laws.

EXPO/B/DEVE/FWC/2009-01/Lot3/03 May 2012

PE 433.701 EN

This study was requested by the European Parliament's Committee on Foreign Affairs.

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LINGUISTIC VERSIONS

Original: EN

ABOUT THE EDITOR

Editorial closing date: 16 May 2012.

Printed in Belgium

ISBN: 978-92-823-3717-2
Doi: 10.2861/75161

The Information Note is available on the Internet at
http://www.europarl.europa.eu/activities/committees/studies.do?language=EN

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EXECUTIVE SUMMARY

The governing principle is that a state cannot take measures on the territory of another state by means of enforcement of national laws without the consent of the latter. The nature of the extraterritorial measure at stake and the interests involved determine the intensity of protests against that measure. The following principles can justify the exception to the general rule:

- The objective territorial principle – a state can assert jurisdiction if a particular action has been committed in its own territory even if part of this action has been performed in another state (applicable in different areas of law - public international law, criminal law, commercial law);
- The universality principle – jurisdiction is established based on the need to suppress some types of crime, usually internationally recognized (applicable in criminal law and to actions for damages in civil law);
- The 'effective control' principle – jurisdiction is established based on the effective control exercised by one state over the territory or individuals of another state (applicable in human rights and humanitarian law);
- The nationality principle – jurisdiction is established by reference (i) to nationality or national character of the person committing the offence; or (ii) to person or national interest injured by the offence (mostly applicable in criminal law);
- The 'effects' principle – provides for the jurisdiction based just upon the effects that acts of foreign companies committed abroad may have in the territory of the respective state (applicable in anti-trust and environmental law);
- The 'substantial connection' principle – jurisdiction is established based on the real and substantial connection between companies or persons in different jurisdictions (applicable to foreign subsidiaries and at the level of constituent elements of federal states).

Figure 1. Taxonomy of Extraterritoriality

Objective territorial	**PNR, Sarbanes-Oxley**	**2**
Universality	PNR, Foreign Corrupt Practices, Iran-Libya, Iran Freedom, Iran Non prolif. Helms-Burton	6
Effective control	-	0
Nationality	-	0
Effects	Container scanning, SOPA, OPEN, PIPA	4
Substantial connection	Foreign Corrupt Practices Act, Sarbanes-Oxley	2

This report reviews a number of measures introduced unilaterally that could be interpreted as having an extraterritorial effect. The scope of these measures is as follows:

- EU Emissions Trading Scheme and Directive 2008/101/EC – provide, as of 1 January 2012, for the inclusion of aviation activities in the scheme for the emission allowance trading within the Community;
- US Legislation on 100% Ocean Cargo Scanning – provides, as of 1 July 2012, 100% scanning of all ocean US-bound cargo containers in foreign ports.;
- US PNR Legislation - US law empowers, as of 2001, the Department of Homeland Security to require each air carrier operating passenger flights to and from the US, to provide it with electronic access to Passenger Name Record (PNR) data prior to the passenger arriving or leaving the US. The interim US-EU PNR Agreement 2007 is currently in force, pending review by the European Parliament of the renegotiated Agreement in April 2011, which has been passed. |;
- Helms-Burton Act 1996 – provides for the expansion of the Cuban embargo to foreign corporations with no connection to US ownership. This statute targets the joint ventures between non-US multinational corporations and Cuban state-owned enterprises;
- Sarbanes-Oxley Act 2002 – sets new or enhanced standards for all US public company boards, management and public accounting firms. The statute also applies to some extent to foreign companies (foreign auditors as well as companies whose securities are listed in the US stock exchange);
- Foreign Corrupt Practices Act 1977 - imposes criminal and civil liability for (i) the bribery of foreign (i.e. non-US) officials; (ii) the failure of issuers' to maintain books and records that accurately reflect the disposition of company assets; and (iii) the failure of issuers' to institute proper internal controls concerning the authorization of transactions;
- Iran-Libya Sanctions Act 1996, latterly the Iran Sanctions Act 2006 – imposes financial and practical sanctions on non-US entities that carry on trade with the Iranian energy industry. The act is extended by the Comprehensive Iran Sanctions, Accountability and Divestment Act 2010, which puts in place a statutory framework for investigation and action.
- Iran Freedom Support Act 2006 – imposes sanctions and non-cooperation with US capital and diplomacy in the event of a third country assisting Iran. The act will be superseded and extended by the bill progressing through US legislative channels titled: Iran, North Korea and Syria Sanctions Consolidation Act 2011, which places heavier sanctions on those assisting the Iranian energy sector and provides the framework through which the President must assist non-US countries in finding non-Iranian energy suppliers;
- Iran Non-Proliferation Act 2000 (superseded by the 2006 Iran, North Korea, Syria Non-Proliferation Act) – places heavy diplomatic penalties on third countries making contributions or providing assistance to Iranian weapons programmes (either to programmes involving weapons of mass destruction, or those involving sophisticated conventional weaponry). The act also allows the US President to seize the assets of entities in breach of the act and to prevent them trading with the US;
- Protect IP Act 2011 (still in consultation) – would allow the US Department of Justice or copyright holders to gain a court order preventing payment and advertising processors from trading with a website found in breach;
- Stop Online Piracy Act 2011 (still in consultation) - would allow the US Department of Justice or copyright holders to gain a court order preventing payment and advertising processors from trading with a website found in breach. The bill also allows the technical removal of the website

from the internet, via so-called deep packet inspection and IP redirection. The act proposes custodial sentences for repeat offenders;

- Online Protection and Enforcement of Digital Trade Act 2011 (still in consultation) – would serve the same purposes as the two bills mentioned above. It does, however, employ the established higher legal standard test (of the Digital Millennium Copyright Act) that the website must have copyright breach as its main aim, and allows the evidence collected against the website to be tested in an adversarial setting.

This report sets out the principles of extraterritoriality, and reinforces these through the legislative case studies presented. Furthermore, whilst the uneven topography of extraterritoriality is explored across these examples of legislation, the legal-political impacts of this legislation on the EU and the unresolved issues within these frameworks are also given due attention.

1. SCOPE OF THE STUDY AND KEY DEFINITIONS

1.1 General Rule

The principle of extraterritoriality stems out of the notion of jurisdiction. State jurisdiction is a manifestation of state sovereignty (Bowett, 1982, 1). 'Sovereignty' is legal shorthand for legal personality of a certain kind, that of statehood; 'jurisdiction' refers to particular aspects of the substance, especially rights (or claims), liberties, and powers." (Brownlie, 2008, 106). As a general rule, state is entitled to exercise domestic jurisdiction limited only by rules of international law:

> "State sovereignty in the sense of contemporary public international law denotes the basic international legal status of a State that is not subject, within its territorial jurisdiction, to governmental, executive, legislative, or judicial jurisdiction of a foreign State or to foreign law other than public international law" (Bernhardt, 2003, 512).

Jurisdiction as an aspect of sovereignty presupposes the three powers of the state: (Brownlie, 2008,299)

i. legislative or prescriptive (to establish rules)
ii. judicial or adjudicative (to establish procedures)
iii. administrative or enforcement (to impose consequences such as loss of liberty or property for breaches of the rules) (Bernhardt, 2003, 512).

Jurisdiction is difficult to define with respect to the extraterritorial application of state powers (Ryan & Mitsilegas, 2010, 73). The governing principle is that state cannot take measures on the territory of another country by means of enforcement of national laws without the consent of the latter (Brownlie, 2008, 309). It is also accepted that a state has enforcement jurisdiction abroad only to the extent necessary to enforce its legislative jurisdiction (Brownlie, 2008, 310-11).

However, on the other hand, the Permanent Court of International Justice (PCIJ) held in *Lotus* that international law does not blankly prohibit to states to extend the application of their laws and the jurisdiction of their courts to persons, property and acts outside their territory. International law leaves the states with a certain amount of discretion when it comes to adopting extraterritorial measures ((1927), PCIJ, Ser. A, no. 10, p. 23). The view of the UK appears that a state acts in excess of its own jurisdiction when its measures purport to regulate acts, which are done outside its territorial jurisdiction by persons who are not its own nationals and which no, or no substantial effect within its territorial jurisdiction.(Hobson 1964, 146-153). The principle of substantial or effective connection is accepted as a basis for jurisdiction in cases of corporations with complex and foreign-based subsidiaries (Mann 1964, 149-50; Brownlie 2008, 310-11; *Carron Iron Co. v. Maclaren* (1855), 5 HLC 416).

The extraterritorial effect of measures is more accepted in some areas of law and not others. There is an position that extraterritorial measures aimed at protecting an obligation *erga omnes*, such· as the protection of human rights, protection of the environment and control of weapons of mass destruction are not the subject of intense opposition by other states (Bianchi 1996, 88). The following sections examine the use of extraterritorial measures in different areas of law.

1.2 Civil Law

There is a variation of approaches with regards to the 'excessive' civil jurisdiction. Some authors suggest that "states claim jurisdiction over all sorts of cases and parties having no real connection with them and that this practice has seldom if ever given rise to diplomatic protests" (Akehurst 1973, 170). The others say that "[e]xcessive and abusive assertion of civil jurisdiction could lead to international responsibility or protests at *ultra vires* acts." (Brownlie, 2008, 300). The third group suggests a general rule by which international law requires 'a substantive connection' before civil jurisdiction can be exercised (Mann, 1964, 149-150). These views are not irreconcilable. The extent of the 'permissiveness' on behalf of other states depends on the circumstances of the case and state interests involved.[1]

In this respect, the decision of the US Supreme Court in Bourmediene v Bush is notable. The Court found the provision of the federal Military Commissions Act 2006 banning US federal courts' jurisdiction to hear habeas corpus petitions2 from aliens detained at Guantanamo Bay to be unconstitutional for two reasons. First, even though Guantanamo Bay is not a de jure US territory, the US Constitution applies to the detention of aliens there because the United States have de facto control over it. Secondly, habeas corpus could only be suspended in accordance with Article 9(1) of the US Constitution ((2008) 171 L. 2Ed. 41). Such extraterritorial exercise of jurisdiction is not likely to face opposition from other states (Harris, 2010, 228).

1.3 Criminal Law

Many ground rules relating to extraterritoriality were first formulated as a part of criminal law, but then used in other areas of law, such as anti-trust or immigration. Criminal jurisdiction means, in general, that municipal courts may exercise jurisdiction in respect of acts criminal under the law of the forum. The principle that the courts of the place where the crime is committed may exercise jurisdiction has received universal recognition (Brownlie, 2008, 301). Nonetheless, criminal jurisdiction of the states can reach beyond its borders based on five principles:[3]

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[1] This position is reinforced by the cases examined in the Study.

[2] A legal action, through which a prisoner can be released from unlawful detention.

[3] Dickinson, Introductory Comment to the Harvard Research Draft Convention on Jurisdiction with Respect to Crime 1935, (1935) 29 A.J.I.L/ Supp. 443. The Harvard Convention of 1935 was the product of the unofficial work of a number of American international lawyers. It is not binding upon any state as a treaty and it is not state practice. Nonetheless, it is intended to reflect customary international law, and is of value because of thorough analysis of state practice.

i. The territorial principle
ii. The nationality principle
iii. The protective principle
iv. The universality principle
v. The passive nationality principle

1.4 Territorial principle

The key concept in the area is the objective territorial principle (Harris 2010, 228). It means that a state should be able to assert jurisdiction only if the offence has been committed, in part or in whole, in its territory. The jurisdiction is founded when any essential constituent element of a crime is consummated on a state territory. This principle extends its application beyond criminal matters to the areas of conspiracy (Board of Trade v. Owen [1957], AC 602 at 634; R. v. Cox [1968] 1 All ER 410 at 414, CA; D.P.P. v. Doot [1973] AC 807 HL.), violation of anti-trust[4] and immigration laws (Brownlie 2008, 301).

The objective principle received general support following the landmark *Lotus* case that arose out of collusion on the high seas between a French steamer and a Turkish collier, in which the latter sank leading to deaths of Turkish crew members ((1927), PCIJ, Ser. A, no. 10, p. 20). Turkey tried and convicted French officers on the watch of involuntary manslaughter. France contended that the flag state of the vessel alone had jurisdiction over acts performed on board on the high seas. The Court rejected the French arguments by stating that the territoriality of criminal law, therefore, is not an absolute principle of international law and by no means coincides with territorial sovereignty. PCIJ decided Turkey had not acted in conflict with principles of international law by exercising criminal jurisdiction ((1927), PCIJ, Ser. A, no. 10, p. 23).

1.5 Nationality principle

The nationality principle determines jurisdiction by reference to nationality or national character of the person committing the offence.

1.6 Protective principle

The protective principle determines jurisdiction by reference to the national interest injured by the offence. Brownlie notes that nearly all states assume jurisdiction over aliens for acts done abroad, which affect the security of the state (*Nusselein* v Belgian State, ILR 17 (1950). The US and UK allow significant exceptions to territoriality principle (i) in the areas of immigration, currency and economic offences based on this principle. However, they do not explicitly rely on it. (Nusselein v Belgian State 1950).

[4] For further discussion on anti-trust law please see Section 1.8 of the Study.

1.7 Universality principle

The universality principle determines jurisdiction by reference to the custody of the person committing the offence. A number of nations have adopted the principle allowing jurisdiction over acts of non-nationals where the crime, including the nature of the crime, justify the repression of some types of crime as a matter of international public policy (Brownlie 2008, 305).[5]

The universality principle has been first recognized in *Eichmann* (*Attorney General of the Government of Israel v Eichmann* (1961) 36 I.L.R. 5 District Court of Jerusalem). In this case, Israel established its jurisdiction to try Eichmann, who had been a German military officer, based on the law of nations. The court held that

> "[t]he State of Israel's 'right to punish' the Accused derives […] from two cumulative sources: a universal source (pertaining to the whole of mankind) which vests the right to prosecute and punish crimes of this order in every state within the family of nations; and a specific or national source which gives the victim nation the right to try any who assault its existence" (Paras 30-31).

The second principle that this passage refers to is the protective principle, which is discussed above.

The US Supreme Court recognized the extraterritorial application of the US Alien Tort State(28 USC. § 1350) in *Sosa v. Alvarez-Machain* (542 US 692 (2004) based on a concept very similar to the universality principle. *Sosa* dealt with a claim for damages as a result of unlawful abduction and not with criminal law as such. The civil nature of the claim did not prevent the US Supreme Court from establishing that the US Alien Tort State sometimes extends its application extraterritorially to causes of action that are specific, obligatory and universally recognized by international law (Harvard Law Review, 2011, 1229; Sosa v. Alvarez-Machain, 542 US 692 (2004), paras. 732-733) and these instances are limited only to already existing causes of action (para 712).

1.8 Passive nationality principle

The passive personality principle determines jurisdiction by reference to the nationality or the national character of the person injured by the offence. This concept was first rejected by the drafters of the 1935 Harvard Research Draft Convention ((1935) 29 A.J.I.L/ Supp. 443) but the attitudes have changed (Harris 2010, 239). The treaties now provide for this principle in respect of terrorist acts and other matters of general concern.[6] The Mexican court relied on the passive nationality principle in the *Cutting* case, where it exercised jurisdiction in respect of public defamation by an American in a Texas newspaper (Brownlie 2008, 304).

[5] For example, In June 2003, the Spanish judge Baltasar Garzón exercised jurisdiction based on the universality principle, enshrined in the Spanish Penal Code, over Ricardo Miguel Cavallo, a former Argentine naval officer, who was extradited from England to Spain pending his trial on charges of genocide and terrorism relating to the years of Argentina's military dictatorship.

[6] For example, 1963 Tokyo Convention on Offences Abroad Aircraft, art 4, 1984 Torture Convention.

1.9 Anti-trust Law

Anti-trust legislation often involves a process which, though formally 'civil', is in substance coercive and penal (Brownlie 2008, 300). US courts often exercise extraterritorial jurisdiction under the anti-trust law based on the extension of the objective territoriality principle, [7] applying the so-called 'effects doctrine', which provides for the jurisdiction based just upon the 'effects' that acts of foreign companies committed abroad may have in the US. Many states object to such an extension of jurisdiction (Harris 2010, 227-8). A number of writers criticised the 'effects doctrine', invoking the analogy of criminal law and arguing that a state has no jurisdiction unless a constituent element of an act forbidden by antitrust law has occurred on that state's territory (Harris 2010, 195).

The *Alcoa* case (US v. Aluminium Company of America and others, 44 F. Supp. 97; 148 F. 2d 416) decided by the US court in 1945, raised for the first time the issue of effects felt within the United States as a result of acts done by foreigners abroad. In this case, foreign companies had agreed among themselves that each company would pay royalties to the other companies if its production of aluminium exceeded a certain level; the result was to inhibit the production of aluminium beyond that level, and it was contended that the resulting lack of aluminium had affected the levels of imports into the US (Akehurst 1973, 193). The court considered it a 'settled law' that "any state may impose liabilities for conduct outside its borders that have consequences within its borders."(US v. Aluminium Company of America and others, 44 F. Supp. 97; 148 F. 2d 443).

The European Court of Justice (ECJ) in the *Wood Pulp* case applied test similar to the 'effects test'(*A. Ahlstrom Oy v. Commission*, (1988), ECJ, ILR 96, 174). In this case, a number of companies from outside of the European Community (EC) alleged to have entered into a price-fixing agreement. The European Commission had levied fines on the jurisdictional basis that the effects of the price agreement were direct, substantial and intended within the EC. This action was then disputed in the ECJ. Advocate General Darmon argued that international law permitted a state to apply its competition laws to acts done by foreigners abroad if those acts had direct, substantial and foreseeable effects within the states concerned. The ECJ adopted a slightly different line of argument by saying that the companies concerned had acted within the EC because they sold directly to purchasers within the Community, thus becoming subject to EC law. The ECJ held that the decisive factor is where the price-fixing agreement is implemented, not where it is formulated (Shaw 2008, 695-6).

The principle of balancing national interests somewhat mitigated the effects doctrine (Timberlane Lumber Co. v. Bank of America, 549 F.2d 597, 1976, 66 ILR, p. 270; Mannington Mills v. Congoleum Corporation, 595 F.2d 1287, 1979, 66 ILR, p. 487). In addition to the effects tests, the US courts attempted to take into account a balancing test, 'jurisdictional rule of reason', involving a consideration of other nations' interests and the full nature of relationship between the actors concerned and the US (Shaw 2008, 689). However, this principle has been criticised as vague (Brownlie 2008, 309).

1.10 Human Rights and Humanitarian Law

The International Court of Justice has explicitly examined the extraterritorial scope of human rights treaties in two cases, which both concerned occupied territories (Ryan and Mitsilegas, 76). In the 2004 Advisory *Wall* Opinion, the Court affirmed Israel's responsibility for military activities in the Palestinian territories not only under international humanitarian law, but also under international human rights law (Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian

[7] For the discussion of the objective territoriality principle, please see Section1.3 of this report.

Territory, ICJ Gen. List No. 131, 9 July 2004). In the 2005, the Court held in the case *DRC v. Uganda* that Uganda was 'the occupying power' in one of the DRC's regions because Ugandan forces in the DRC substituted their own authority for that of the DRC. Thus, Uganda, as an occupying power, had substantial positive obligations under international law, which included the duty to secure the respect for the applicable rules of international human rights humanitarian law by other actors present in the occupied territory (Case Concerning Armed Activities on the Territory of the Congo (DRC v. Congo), ICJ Gen. List No. 116, 19 December 2005, esp. at para. 178).

The Inter-American Commission on Human Rights also found that military occupation established extraterritorial jurisdiction as a basis for responsibility under international human rights law (Ryan and Mitsilegas, p. 76). In *Coard et al v. US*, the Commission held the US responsible for human rights violations committed during the military action led by US armed forces in Grenada in October 1983, based on the 'personal control' that the US authorities exercised over the complainant. The Commission clarified that 'jurisdiction'

> "[m]ay, under given circumstances, refer to conduct with an extraterritorial locus where the person concerned is present in the territory of one state, but subject to the control of another state – usually through acts of the latter's agents abroad" (Coard et al. v. the United States, Case No. 10.951, Report No. 109/99, 29 September 1999, para. 37)

The European Court for Human Rights (ECrtHR) held in *Bankovic* jurisdiction is 'primarily' or 'essentially' territorial and any extension of jurisdiction outside the territory of the Contracting State as 'exceptional' and required 'special justification in the particular circumstances of each case'(*Bankovic v Belgium* (2001) 11 B.H.R.C. 435, para. 61.). In this case, the Grand Chamber of the ECrtHR held inadmissible a claim brought by six citizens of the Federal Republic of Yugoslavia against seventeen European countries that were members of the North Atlantic Treaty Organization (NATO). The Court came to the conclusion that there was no jurisdictional link between persons who were victims of the act complained of and the respondent States (Para 82). In contrast, in the recent *Al-Skeini* case, the Court held that the United Kingdom had jurisdiction under Article 1 of the European Convention on Human Rights (ECHR) in respect of civilians killed during British occupation in South East Iraq (Al-Skeini v the United Kingdom (55721/07) (2011) 53 E.H.R.R.18). The Court found that the 'exceptional circumstances' justifying the extension of jurisdiction outside the country's territorial boundaries existed in the case at issue because the United Kingdom, through its soldiers engaged in security operations in Iraq, during the period in question, exercised authority and control over individuals killed in the course of such security operations (para. 149).

1.11 WTO Law

The General Agreement on Tariffs and Trade (GATT) and other World Trade Organization (WTO) agreements do not regulate questions of extraterritorial application as such. However, WTO had an opportunity to make a pronouncement on measures having extraterritorial effect on several occasions.

One of the leading WTO cases on extraterritoriality is the *Shrimp Turtle* case (United States Import Prohibition of Certain Shrimp and Shrimp Products, 12 October 1998, wr/DS48/ABIR). In October 1996, India, Malaysia, Pakistan and Thailand challenged the US decision to ban shrimp imports from nations that do not require all of their shrimp trawlers to use Turtle Excluder Devices in their nets. The argument centred on whether US extraterritorial environmental measures were justified under Article XX of GATT, which allows any contracting party to adopt or enforce measures in certain instances, for example, for conservation of the exhaustible natural resources in conjunction with restrictions on domestic production or consumption under Article XX(g), provided that

> "[S]uch measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade."

The Panel considered the object and purpose of the WTO multilateral trading system. It held that the US legislation could not be justified under Article XX GATT because it constituted discrimination between countries where the same conditions prevailed (The Panel Report, United States – Import Prohibition of Certain Shrimp and Shrimp Products, WT/DS58/R, 15 May 1998, paras. 7.44, 7.52, 7.61.) The Appellate Body disagreed with the Panel's line of reasoning because the Panel failed to inquire specifically into how the application of the measure constitutes 'unjustifiable discrimination', but, rather focused on the consistency of the measure with the chapeaux of Article XX GATT (The Appellate Body Report, United States – Import Prohibition of Certain Shrimp and Shrimp Products, WT/DS58/AB/R, 6 November 1998, paras. 115-116). The Appellate Body held that the US conservation measure was justified under the specific exception of Article XX(g) since there was 'sufficient nexus' between the protected turtles and the US (paras 129-133). The Appellate body did, however, conclude in the end that the US measure failed to meet the requirements of the Article XX chapeau since the inflexible manner of application of the measure was 'unjustifiably discriminatory' (para 186). The Appellate body based its opinion on the US's failure to pursue an alternative course of action and negotiate with all of its partners prior to the introduction of the measure (paras 171-2).

Consequently, the WTO theoretically allowed the possibility of introducing an extraterritorial measure unilaterally, provided: "It falls within the one of the exceptions of Article XX GATT; and it is not discriminatory; and it is justified by the preceding negotiation attempts, seeking an alternative solution and consensus".

1.12 Securities Law

In a recent US case *Morrison v. National Australia Bank* the US Supreme Court explicitly held that the Securities Exchange Act of 1934 (15 USC. § 78a et sq.) is not immune to the presumption against extraterritoriality (Morrison v. Nat'l Austrl. Bank Ltd., 130 S. Ct. 2869, 2888 (2010)). The issue in *Morrison* was whether the Court had subject matter jurisdiction over the claim, despite the fact that neither the plaintiff nor defendant was an American citizen, and the misconduct occurred on a purely foreign exchange—not an American exchange.

The Securities Exchange Act of 1934 does not explicitly grant extraterritorial application. However, before *Morrison* was decided, lower courts interpreted the silence in the act as permission for federal courts to determine whether the act could apply extraterritorially (2878). The Supreme Court did not agree with this rule and sought to end this practice (2881). The Court held that there was a 'longstanding principle' that whenever Congress enacts legislation, it is only meant to apply within the US unless Congress indicates that its intent was otherwise (2877). The judges concluded that the provision of the Securities Exchange Act of 1934 is directed at actions abroad only to the extent that these actions might conceal a domestic violation, or might cause what would otherwise be a domestic violation (2883). The Court, thus, overturned extraterritorial application of the US Securities Exchange Act 1934.

1.13 Extraterritoriality in Federal States

Constituent elements of federal states – territories, states, provinces – also invoke extraterritoriality. The principles of extraterritoriality developed at the inter-state level are similar to those at the intra-state level, despite the absence of the aspect of sovereignty in the former.

For example, the Minnesota Supreme Court held that a wife, whose husband died in a motorbike accident in Wisconsin, was entitled to bring an insurance claim in Minnesota, regardless of the fact that the accident happened in Wisconsin and at the time of accident all parties were Wisconsin residents. The Court stated that there existed sufficient 'link' between the jurisdiction 'other than the *situs* of injury' (Minnesota) and the occurrence of the injury because the husband had worked in Minnesota for 16 years preceding his death and at all times insurer had been preset in Minnesota. The fact that husband did not die while commuting to work or while in Minnesota did not dictate a different result (Allstate Insurance Company v. Lavina Hague, 450 U.S. 971, 101 S.Ct. 1494).

With regards to the 'link' between jurisdictions, the Supreme Court of Canada stipulated that in order to determine the applicability of s. 275 of Ontario Insurance Act to the British Columbia insurer, "a real and substantial connection had to exist between the British Columbia and Ontario insurers." (Insurance Corporation of British Columbia v. Unifund Assurance Company, [2003] 2 S.C.R. 63, 2003 SCC 40.) The Supreme Court of New South Wales, Australia, held that a Victorian company is to be treated as a taxpayer in New South Wales if it uses the debentures issued to it in Victoria in order to secure a mortgage in New South Wales. 'Conducting business in New South Wales' was a sufficient link to that jurisdiction in the eyes of the Court (Broken Hill South Ltd v Commissioner of Taxation (NSW) [1937] 56 CLR. 337).

2. CASE STUDIES

The case studies presented within this study predominantly feature the United States. There are several reasons for this: the first is that US legislators have a far stronger preference that their political preferences, expressed via their legal code, to be enforceable outside of the US territorial space. So, there are far more examples within the US judicial code, than within the many levels of the EU's judicial codes. The preference for extraterritorial enforcement is evident in the examples given here regarding Cuba and Iran, where the considerable financial instruments of the US are used in support of the code to enforce the compliance of third parties. The second reason is that this study is interested in the operation of extraterritoriality, and in how it impacts on those who feel the reach of these laws outside of the originators' judicial area. For us, researching this in the EU, the impact on European industries, business and individuals was both empirically significant and of greater public policy interest. There are historic cases of where European governments (mostly prior to the formation of the Union) have enacted extraterritorial laws, and these are highlighted in the conceptual section of this study, above.

2.1 EU Emissions Trading Scheme, Directive 2008/101/EC

2.1.1 Background of the Measure

The European Union (EU) has long been committed to international efforts to combat climate change. In the 1986, the European Parliament passed its first resolution, calling for measures to counteract the rising concentrations of carbon dioxide in the atmosphere(Hansjuergens 2005, 135). In 2003, the EU adopted a Directive (2003 Directive) establishing a scheme for greenhouse gas emission allowance trading for the cost-effective reduction of such emissions (2003/87/EC). The EU introduced this scheme to reduce emissions in the context of the Kyoto Protocol, to which both the EU and its Member States are members.[8]

On 18 November 2008, dissatisfied with the perceived lack of progress surrounding aviation emissions, the EU adopted another Directive (2008 Directive) providing for the inclusion of aviation activities in the scheme for the emission allowance trading within the Community, established in 2003, but which had an extraterritorial dimension (Directive 2008/101; Directive 2003/87/EC; Bo 2011).

2.1.2 Legal Standards and Extraterritorial Reach

The objective of the 2008 Directive is to reduce the EU greenhouse gas emissions to at least 20 % below 1990 levels by 2020, recognizing that emissions from aviation is an essential contribution in line with this commitment (Para. 4 Directive 2008/101). The 2008 Directive included aviation in the scheme for the EU scheme for greenhouse gas emission allowance trading (Para. 12 Directive 2008/101) A certain amount of free allowances is to be issued to aircraft operators under the 2008 Directive. The allowances are to be allocated by auction (Para. 20 Directive 2008/101) The Directive stresses that the proportion of allowances issued free of charge shall ensure a level playing field for aircraft operators. As of 1 January 2012, the 2008 Directive is applicable to all flights arriving and departing from the EU aerodromes, including the flights departing to or from the third countries (Para. 16 Directive 2008/101).

2.1.3 Authorities Enforcing the Measure and Penalties for Violations

It is incumbent on Member States of the EU to be responsible for aircraft operators. The 2008 Directive provides

> "Member States should be required to ensure that aircraft operators which were issued with an operating licence in that Member State, or aircraft operators without an operating licence or from third countries whose emissions in a base year are mostly attributable to that Member State, comply with the requirements of this Directive" (Para. 26 Directive 2008/101).

Member States ensure that any aircraft operator who does not surrender sufficient allowances by 30 April of each year to cover its emissions during the preceding year is held liable for the payment of an excess emissions penalty of EUR 100 for each tonne of carbon dioxide emitted without surrendering the allowances. In addition to paying the excess emissions penalty, the aircraft operator must surrender an amount of allowances equal to those excess emissions when surrendering allowances in relation to the

[8] The Kyoto Protocol to the United Nations Framework Convention on Climate Change ('the Kyoto Protocol') was adopted on 11 December 1997 and entered into force on 16 February 2005. It has been ratified both by the then European Community (Decision 2002/358/EC) and by all 27 Member States of the European Union.

following calendar year (Article 16(3) Directive 2003/87/EC as amended by Directive 2008/101). 2008 Directive authorizes the administering Member State to apply the enforcement measures to an aircraft operator in cases of noncompliance with this Directive. If the enforcement measures are not successful, the administering Member State may request the European Commission to decide on the imposition of an operating ban at EU level on the aircraft operator concerned (Para. 26 Directive 2008/101).

2.1.4 Unsuccessful Challenge of the Measure in the ECJ

The Air Transport Association of America together with three American airlines challenged the validity of the 2008 Directive before the High Court of England and Wales. The English court referred the case to the ECJ. The claimants argued that the inclusion of international aviation in the EU's emissions trading scheme is incompatible with a number of principles of customary international law and with various international agreements (Opinion of Advocate General Kokott in Case C-366/10, The Air Transport Association of America and Others, 6 October 2011, para. 41). In particular, the claimants raised concerns regarding three issues (para 42):

1. The EU is exceeding its powers under international law by not confining its emissions trading scheme to wholly intra-European flights and by including within it those sections of international flights that take place over the high seas or over the territory of third countries;
2. Emissions trading scheme for international aviation activities should be negotiated and should not be introduced unilaterally;
3. The emissions trading scheme amounts to a tax or charge prohibited by international agreements.

On 21 December 2011, the ECJ rejected the claimants' arguments and held that the 2008 Directive is valid and does not violate international law. The Court specified that the 2008 Directive is not concerned with international flights 'as such', but only with those that arrive or depart from the airdrome of the EU (Judgement of the ECJ, Case C-366/10, The Air Transport Association of America and Others, 21 December 2011, paras. 116-118). The Court further explained that the 2003 and 2008 Directives cannot be applied to aircraft registered in third states that are flying over third states or the high seas because that would contravene the international principles of sovereignty and territoriality. However, when the aircraft is in the territory of one of the Member States and, more specifically, on an aerodrome situated in such territory, that the aircraft is subject to the unlimited jurisdiction of that Member State and the EU (paras 122-125).

As for the fact that the operator of an aircraft must surrender allowances calculated in the light of *the whole* of the international flight, the ECJ held that the EU legislature may in principle choose to permit a commercial activity, like air transport, to be carried out in the territory of the EU only on condition that operators comply with the criteria that have been established by the EU and are designed to fulfil the environmental protection objectives which it has set for itself. The fact that certain matters that contribute to the pollution of the air, sea or land territory of the Member States originate partly outside that territory does not call into question the full applicability of EU law in that territory (paras 128-129).[9]

In response to the claimants' third argument, the ECJ clarified that, unlike a duty, tax, fee or charge on fuel consumption, the scheme introduced by the 2003 and 2008 Directives is not intended to generate

9 In support of this argument, the ECJ invoked the Wood Pulp case. For more discussion of this case see Section 1.8 the Study.

revenue for the public authorities (para 143). The measures are still strongly opposed by the largest emitters of carbon dioxide (China, India and the United States) who contend that the EU is overreaching its legal competence by charging for the entire passage of a flight, and not just the European element of it. It is possible to see a resonance between this EU measure and those that will follow in this study from the United States. There are, however, pragmatic reasons for the EU to alter its position eg this measure is said to be having a negative impact on the potentially lucrative EU-India Free Trade Agreement, which is in the latter stages of negotiation.

2.2 US Legislation on 100% Ocean Cargo Scanning

2.2.1 Scope of the Measure

The pilot system for 100% scanning of ocean US-bound cargo containers in foreign ports was first introduced by the Security and Accountability For Every Port Act of 2006 (SAFE Port Act)(6 USC § 231). Under this statute, the Secretary of the Department of Homeland Security, an authority tasked with the implementation of the measure, was supposed to designate 3 distinct foreign seaports through which containers pass to the US for the establishment of pilot integrated scanning systems that couple nonintrusive imaging equipment and radiation detection equipment(6 USC § 231(a)). The Appropriations for the Department of Homeland Security Act of 2007 rescinded total of USD 5,000,000 from the US budget to pay for the pilot program (H.R.5441 § 559).

The SAFE Port Act provided for international cooperation and coordination in implementing the pilot scanning system in foreign ports. This act authorized Secretary of the Homeland Department to provide technical, financial and personnel training assistance to domestic and foreign ports (6 USC § 233). The SAFE Port Act envisaged full scale implementation of 100% scanning of all ocean US-bound cargo containers in foreign ports, *but not before* the Secretary of the Department of Homeland Security determines that the integrated scanning system:

1. Has achieved full scale implementation at the pilot level;
2. Has a sufficiently low false alarm rate for use in the supply chain;
3. Is capable of being deployed and operated at ports overseas;
4. Is capable of integrating, as necessary, with existing systems;
5. Does not significantly impact trade capacity and flow of cargo at foreign or United States ports; and
6. Provides an automated notification of questionable or high-risk cargo as a trigger for further inspection by appropriately trained personnel (6 USC § 232 (b)).

The SAFE Ports Act was amended the following year by the Implementing Recommendations of the 9/11 Commission Act of 2007 (H.R.1 § 1701). President Bush stated, when signing this bill, that "[t]his legislation builds upon the considerable progress we have made in strengthening our defenses and protecting Americans since the attacks of Sept. 11." (August 2007).

The amendment introduced a fixed deadline for the full-scale implementation of the measure - 1 July 2012 - after which, no container loaded on a vessel in a foreign port shall enter the US unless it was scanned by nonintrusive imaging equipment and radiation detection equipment at a foreign port before it was loaded on a vessel (H.R.1 § 1701 (b)). The results of the pilot programs were not awaited. The fixed deadline is subject to a two-year extension, which can be further renewed in two-year increments (H.R.1 § 1701 (b)(3)). Extensions are to be granted if at least two of the conditions that roughly equivalent to conditions in the § 232 (b) SAFE Ports Act (outlined above) are not met (H.R.1 § 1701 (b)(4)).

2.2.2 Implementation of 100% Container Scanning

In 2009, Department of Homeland Security Secretary Janet Napolitano told the House of Representatives Homeland Security Committee that 100% scanning of inbound ocean containers will not meet the 2012 deadline.

On 7 February 2012, Stephen Caldwell from the US Government Accountability Office released a statement to a House of Representative's Homeland Security Border and Maritime Security subcommittee. Cadwell announced that container security programs have matured, but uncertainty persists over the future of 100% scanning. The statement acknowledged some progress in developing and implementing container security technologies. However, the pilot program revealed a number of logistical, technological, and other challenges that create an uncertainty in the fulfilment of the mandate for 100% scanning. Cadwell pointed out that the scope of the pilot program to test the viability of the requirement was reduced from six ports to one. One should expect that by 2 May 2012, the Department of Homeland Security requests US Congress to grant a blanket extension to all foreign ports pursuant to the statute, thus extending the target date to July 2014 (Committee on Homeland Security, 7 February 2012).

2.2.3 Extraterritorial Implications of the Measure

Since its adoption, the legislation has provoked an international debate and drawn strong reservations from the business community, national governments and security specialists worldwide, particularly as the measures impose significant compliance costs upon European companies and disruption to global cargo flows: an additional cost to European businesses. The European Commission has carried out an assessment of the potential impact of the 100% scanning requirement on European trade, transport and customs security (European Commission February 2010). This assessment concluded that "implementing 100% scanning would require sizable investments, increase transport costs significantly and entail massive welfare losses. More importantly, such burdens to port authorities, companies and ultimately consumers worldwide would be for no proven security benefit." The two main concerns of the European Commission are the unilateral and extraterritorial measure (i) creates a false sense of security creates by diverting resources from other essential measures; and (ii) carries the high potential of trade and transport disruption of within the EU and globally, at high cost (European Commission Comments on 100 % scanning Annex to note n° TAXUD/SM/D(2008) 12145, 4 April 2008).

US officials appear to recognize the difficulties with implementing 100% scanning of containers, and the Department of Homeland Security have now moved the deadline for implementation out to 2014. The extraterritoriality of the US legislation may be entirely mitigated by an unpublished Council document (6759/12) dated 23 February 2012 which outlines an EU-US agreement to create common recognition around the Authorised Economic Operator (AEO) and Customs-Trade Partnership Against Terrorism (C-TPAT) frameworks. The document also establishes common standards and enforceability for all operators using US and EU ports. Such a measure removes the extraterritoriality of the original US legislation and replaces it with what can be viewed as a common business compliance cost for trading with the EU and US.

2.3 US PNR Legislation

2.3.1 Background and Scope of the Measure

US law empowers the Department of Homeland Security to require each air carrier operating passenger flights to and from the US, to provide it with electronic access to Passenger Name Record (PNR) data prior to the passenger arriving or leaving the US.[10] The Aviation and Transportation Security Act of 2001, enacted shortly after the attacks of 11 September 2001, contains this requirement.

This statute stipulates that each air carrier operating a passenger flight in foreign air transportation to the United States shall provide, in advance of the aircraft landing in the US, to the Customs Service by electronic transmission a passenger and crew manifest containing the following information" (49 USC. § 115 (c)(1)(2)(4):Title 19, Code of federal regulations, § 122.49(b).).The full name of each passenger and crew member; the date of birth and citizenship of each passenger and crew member; the sex of each passenger and crew member; the passport number and country of issuance of each passenger and crew member if required for travel; the US visa number or resident alien card number of each passenger and crew member, as applicable; such other information as the Under Secretary, in consultation with the Commissioner of Customs, determines is reasonably necessary to ensure aviation safety. This information may be shared with other federal agencies for the purpose of protecting national security (49 USC. § 115 (c)(5).)

2.3.2 US-EU PNR Agreement

The data protection laws of the EU do not allow European and other carriers operating flights from the EU to transmit the PNR data of their passengers to third countries, which do not ensure an adequate level of protection of personal data without adducing appropriate safeguards. A solution is currently required that will provide the legal basis for the transfer of PNR data from the EU to the US as recognition of the necessity and importance of the use of PNR data in the fight against terrorism and other serious transnational crime, whilst avoiding legal uncertainty for air carriers.

The EU signed an agreement in 2007 with the US on the transfer and processing of PNR data based on a number of commitments by US Department of Homeland Security (OJ L204/16, 4.8.2007). The European Parliament, however, decided to postpone its vote on the consent for the conclusion of the agreement. The Parliament requested renegotiation based on a set of criteria, including the requirement (i) to demonstrate the necessity and proportionality of the mass collection and storage of data, as well as (ii) to limit the purposes of such collection strictly to fight with terrorism and other serious transnational crime (European Parliament Resolutions, 5 May & 11 November 2010). The 2007 Agreement remains provisionally applicable, pending the renegotiation.

After a new round of negotiations in 2011, the European Commission initialled the new US-EU PNR Agreement and sent a recommendation to EU Council on 23 November 2011[11] to sign and conclude the Agreement. Council adopted the Agreement on 13 December 2011, and the Agreement was signed

[10] Explanatory Note to Draft Council decision on the conclusion of the Agreement between the United States of America and the European Union on the use and transfer of Passenger Name Records (PNR) to the United States Department of Homeland Security, 23 November 2011, (17433/2011 – C7-... 2011/0382(NLE)).

[11] Draft Council decision on the conclusion of the Agreement between the United States of America and the European Union on the use and transfer of Passenger Name Records (PNR) to the United States Department of Homeland Security, 23 November 2011, (17433/2011 – C7-... 2011/0382(NLE)).

and sent to the European Parliament with a request for consent.[12] The US-EU PNR Agreement report was presented in the European Parliament's Civil Liberties, Justice and Home Affairs committee meeting of 27 February 2012 by rapporteur Sophia In 't Veld MEP who recommended the European Parliament to withhold its consent. The main areas of committee's concern are the following:

- The necessity and proportionality of the mass collection and storage of data is insufficiently demonstrated by the European Commission;
- The purposes of collecting data using PNR (Article 4 of the Agreement) are defined too broadly and go beyond preventing, detecting, investigating, and prosecuting terrorism and serious transnational crimes;
- Indefinite retention of PNR data (Article 8 of the Agreement) is inadequate;
- Article 6 of the Agreement allows for the full and unrestricted use of sensitive data;
- The onward transfer of data by the recipient country to third countries (Article 17 of the Agreement) is not yet in line with EU standards on data protection.

As we conclude in Section 5, the absence of reciprocity within the US-EU PNR proposals is alarming, particularly in the light of the loss of control of the data pertaining to EU citizens within the transfer. Within bilateral intelligence and security relations, information akin to PNR data would be tradable, rather than merely provided. This is particularly the case given the impact it has on the privacy rights of European citizens. The EU Commission seems, from the outside, to have underplayed its negotiating hand in these arrangements.

2.4 Helms-Burton Act 1996

2.4.1 Background of the Helms-Burton Act

On 12 March 1996, President Clinton signed into law the Cuban Liberty and Democratic Solidarity (Libertad) Act of 1996 (referred to as the Helms-Burton Act) (22 USC). This was the latest in a series of legislative initiatives since the US proclaimed a trade embargo against Cuba in 1962 (Foreign Assistance Act of 1961, 22 USC. § 620 (a).) The Helms-Burton Act expanded the Cuban embargo to foreign corporations with no connection to US ownership. Its primary target was the growing number of joint ventures between non-US multinational corporations and Cuban state-owned enterprises Rodman 2001, 176).

The Helms-Burton Act amounts to the secondary boycott of foreign companies investing in Cuba; the approach previously condemned by the US in relation to the Arab League's boycott of foreign companies trading with Israel (Rodman 2001, 172). Unlike primary boycott, which is limited to the sender state's territory, the secondary boycott targets the world at large, penalizing anyone who deals with the enemy.

[12] Draft Recommendation on the draft Council decision on the conclusion of the Agreement between the United States of America and the European Union on the use and transfer of Passenger Name Records (PNR) to the United States Department of Homeland Security (17433/2011 – C7-... – 2011/0382(NLE)), Committee on Civil Liberties, Justice and Home Affairs, rapporteur Sophia In 't Veld, 2011, 30 January 2012.

2.4.2 Legal Standards and Extraterritorial Reach

The Helms-Act contains four broad titles dealing with different aspects of US relations with Cuba:

1. Title I contains provisions aimed at tightening the economic embargo against Cuba, including a prohibition against indirect financing of Cuba (22 USC. § 101-116);
2. Title II lays out a set of criteria (including the establishment of the transitional government) that must be met by a post-Castro Cuban government for the embargo to be suspended, including the establishment of an independent judiciary and free trade unions (22 USC. § 201-207);
3. Title III creates a private right of action that empowers US citizens, including naturalized Cuban Americans, to sue foreign corporations for damages for 'trafficking' in properties confiscated after the Cuban revolution (22 USC. § 301-306);
4. Title IV empowers the Secretary of State to exclude from the US of aliens who have confiscated property of US nationals or who traffic in such property (22 USC. § 401).

The most controversial Titles III and IV are aimed specifically at deterring joint ventures (Rodman 2001, 177). The term 'trafficking' under Title III was consciously borrowed from drug-related filed to stigmatize what foreign businesses saw as regular investment opportunities (Rodman 2001, 172). Title III may be suspended by the US President for six months (22 USC. § 306). Presidents Clinton, Bush, and Obama have each found ways to issue waivers under this title every six months since the enactment of Helms-Burton (Bearden 2001). Title IV does not allow for the Presidential waiver similar to the one envisaged by Title III. To date, only the executives of three companies have received exclusion notices. Of the three companies, to be sent such notices, only Sherritt International, a Canadian mining company, has actually had any executives banned from the US (Bearden 2001).

2.4.3 Reactions to the Helms-Burton Act

The Helms-Burton Act raised worldwide concern (Shaw 2008, 693). One of the major points argued by academics and states alike (Troia, 1997) is that, from international law point of view, the extraterritorial effect of the Helms-Burton Act cannot be sustained because it falls outside of the scope of valid jurisdiction bases that US recognizes under international law.[13] The effects principle, as the only basis for potential US jurisdiction under the Helms-Burton Act, requires that the foreign conduct has, or is intended to have, a *substantial* effect within the United States. However, foreign investments in Cuba do not have a substantial effect on the United States.

Many countries regard Helms-Burton as a barrier hampering trade and investment. Canada (Foreign Extraterritorial Measures Act 1996, ch.28), Mexico (Law for the Protection of Trade and Investment 1996) and the European Union (Council Regulation 2271/96 Protecting against the Effects of the Extra-territorial Application of Legislation Adopted by a Third Country) adopted blocking and claw-back legislation. For example, the main elements of the Canadian blocking legislation include (i) permitting the attorney general to block the enforcement in Canada of foreign judgments rendered under Helms-Burton Act; and (ii) giving Canadian companies recourse in Canadian courts if awards are made against them in US courts (Roy 2000, 88). The Mexican claw-back provisions prohibit, *inter alia*, acts derived from the extraterritorial effect of foreign laws and supply of information requested by foreign courts (Roy

[13] These principles are i) territoriality; (ii) nationality; (iii) the protective principle; (iv) the passive personality principle; and (v) effects principle. See Restatement (third) of the Foreign Relations Law of the United States, § 402 (1986). For the description of these principles see Sections 1.3-1.8 of the Study.

2000, 93). Such measures are technically available to be repeated in the Iranian case studies presented later in this study, should the international situation change.

Both Canada and the EU were prepared to fight the battle on legal grounds within NAFTA and under the WTO dispute settlement procedures, respectively (Smis 1999). The EU challenged Helms-Burton as a discriminatory trade practice and initiated grievance proceedings before the WTO, which, however, never heard the EU-US dispute (Rodman 2001, 179). The EU allowed its WTO grievance to lapse in exchange for the US commitment (i) to obtain a permanent waiver under Title III; and (ii) to continue working on obtaining a permanent waiver under Title IV with respect to the EU.[14] However, these permanent waivers have not been granted up to this point.[15]

2.5 Sarbanes-Oxley Act 2002 (SOX)

2.5.1 Background of the SOX

The SOX (11, 15, 18, 28, and 29 USC (Pub.L. 107-204, 116 Stat. 745]), also known as the 'Public Company Accounting Reform and Investor Protection Act', was enacted in 2002. The statute created new or enhanced standards for all US public company boards, management and public accounting firms. The SOX attempts to (i) capture a broad range of conduct within its provisions; and (ii) encourage greater self-policing of behaviour not specifically captured within its provisions through the adoption by companies of corporate codes of ethics (Harvard Law Review, 2003, 116, 2123).

The statute is a response to a number of significant corporate and accounting scandals including those affecting Enron, Tyco International, Adelphia, Peregrine Systems and WorldCom. The legislators hoped that the introduction of the SOX will restore investors' confidence in the US securities market (Harvard Law Review, 2003, 2123).

2.5.2 Authorities Enforcing the SOX

The Securities and Exchange Commission ('SEC') and the Public Company Accounting Oversight Board ('Board')(15 USC § 101)[16] are responsible for the enforcement of the statute. The SEC is responsible for the promulgations of rules and regulations that are necessary or appropriate in the public interest or for the protection of investors, and in furtherance of the SOX (15 USC § 3). The SEC has oversight and enforcement authority over the Board (15 USC § 107(a).). The duties of the Board include

1. Registering public accounting firms that prepare audit reports for issuers;
2. Establishing or adopting auditing, quality control, ethics, independence, and other standards relating to the preparation of audit reports for issuers;
3. Conducting inspections of registered public accounting firms;
4. Conducting investigations and disciplinary proceedings and imposing appropriate sanctions upon registered public accounting firms;

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[14] EU-US Understanding with Respect to Disciplines for the Strengthening of Investment Protection, 18 May 1998, Part II (4), (5).

[15] See, for example, Market Access Database, Helms-Burton Act, 20 February 2008, http://madb.europa.eu/madb_barriers/barriers_details.htm?barrier_id=960295&version=2, accessed on 24 February 2012.

[16] Established under to "to oversee the audit of public companies that are subject to the securities laws, and related matters, in order to protect the interests of investors and further the public interest […]".

5. Enforcing compliance with the SOX, the rules of the Board, professional standards, and the securities laws relating to the preparation and issuance of audit reports by registered public accounting firms (15 USC § 101(c).).

2.5.3 Legal Standards and Extraterritorial Reach

The SOX applies to:

- 'issuers'; [17]
- 'listed companies; '[18]
- 'auditors' (independent public accounting firms that examine the financial statements of any issuer in accordance with the established rules for the purpose of expressing an opinion on such statements); [19]
- In some respects to 'foreign companies' (investment companies registered under the Investment Company Act of 1940 and public companies domiciled outside of the US).

Thus, the SOX applies to any public company whose securities are registered or listed in the US. The extraterritorial effects of the SOX include:

- The implied consent by foreign accounting firms issuing audit reports to produce audit work papers for the Board or the SEC in relation to investigations of either body; and to subject themselves to the jurisdiction of the US courts for purposes of enforcement of any request for production of such work papers (15 USC § 106(b)(1).);
- The requirement that the CEO and CFO of the issuer sign and certify periodic compliance reports under the Securities Exchange Act of 1934 (15 USC § 302(a).). This requirement is not alleviated in cases when the issuer reincorporates or engages in any other transaction that results in the transfer of the corporate domicile or offices of the issuer from inside the US to outside of the US(15 USC § 302(b).);
- The requirement that each financial report under the Securities Exchange Act of 1934 is prepared in accordance with generally accepted accounting standards (15 USC § 401(a).

The requirements under the SOX may generate conflicts with national laws of countries, where the auditors and issuers have their registered offices. For example, the obligation of public accounting firms to disclose all documents in connection with the investigations conducted by the SEC or the Board may lead to conflicts with the some national confidentiality rules protecting confidentiality of the issuer (the one under investigation) and various third parties, whose interests may be affected by the investigations.[20] The SOX measures are, however, concerned with the regulation of a domestic market and might therefore be seen as a business compliance cost.

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[17] 'Issuers' include companies with securities registered with the Securities Exchange Commission under § 12 of the 1934 Securities Exchange Act or companies that must file reports under § 15(d) of the 1934 Securities Exchange Act.

[18] Some SOX provisions apply only to 'listed companies' - companies listed on a national securities exchange, which is an exchange registered as such under 1934 Securities Exchange Act §6.

[19] 15 USC § 2(a)(2). Foreign public accounting firms preparing audit reports for 'issuers'. These firms are subject to the registration and oversight regime. See 15 USC § 106(a)(1).

[20] See, for example, Article 730 Swiss Code of Obligations, Article 321 Swiss Penal Code and Article 47 Swiss Banking Act.

2.5.4 Penalties and Additional Measures Taken for SOX Violations

A violation of the SOX, or of any rule of the SEC or the Board, issued under the statute, is treated in the same manner as a violation of the Securities Exchange Act of 1934 (15 USC § 3(b)(1).). This means that, unless a different penalty is foreseen for a specific violation, a company that violates the SOX provisions may be required to pay civil or criminal fines. US individuals or foreign nationals who violate the statute may be subject to fines or imprisonment for a period of up to twenty years (78a USC § 21). Moreover, the violation of the SOX may lead to the delisting of a company that does not comply with the securities laws. In addition to that, public accounting companies ('auditors') that refuse to testify, produce documents, or otherwise cooperate with the Board in connection with the investigations under the SOX may face the suspension or revocation of the company's registration. The Board may also suspend or prohibit individuals associated with these companies from being associated with a registered public accounting firm (15 USC § 105(b)(3).).

2.6 Foreign Corrupt Practices Act 1977 (FCPA)

2.6.1 Background of the FCPA

The FCPA (codified at 15 USC. §§ 78dd-1, 78dd-2, 78dd-3, 78ff, 78m(b), (d)(1), (g)-(h) (2000).) was enacted by the US Congress in 1977 as part of the 1934 Securities Exchange Act. The statute imposes criminal and civil liability for (i) the bribery of foreign (i.e., Non-US) officials; (ii) the failure of 'issuers' (Serafini 2004, 40, 721 & 726) to maintain books and records that accurately reflect the disposition of company assets; and (iii) the failure of 'issuers' to institute proper internal controls concerning the authorization of transactions.

The FCPA is widely considered being a by-product of the Watergate scandal that revealed, among other things, certain unreported campaign contributions. This caused the US Securities and Exchange Commission to investigate undisclosed corporate payments to domestic and foreign governments and politicians. As part of a voluntary disclosure program, over 200 corporations (mostly Fortune 500 companies) admitted to making questionable payments to foreign government officials of over USD 300 million. This caused Congress to enact criminal and civil penalties for such illicit foreign payments made in exchange for business.

The FCPA was amended in 1988 to add two very narrow affirmative defenses for (i) value provided to a foreign government official in accordance with the written laws of that official's country; and (ii) reasonable and bona fide expenditures directly related to either promotion, demonstration, or explanation of products and services or execution/performance of a contract with a foreign government agency.

2.6.2 Legal Standards and Extraterritorial Reach of the FCPA

FCPA contains provisions prohibiting bribery of foreign officials and provisions on the accounting practices. The anti-bribery provisions prohibit directly or indirectly offering, paying, promising, or authorizing the payment of money or anything of value to a foreign official in exchange for business. 'Foreign official' under the FCPA is defined as:

> "Any officer or employee of a foreign government or any department, agency or instrumentality thereof, or of a public international organization, or any person acting in an

official capacity or on behalf of any such government, department, agency or instrumentality or for, or on behalf of any such public international organization."(15 USC. § 78dd-1(f)(1)(A).).

This definition includes individuals appointed by a foreign head of state or by the head of an executive department, individuals whose day-to-day performance is supervised by a governmental authority, foreign legislators, officials of foreign municipalities, accountants, lawyers, other professionals acting on behalf of a government entity (e.g., physicians in publicly-owned hospitals), military officials, officials of state-owned companies and/or consortiums (of particular relevance in oil and gas contexts and circumstances in which privatization is in progress), certain officers of non-governmental organizations, and non-US political parties and candidates for political office outside the United States.

The prohibition applies to the following 'persons' or 'covered entities:' 'issuers; ' 'domestic concerns' (business entities, including any corporation, partnership, association, joint-stock company, business trust, unincorporated organization, or sole proprietorship organized under US laws or with their principal place of business in the United States, as well as any individual 'who is a citizen, national or resident of the United States)' and; persons, other than issuers or domestic concerns, who commit an act in furtherance of a violation of the FCPA 'while [they are] in the territory of the United States.' (15 USC. § 78dd-2(h)(1).)

A violation of the anti-bribery provisions requires proof of the following elements (Serafini 2004, 732-3): A person (including any officers, directors, employees, agents, or shareholders acting on behalf of an issuer, domestic concern, or person) or covered entity; That makes use of the mails or any means or instrumentality of interstate commerce; In furtherance of an offer, payment, promise to pay, or authorization to pay anything of value; To any foreign official, any foreign political party or official thereof, or any candidate for foreign political office, or other person knowing that the payment to that other person would be passed on to a foreign official, foreign political party or official thereof or candidate for foreign political office; Inside the territory of the United States or, for any US issuer or domestic concern, outside the United States; To corruptly influence any official act or decision, induce an action or an omission to act in violation of a lawful duty, or to secure any improper advantage, or induce any act or decision that; Would assist the company in obtaining, retaining, or directing business to any person.

The extraterritorial effect of the FCPA manifests itself in that parent issuer corporations and joint venture partners who are 'covered entities' can be held civilly and criminally liable for improper payments made by their subsidiaries or joint ventures. Such liability is possible if, for example, the issuer's subsidiary or joint venture makes improper payments, and the parent, member of the joint venture, or its employees 'authorized, directed, or controlled the activity in question.' Moreover, the US Securities and Exchange Commission has taken the position that a company has a duty to inquire if it finds information suggesting a possible FCPA issue. The government may prove a company had knowledge of FCPA violations by demonstrating a 'deliberate ignorance' or 'conscious disregard.' (Low & Tiller 2002, 6: Tarum 2005). The measures should be seen in the context of the laws of other countries, like the UK, which have adopted similar measures, and in the light of the OECD recommendations on bribery, and they comparatively speaking do not sit outside of this legal norm.

2.6.3 Penalties and Additional Measures Taken for FCPA Violations

A company that violates the FCPA's anti-bribery or accounting provisions may be subject to criminal fines and punishment, civil fines, and disgorgement. Specifically, a company that violates the anti-bribery provisions may be required to pay civil or criminal fines, or to net profits associated with the improper transactions. US individuals or foreign nationals who violate the FCPA's anti-bribery provisions or accounting provisions are subject to criminal and civil fines, as well as imprisonment for a term of up to five or up to twenty years, depending on the violation. In addition to penalties for violating the FCPA itself, a corporation violating the FCPA exposes itself to a number of related consequences. One of the most significant effects of violating the FCPA is the possibility of administrative sanctions. Indictment of a company can result in a suspension of its right to conduct business with the US government or its agencies (Zarin 2007). The US government may also revoke licenses and permits necessary to conduct one's business. This may effectively prevent a company from operating until an FCPA investigation is concluded. Indictment for bribery may also result in the suspension of a party from federal financial assistance and other non-financial benefits (Zarin 2007).

2.6.4 Authorities Enforcing FCPA Offenses

Both the US Department of Justice and the US Securities and Exchange Commission enforce the FCPA. The Department of Justice has responsibility for all criminal enforcement of the FCPA (including criminal enforcement against issuers)(H.R. Rep. No. 95-640, p. 9, 12 (1977).). The Securities and Exchange Commission has responsibility for civil enforcement of the anti-bribery and accounting provisions in cases involving issuers (15 USC. § 78u (2000).) The Department of Justice and the Securities and Exchange Commission cooperate in bringing enforcement actions for violations of the FCPA.

The past decade has seen increasingly aggressive enforcement of the FCPA. This is no accident. Rather, it is the result of a deliberate effort by the Department of Justice and the Securities and Exchange Commission to encourage compliance with the FCPA. Mark Mendelsohn, the Department's deputy chief of the fraud section, reported that in late May 2009 as many as 120 companies were under investigation on suspicion of FCPA violations, compared with 100 at the end of the previous year (Mendelsohn 2009). Companies with global operations are clearly affected by enhanced FCPA enforcement. The current increase in investigations and prosecutions has resulted from the US government's broad interpretation of the FCPA's text, and its insistence that parent companies are responsible for the actions of their foreign subsidiaries. Courts align with the government in the broad interpretation of the FCPA provisions.

For example, both the government and the US Fifth Circuit Court of Appeals have broadly interpreted the term 'obtain or retain business' under the anti-bribery provision to include payments to government officials that are only loosely connected to a business purpose. In *United States v. Kay*, the District Court for the Southern District of Texas dismissed an indictment for violation of the FCPA after the defendant argued that payments made to Haitian officials to reduce customs duties and sales tax on rice shipped to Haiti were not made to obtain or retain business because no government contract was sought. On appeal, the government successfully argued that such payments were within the scope of the FCPA's statutory language because the FCPA 'covers payments that indirectly advance the payor's goal of obtaining or retaining foreign business.' The government reasoned that a reduction in duties and taxes is the type of advantage that 'always will assist in obtaining or retaining business in a foreign country.' Relying on the FCPA's legislative history, the Fifth Circuit stated that the FCPA applies 'broadly to payments intended to assist the payor, either directly or indirectly, in obtaining or retaining business.' (359 F.3d 738, 755 (5th Cir. 2004).).

3. US SANCTIONS ARCHITECTURE AND IRAN – CONTEXT POINT:

Legal and political measures taken by the United States against Iran have been targeted at creating three main effects: 1) the halting of the Iranian regime's efforts to acquire a militarised nuclear capability and – latterly - to frustrate the acquisition of sophisticated conventional weapons, 2) to promote western style modes of governance and equality norms within Iran and 3) to try and curtail Iran's support for organisations and political ends that run contrary to the core national interests of the United States and their allies. The legislative actions examined within this section all contain an extraterritorial component, based on US legislators' beliefs that non-proliferation and democratic governance norms are universally applicable.

3.1 Iran-Libya Sanctions Act (amended in 2006 to the Iran Sanctions Act)

The Iran Sanctions Act (ISA) is one of the key elements of the US sanctions regime against Iran. The ISA places penalties and sanctions upon entities outside of the US if they breach the prescriptions in the Act. So, whilst the US cannot force these entities to comply with the terms it is able to restrict access to markets and financing to force compliance through indirect avenues, and in that way it aims to steer third countries behind its unilateral sanctions regime. Many of the companies affected by these provisions are based in countries allied to the US, including the EU.

The various iterations of the ISA, including the most recent version, aims to restrict the resources Iran has available for its nuclear programme and for its well-known efforts in supporting enemies of Israel (America's key strategic ally in the region) such as Hizbollah, Hamas, and Palestine Islamic Jihad. The ISA targets Iranian energy industries, of which the petroleum sector generates about 20% of Iran's GDP (which is about €670 billion), 80% of its exports, and 70% of government revenue. The oil fields in Iran are increasingly difficult and expensive to exploit due to the maturity of oil extraction in the country, but energy expects still assess that Iran has 130billion barrels of proven oil reserves, making it the third largest in the world. Iran also possesses an under-exploited natural gas reserve of over 900 trillion cubic feet which is only exceeded by Russia. This reserve has remained underexploited due to the sanctions regime that has been in place since the mid-1990s.

3.1.1 Legal Framework and Application

Despite its extraterritorial ambitions, the ISA does not try to force non-US governments to take action against companies registered in its jurisdiction breaching the terms of the ISA. However, it empowers the President to restrict access to American markets and in a myriad of indirect ways to negatively impact on the company's ability to raise finance in the international markets and this extraterritoriality is an indirect way for the US Administration to bring third countries into compliance with what it sees as a set of universal principles that Iran is assessed to be breaking.

The ISA requires the President to sanction non-US entities who make an "investment", meaning not just equity ownership but also income or potential income from developing petrol resource of more than $20 million (€15million) in one year (ISA s.14[9]). The CISADA amends the definition of investment to include transportation pipelines to or through Iran and any contracts which lead to the upgrade or expansion of Iranian energy facilities. The CISADA forces the US Administration to act upon information that suggests a violation of the ISA (CISADA S.102(g)[5]), and compels them to make a determination on the facts within 180days, to provide certainty to those companies under investigation. There are two aspects of this legislation that are yet to be tested in court: what constitutes information credible enough to spur a mandatory investigation (although unless there are strategic reasons not to do so the presumption would be to investigate) and the second is under what conditions new information would spur a reinvestigation.

The ISA did not originally ban sales of petrol and equipment associated with petrol, nor did it deal with Iran's investment in Asian petrol refineries (e.g. China, Indonesia, Malaysia and Singapore). The impact of a ban of the sale of petrol and equipment needed in the petrol industry (at a level prescribed by CISADA of trade of $1m (€760k) or a one year trade of $5m (€3.8m) was seen as an area that would have an impact on the Iranian economy and political system as, paradoxically, the Iran imports 40% of its petrol from abroad. There is conflicting evidence from energy security experts about whether the Iranian government can mitigate the effects through the introduction of internal market controls.

The ISA was extended by Executive Order 13590, issued on 21 November 2011.[21] The Executive Order was issued under the International Emergency Economic Powers Act (IEEPA), and it provides the Secretary of State the power to impose one of the penalties allowed under the ISA if a foreign company provides: $1 million or more (or $5 million in a one year period) worth of goods or services that Iran could use to maintain or enhance its energy industry(Executive Order 13590, 1(b).). As such the activity of many multinational oil companies are brought under the Act.

3.1.2 The Impact of the ISA

There have been two rafts of recent rulings concerning companies investigated under the provisions of the ISA. The first of these were published on 30 September 2010, and within this determination it was notable that four multinational energy companies were given temporary reliefs from the punitive provisions of the ISA because they had issued formal, but unpublished undertakings to end their business engagements in Iran. This formal pleading had been accepted; it was said, because of the unreasonable costs on these companies of withdrawing from Iran without notice. Of these four companies, three are based in the European Union: Total of France, ENI of Italy, and Royal Dutch Shell of the UK and Holland. For information, the fourth is Statoil of Norway, who – as a trading state – of course retain special trading relations with the EU.

In May 2011 the US Administration issued its first sanctions under CISADA[22], whilst President Obama issued an Executive Order placing the responsibility for enforcing the financial penalties under ISA (bans on credits, foreign exchange and loans, or imports) to the US Treasury Department (Executive Order 13590, 3(a).). Of the seven companies cited and penalised in May 2011 three could be described as being in the European area, although registered within tax-havens (for a full list please refer to Appendix 1).[23]

[21] It remains untested in court as to whether the 180 day time provisions apply to this Order.

[22] For the full account of the evidence behind the penalties see: US Department of State (24 May 2011), Seven Companies Sanctioned Under the Amended Iran Sanctions Act (http://www.state.gov/r/pa/prs/ps/2011/05/
164132.htm)

[23] It also remains untested in court as to how the ISA applies to companies which have a significant or insignificant element of their shares owned by the Iranian government or proxies for the Iranian government (such as investment vehicles). It would require further research to ascertain the impact to the EU of this.

3.2 Iran Freedom Support Act (extending the provisions of ILSA until 2011)

The Iran Freedom Support Act 2006 (IFSA), provided an extraterritorial platform from which the US President could support non-violent programmes that supported the hoped for transition from Iranian theocracy to western style modes of governance. The Act also signaled the US' opposition to the Iranian government's desire to acquire weaponised nuclear technologies, and what the Act describes as sophisticated conventional weaponry. The Act does so by imposing a bar on creating instruments of cooperation with governments who support Iran in this way, and also allows the Administration a flexible approach to applying sanctions and penalties to countries assisting Iran's WMD programmes.

3.2.1 The IFSA applied

Iran Freedom Support Act 2006, provides a framework under which sanctions can be applied to non-US entities assisting Iran in acquiring and advancing a sophisticated weaponry programme and nor to assist in the development of the Iranian energy sector. There was a sunset clause in place timed for 30th December 2011 (s.204), and the IFSA is due to be replaced by the *Iran, North Korea, and Syria Sanctions Consolidation Act 2011 (S. 1048)* which is still under consultation at the time of writing.

The Act makes clear within S.301. (1) that the United States will 'support efforts by the people of Iran to exercise self-determination over the form of government of their country; and 2) to support independent human rights and peaceful prodemocracy forces in Iran'. It was similarly clear that these provisions did not provide support for the use of force against Iran which would require separate legislative provision (s.302). The initial funding for this stream of activity was placed at $10millions, but additional resources of up to $75millions have been mooted through Congress (Barry 2006), which would amount to a substantial resource to those wishing to seek a change in the style of governance or regime change in Iran. It is this latter provision that is crucially important in the current climate concerning the diplomacy over the Iranian nuclear weapons programme.

S.401 is, however, potentially problematic not only for non-US governments, but also for the US Administration. The section states that the US will not enter into agreements of cooperation with any country supplying Iran with materials helpful to the construction of nuclear weapons technology, nor that is supplying sophisticated conventional weaponry. It amended the Iran Sanctions Act (see above) so that sanctions be applied to any entity that sells Iran weaponry classed as 'weapons of mass destruction' or a 'destabilizing number and type' of advanced conventional weaponry (PL 109-293). The problem may arise because of China's role in supplying Iran with a sizeable quantity of conventional weaponry (estimated at €240millions between 2006-11), running in tandem with the US Administration's attempts to build some levels of cooperation with the Chinese government, most recently in May 2011 when the two sides met in the US and concluded a security and economics framework agreement (Schneider & Sheridan, 11 May 2011). Improving relations with China will inevitably override the desire to try and use the measures included in the Iran Freedom Support Act, particularly given the amount of US debt owned by China. In this sense China is the awkward example for the IFS Act, but it does allow the Administration enough flexibility to adapt their approach. Another awkward possibility, however, is the quasi-sanctioned actions of government actors within a state. When the Pakistani nuclear scientist, AQ Khan, was selling nuclear technologies to North Korea, and Iran (amongst others) he was doing so as someone funded within the Pakistani government nuclear programme, but without the authorisation of government (Corera 2006). If those circumstances were somehow replicated today, it might pose a set of questions for the US Administration with non-clear-cut answers: a third party country could easily fall foul of the IFS Act and then the ISA by dint of having not prevented the trade of material support to the Iranian regime.

3.2.2 Legislative developments

The Iran Freedom Support Act amended the Iran Sanctions Act by requesting, although not mandating that the Administration should determine whether a violation of the ISA had occurred within 180days. This softened a position from the draft legislation which had set the figure at a mandated 90days, and which had insisted on Administration cutting all aid and assistance to those countries whose companies had violated the terms of the ISA (H.R. 282, S. 333). If this original proposal had been included in the eventual act, then it would have served to a) substantially curtail the diplomatic freedom of movement for the Administration and b) imposed penalties on third countries, including potentially those of the European Union for the activities of companies registered in their jurisdiction. This in turn would have imposed disproportionate costs on European countries to police companies in their jurisdiction and to then deal with potential US sanctions. EU officials should watch for a reactivation of this kind of provision in subsequent US action in this matter.

It is important to note that the most significant recent development within this field of legislation is the proposed ***Iran, North Korea, and Syria Sanctions Consolidation Act 2011 (S. 1048)***, which is still being consulted upon within Congress at the time of writing in March 2012. The bill legislates that it is U.S. policy to prevent Iran acquiring a militarised nuclear programme and increases the sanctions on those doing business with the Iranian energy sector, including the petroleum industry. The bill imposes a duty upon the US President to initiate an investigation of a foreign entity for violating U.S. sanctions on Iran's energy sector. It requires the US President to develop diplomatic initiatives to assist countries reduce their dependence on Iranian energy products, and to impose sanctions on companies participating in collaborative projects with Iran outside of Iranian territory. The bill provides a blanket ban on interactions with the Iranian Revolutionary Guard Corps (IRGC) (an echo of the EU's measures of 1 December 2011), and imposes penalties for doing so. The bill imposes sanctions on any country or organisation providing military or homeland security technology to Iran, and provides funding for human rights promotion in Iran, and puts the resourcing in place for a senior State Department official to oversee US support for this activity. This consolidation Act tightens up some of the provisions from the existing legislation, with significant extensions into the area of homeland security technology and into assisting states with moving away from Iranian energy imports, something again targeted to significantly damage the Iranian economy. Within this consolidation bill there is still the scope for civilian trade with Iran, and so there is room for a further ratcheting of measures in future bills. This consolidation bill can also be seen as evidence of further convergence between the EU and US, as there is now significant overlap between the two sanctions regimes, but it does also demonstrate how the US uses extraterritorial legislation to give additional weight to its diplomatic positions.

3.3 Iran Non-Proliferation Act (INPA) signed 2000

The Iran Non-Proliferation Act (INPA), subsequently superseded by the Iran-North Korea-Syria Non-Proliferation Act 2006 (INKSNA) and which would again be superseded by the consolidation Act (discussed above) is one of the suite of extraterritorial measures preventing the transfer of advanced military and dual-use technology to Iran. INPA sets out the sanctions that will be imposed on non-US entities that provide equipment or support to Iran's weapons of mass destruction programmes or who transfer 'destabilizing numbers and types of conventional weapons' (something that was latterly picked up by the Iran Freedom Support Act, as noted above).

3.3.1 The application and impact of INPA

The Iran-Iraq Arms Nonproliferation Act (P.L. 102-484) provides a framework for sanctions to be imposed against those entities who supply Iran with WMD technology or "destabilizing numbers and types of conventional weapons." Section 1603 of INPA also tackles so-called 'dual-use technologies' to Iran. This section makes a formal presumption against these exports, with a case-by-case review and adjudication being in place for such technologies.

The specific sanctions that are available under INPA against entities supplying such technologies include a two year ban from US government procurement channels for that entity, a two year ban from receiving exports from the US, and a ban on exporting goods into the US. If, however, the sanctions are to apply to a government, then the sanctions include a one year ban on US assistance to that country; a one-year requirement that the United States vote against international lending to it; a one-year suspension of U.S. co-production agreements with the country; a one-year suspension of technical exchanges with the country in military or dual use technology; and a one-year ban on sales of U.S. arms to the country. The powers within the Act are vested with the President and it is his or her responsibility to determine whether a favoured trading status should be withheld and whether to impose a ban on all US trade with that country. The President has further powers of note, which are encapsulated by Executive Order 13382 (28 June 2005), which allows the blocking of the assets of any entity found to be assisting the proliferation of WMD. This Executive Order was made under the International Emergency Economic Powers Act, the National Emergencies Act and Section 301 of Title 3 of the United States Code.

The successor Act to INPA, the 2006 Iran-North Korea-Syria Non-proliferation Act (INKSNA) authorises sanctions on non-US entities which have been formally judged by the US Administration to have provided material support to Iran's advanced military technology programmes. The Act had the unintended consequence, between 2006 and 2009, of temporarily ending the collaboration between the US and Russian space agencies over the International Space Station because Russian rocketry technology had been used both at the Space Station but also within Iran's missile programme (Mizin 2004).

The extraterritoriality of this Act – based upon the principle of universality - impacts on entities adjudged to be providing material support to the proliferation of weapons of mass destruction to Iran and then subsequently North Korea and Syria as well. The powers awarded to the President are very wide. They allow the President to take action against individuals and businesses in blocking their assets and preventing them from trading with the US or receiving US export goods, something which would be likely to have a large impact on businesses and individuals. At a country-to-country level, the sanctions regime that becomes automatically triggered at the point of a country being identified as being in contravention of INPA (and then INKSNA) is also severe: of particular note is the one year veto that the US Administration would place over international lending to a sanctioned nation, something that some of the most heavily indebted nations would fear. The bar on military equipment transfers would also have a serious impact on many countries of the kind likely to be caught by such a provision. So, INPA and INKSNA are well developed tools of political compliance; with the United States' economic and political leverage being brought to the fore.

4. THE PROTECTION OF INTELLECTUAL PROPERTY ON THE INTERNET

All of the bills in this section are extraterritorial in their nature using the principle of universality as outlined in Section I; they seek to secure the intellectual property rights of American entities against the copyright infringement of non-US entities. What these bills highlight is the tension between the predominant US regulation of the internet (including the technical means by which websites are reached by web-users) against the belief that the internet is a global entity, with universal reach, owned by all of its global users, not just the United States. [24]

4.1 Protect IP Act (PIPA) Senate Bill 968, introduced 12 May 2011

The Protect IP Act (PIPA), an extraterritorial measure to protect US copyright holders, was approved by the US Senate Judiciary Committee in May 2011, but at the time of writing its passage through the legislative process is halted whilst elements of it are reviewed in the light of the widespread and public January 2012 protests against some of its measures (notably the blackout of *Wikipedia*, and banners on *Google, Wired* and *Firefox*). As such it has yet to come into law. The bill aims to provide protection to those who own copyright material from the unauthorised reproduction of that material online, and allows for the removal of websites which 'facilitate' that breach, and the cessation of their direct income and advertising revenue from the website.

S.968 of the bill requires the US Attorney General to serve notice on the website owners (or to proceed if they cannot be located). The presiding court can then proceed to issuing orders to cease trading with the affected website/company on financial transaction management companies (e.g. PayPal, Visa, MasterCard etc), internet service providers and advertising companies, as well as to demand that all hyperlinks to the offending material also be removed. In an extension to existing remedies, under PIPA, copyright holders who had their IP infringed by a website could apply for a court injunction against the website and to compel financial transaction management companies and advertising agencies to stop doing business with the website (S.968). These provisions are particularly important to European based web-enterprises as these court orders can also be applied to top-level domains which reside outside of the US, and where operators of the sites are based outside of the US and therefore may take the suffixes, for example of .uk, .fr, .eu and so on.

One of the more controversial elements of the bill is the provision to effectively remove the website from the internet. Whilst web users could still technically reach the website by navigating through the IP address, they could not reach the website via its normal URL address. This provision of the Act also requires internet search engines to remove the website from their search results and to similarly remove any hyperlinks to the website from their results pages.

[24] The March 2012 case in the UK of Richard O'Dwyer is potentially instructive here. Whilst a product of the imbalance in the UK-US 2003 Extradition Act, the US DoJ sought and won the extradition of O'Dwyer who ran a website which hosted US owned copyright material. Any offence committed was done so in the UK but the weakness of the 2003 Act allowed for extradition to be granted (but subject to further appeal) without evidence being tested in court: the case is also notable for the extent to which US authorities will seek to apply US law in non-US territories.

4.1.1 Development and Commentary

PIPA has yet to come into force and as such there is no established corpus of court rulings surrounding it. A prominent legal opinion delivered about PIPA and SOPA comes from the December 2011 article in the *Stanford Law Review* by Mark Lemley, David Levine and David Post. Lemley et al were particularly critical of the extraterritorial dynamic within the provision to bar the Domain Name System (DNS) records of allegedly rogue websites, and they saw this as having the unintended consequences of undermining the key functionality of the internet, and pushing rogue websites and their users into a parallel form of DNS address system that would make regulatory and law enforcement work harder to achieve, something that the open-source Mozilla foundation has provided the technology for (eg. 'MAFIAAFire Redirector')(Lemley 2011, 35).

Lemley et al's other key criticism of PIPA and SOPA concerned the constitutionality of the process they seek to establish. They note that under both proposed bills the prosecutorial actions and 'punishments' are executed without reference to the accused being able to defend their position in court. Both bills provide for the effective removal of a website, and the 'prevention, prohibition or suspension' of financial organisations and online advertisers to carry out transactions for those sites without notice to the accused, nor the production of evidence that could be challenged. Thus a website owner's livelihood could be removed from them, without notice, or without the constitutional provision of a court making a 'final determination.. after an adversary hearing' (Ctr for Democracy and Tech v Pappert, 337 F.Supp 2d 606, 657 (ED Pa 2004).

4.1.2 Technical Impacts

PIPA includes measures to remove proscribed websites from the DNS register, thus making it appear to a web-user that that the website does not exist. The technical efficacy of such a move is contested amongst internet technicians. Some argue that in blocking a DNS record on US servers would not make the ban universal, and would actually fracture the DNS system as servers outside of the US would still contain the original DNS record. Others argue that this fracturing would merely open up a parallel market in illegal mirroring of sites to allow users intent on viewing this content to do so, but which might also open up avenues for fraudsters and malware proponents to pursue illegal activities against internet users. This is likely to be a marginal concern and has not occurred in jurisdictions which already practice this such as Austria, Belgium, Denmark and Finland (Kravets May 2011: Crocker et al, May 2011). There is a wider point to be made about the DNS provision which is that it removes an entire website, that might have 99.9% of its pages in compliance, rather than just an offending page. Such a stiff legal test with large consequences of enforcement could in theory put out of business very large file-sharing and social media businesses which have been significant engines of economic growth since 2007. Moreover, such legal tests also pre-emptively drive up legal and technical compliance costs in legitimate businesses seeking to avoid non-compliance with the laws of a third country, and may also drive companies out of business as the number of complaints and law suits from copyright holders increase, including online communities which have been seen to have a positive impact on political engagement. The political supporters of SOPA and PIPA have indicated a willingness to drop the DNS provisions of their acts in January 2012, but European officials will have to cross-reference this with the enacted legislation.

4.2 Stop Online Piracy Act (SOPA) House Bill 3261, introduced 26 October 2011

SOPA (H.R. 3261), is a bill with strong extraterritorial ambitions which is still progressing through the House of Representatives, and can be seen as a complementary effort to PIPA, as above. SOPA would give powers to the US Department of Justice and copyright owners to seek court injunctions in the US against non-US websites accused of enabling or facilitating the infringement of copyright. It should be noted that this legal test is, just like PIPA, lower than the established legal precedent set by the 1998 Digital Millennium Copyright Act. Such a court order could include provision to ban advertising agencies and payment management services from doing business with the infringing website and requires internet service providers to block access to these sites.

4.2.1 Legal Application

SOPA proposes the following process for any copyright holder who feels that their copyright material has been infringed. The copyright holder must firstly notify payment processors and advertising management services that they are disputing the content of a website, and these processors must suspend services to the affected website and pass the notification on the website owner who may then provide counter notice explaining how they are not in violation. If it is found that copyright holder knowingly misrepresents that a website is violating their intellectual property they will be liable for damages. If a counter-notification is provided or the payments processor/advertising management company fail to suspend their services then the rights holder may still seek a temporary injunction against the website anyway. Payments processors and advertising companies can secure immunity under SOPA if they take immediate steps to sever ties with the offending website. SOPA also introduces new penalties for those selling counterfeit products (typically prescription medicines, popular consumer items and military equipment), and access to streamed copyright content (normally high value sporting events) on the internet, including a possible prison term of up to five years for ten infringements within a six month period (s.201). Much of the legal process that underpins SOPA occurs outside of a publicly visible legal process, therefore it will be hard in absolute terms to understand how this law is being applied, but also particularly hard for entities based in the EU and wider world to understand how the law is being applied and therefore how to remain in compliance.

4.2.2 Reactions to the bill

SOPA has been subject to a large amount of criticism from a wide range of stakeholders. These criticisms have included charges that the measures are incompatible with the US Constitution (particularly the First Amendment), amounts to the censorship of the internet, will undermine the operation of the internet, and negatively impacts on freedom of speech (Tribe, 2011). It is also not clear from the text of the bill whether companies providing server space or advertising management companies (like Google) can be sued for the content of a website owned by another party. Such questions may only be resolved by case law, or subsequent legislative drafting.

The mechanism by which SOPA blocks websites has also raised serious concerns about the privacy of web-users. By inspecting the IP addresses of blocked websites, and intercepting this traffic before it reaches web-users requires internet service providers to monitor the web-use of all of its customers, an extensive intrusion into the online life of its customer base. The European Parliament also criticised the bill on 18 November 2011 with a widely supported statement that there needs to measures that "[stress] the need to protect the integrity of the global Internet and freedom of communication by refraining from unilateral measures to revoke IP addresses or domain names." This may be a clear recognition of the sort of impact such a law may have on companies registered in the EU area: there has also been some commentary about whether non-US governments might take retaliatory action against US based websites (Wong, November 2011). If SOPA came into force it might also be the spur to non-US authorities to place DNS providers outside of the US and also to launch top-level domain names outside of the US and the internet regulator ICANN to loosen the United States' control over the internet.

4.3 Online Protection and Enforcement of Digital Trade Act (OPEN Act), Senate Bill, introduced 17 December 2011.

The Online Protection and Enforcement of Digital Trade Act (OPEN) aims to prevent non-US websites from profiting when their main purpose is the piracy or counterfeiting of IP. It differs from SOPA and PIPA (as above) as it requires internet service providers (ISP) and search engines to redirect users away from sites adjudged to be in violation of the Act. OPEN retains extraterritorial elements, by necessity and in line with the effects based principle it is founded upon, but with less arbitrary measures than either PIPA or SOPA. OPEN is less invasive than PIPA which, as noted above, seeks to change the internet architecture to effectively delete the offending website. It is similarly less invasive than SOPA which requires US-based ISPs to prevent access to the sites for US users, which may also include blocking IP addresses, another change to the architecture of the internet.

OPEN has been mooted explicitly by its sponsors as an alternative to SOPA and PIPA, even in terms of how the bill has been consulted upon. Reflecting on the criticisms of SOPA and PIPA as having been arranged in secret, with only the consultation of those multinationals with financial interests in the subject, OPEN has consulted on its various drafts by crowd-sourcing comments from users who register on its website (www.KeepTheWebOpen.com). The sponsors of OPEN say that it provides adequate protection to owners of pirated IP vesting the powers of adjudication and enforcement within the United States International Trade Commission (ITC) which currently deals with patent disputes, and not within the US Justice Department which it is said would use different procedural methods to do so. OPEN also differs to SOPA and PIPA in not attempting to fundamentally change the architecture of the internet, nor does it place the US in a position of tension in calling for an open internet in places such as China whilst restricting the freedom of internet speech in the US.

4.3.1 Legal Application and Impact

Under OPEN's proposals, which are constantly evolving because of the crowd-sourced consultation, the owners of IP can request that the US International Trade Commission (ITC) investigate whether a non-US based or owned web-site is dedicated to the piracy of IP. Under the OPEN process, the website owner accused of owning a site dedicated to copyright infringement would have a formal opportunity to rebut this claim, unlike with SOPA where enforcement action is taken in advance of the notification of investigation or adjudication. It should be noted here, that OPEN does allow for the imposition of temporary restraining orders in order to protect time-sensitive IP: these restraining orders can still be challenged by the website affected by the order. In giving the ITC the sole discretion to adjudicate on these issues OPEN prevents the owners of IP from seeking redress from multiple authorities, which provides for legal certainty and mitigates against retaliatory actions in different jurisdictions. If the ITC rules in favour of the complainant, it then can then compel companies who process the payments for the copyright infringing site and advertising revenue agencies to cease doing business with the offending website.

OPEN has been criticised by US film distributors and music publishers as being too weak against those infringing IP, as the test OPEN applies for breach is pitched at 'wilfully and primarily' involved in infringing copyright, which is compliant with the test imposed by existing legislation such as the Digital Millennium Copyright Act 1998. The corporate interests supporting SOPA and PIPA want the test to be applied to be lowered to 'enabling or assisting piracy', a substantially lower burden of proof and they also wanted IP owners to be able to direct payment processors to stop doing business with an offending website, rather than this coming from a government authority: in the case of OPEN, the ITC.

OPEN (and SOPA) have recently been subject to an official consideration and response from Whitehouse officials as a result of a public petition to the Administration. This official response stated:

> "To minimize this risk, new legislation must be narrowly targeted only at sites beyond the reach of current U.S. law, cover activity clearly prohibited under existing U.S. laws, and be effectively tailored, with strong due process and focused on criminal activity. Any provision covering Internet intermediaries such as online advertising networks, payment processors, or search engines must be transparent and designed to prevent overly broad private rights of action that could encourage unjustified litigation that could discourage start-up businesses and innovative firms from growing." (Espinel, Chopra & Schmidt, January 2012)

The Whitehouse officials also counselled against legislation that fundamentally changed the architecture of the internet, suggesting that this might result in an unintended proliferation of cyber threats. The considered response of these officials articulates a line that might reasonably be interpreted as the line the President would take when faced with this legislation, and the approach of the Whitehouse seems to broadly converge with that of the sponsors of OPEN.

OPEN would still give the United States extraterritorial influence over the internet, particularly with the sole focus of adjudication and enforcement being placed within the US International Trade Commission, but with some procedural protections in place. These protections include the right of website owners to contest the accusations levelled against them, and to contest temporary injunctions granted by the ITC. The problem of copyright infringement runs wider than just the infringement of American intellectual property, and thus it would seem sensible and necessary for an international agreement to be both struck and ratified. The Anti-Counterfeiting Trade Agreement (ACTA) has been agreed by the US and the EU as well as Australia, Canada, Japan, Morocco, New Zealand, Singapore, South Korea, but requires ratification by six of the signatory parties to come into force and is therefore still to come into legal being.

5. CONCLUSIONS AND RECOMMENDATIONS

This concluding section should be read in conjunction with Section I concerning the principles of extraterritoriality. It presents the lessons that can be learned from each of the case studies that were explored in the main sections of the report, and a summary of the generic lessons that can be taken away from this research.

- EU Emissions Trading Scheme and Directive 2008/101/EC – provide, as of 1 January 2012, for the inclusion of aviation activities in the scheme for the emission allowance trading within the Community. Whilst the ECJ rejected the legal challenge to this measure it remains the case that the measure has extraterritorial effects, on non-EU airlines. Politically, the international objections to this measure would be reduced by levying the measure only on the element of the flight in EU air-space and not on the element of the flight which occurs outside of the EU;
- US Legislation on 100% Ocean Cargo Scanning – provides, as of 1 July 2012, 100% scanning of all ocean US-bound cargo containers in foreign ports. This measure comes under the 'effects principle', and it places a substantial burden on EU states to invest in the infrastructure necessary to comply and adds disruption and cost to cargo shipping. In a yet to be published Council document (6759/12) drawn up on 23 February 2012, the EU and US agreed to create common a set of standards that both would be bound by. When these measures are implemented it will create a common compliance cost for trading with the EU and the US: a mitigation of the extraterritoriality of the original measure.
- US PNR Legislation – This law fits within objective territorial and universality principles, based upon an interpretation that hostile individuals entering the US could commit some part of the crime on its territory, and that countering terrorism is a universal goal. The problem with the legislation is that it is not reciprocal (there is no mechanism for US data to flow to the EU), that the EU has no control over the data once it has been transmitted to the US, and that there are inadequate safeguards over individual privacy. Information of this kind is tradable intelligence and the EP should continue to withhold its consent for this measure until reciprocity is introduced.
- Helms-Burton Act 1996 – This is an attempt to coerce support for the US policy of sanctions against communist Cuba, which the US could view as being based on the 'effects principle'. The coercion contained within Helms-Burton comes in the form of penalties issued by US courts when no substantial effect can be proved on the US. There have been substantial international objects to the Act and many states allied to the US have passed legislation to nullify its effect. This could also be done on a European level;
- Sarbanes-Oxley Act 2002 – This Act falls under the substantial connection and objective territorial principles and because of the nature of the trade it regulates can be viewed as a compliance cost for those companies seeking to carry on trade in the US. The requirements of the act potentially causes conflicts with national laws of non-US countries, but can be viewed as the US regulation of its own financial markets;
- Foreign Corrupt Practices Act 1977 – This Act works under a universality and substantial connection principles, and seeks to regulate the interaction between non-US officials and the foreign subsidiaries of US companies. The penalties include a prohibition on trading with the US, even during an official investigation. Some European governments have enacted similar

legislation to regulate the behaviour of companies registered in their jurisdiction (eg UK Bribery Act 2010, which is compliant with the OECD Anti-Bribery Convention).

– Iran-Libya Sanctions Act (latterly the Iran Sanctions Act 2006), Iran Non-Proliferation Act (superseded by the 2006 Iran, North Korea, Syria Non-Proliferation Act) – These measures seek to coerce non-US countries and entities registered in non-US jurisdictions into conforming to US foreign policy positions concerning Iran. The US believes these measures come under a universality principle. The specifics of the Iranian case study are one part of this picture as the EU large agrees with the US position, the more important element is the mechanism by which the US seeks to ensure compliance: barring access to US markets, the seizure of assets held in the US, and diplomatic measures taken against third countries. These measures have impacted on European manufacturing and petro-chemical interests and in other circumstances countermeasures as deployed in response to Helms-Burton could also be considered.

– Iran Freedom Support Act 2006 – is in operation as part of a principle of universality concerning the Iranian weapons of mass destruction programme and theocratic governance. The Act allows the President to invest in non-violent opposition movements in Iran and also to sanction countries who break the terms of the act. The EU is broadly aligned to the diplomatic position of the US in this regard, but in other circumstances the intervention into domestic politics can only be addressed diplomatically (and from a position of parity), whilst the sanctions on third countries can be opposed with appropriate domestic counter measures.

– Protect IP Act 2011, Stop Online Piracy Act 2011, Online Protection and Enforcement of Digital Trade Act 2011 (OPEN) (all still in consultation) – All three bills work on an effects based principle of extraterritoriality. All three assume a right for recourse for US copyright holders that extends to non-US territories and which are enforced via technical measures taken in the US, or in the case of OPEN via restraining orders. All three bills, (with OPEN being the weakest variant) seek to enforce compliance through removing access to revenue and in denying access to US markets. If enacted, all three bills would most likely result in a breakdown of the universality of the internet and in reciprocal measures from non-US states particularly impacted by the enforcement of these actions. A parallel internet architecture, with accompanying payments and advertising revenue would fundamentally change the character of the internet and entirely erode US control of internet governance and enforcement.

As per Figure 1. Taxonomy of Extraterritoriality

Objective territorial	**PNR, SOX**	**2**
Universality	PNR, FCPA, Iran-Libya, Iran Freedom, Iran Non prolif. Helms-Burton	6
Effective control	-	0
Nationality	-	0
Effects	Container scanning, SOPA, OPEN, PIPA	4
Substantial connection	FCPA, SOX	2

The research behind this study points to the following conclusions: US legislators deploy extraterritorial measures to advance US foreign policy interests and political norms, and in defence of domestic market conditions (in this study, financial markets and copyright materials). The extraterritorial legislation examined here have been typified by a coercive framework of enforcement, be it the barring of access to US markets, revenue streams, or a loss of US-based assets. For non-US companies the penalties include an end to diplomatic and financial cooperation for set periods and indirect penalties in the international money markets. The politics behind these positions are clear: the US believes its interests are universally applicable and thus should be actionable and defensible universally. In those instances where direct harm is (potentially) caused to EU interests (see the intellectual property cases, Iran sanctions regime, container scanning and PNR data cases above), the relative bargaining weight of the union is currently underutilised, and greater thought and attention needs to be paid to such things as – for example - the tradability of information under PNR. In the case of the EU's Emissions Trading Scheme and Directive, the key problem with this attempt at extraterritoriality is reach: a simple redrawing of the measure to incorporate only the proportion of the flight in EU airspace would then become an issue of compliance cost rather than extraterritorial legislation.

The majority of the legislative examples examined in this study were indirect diplomatic tools, and should be viewed in a wider political, diplomatic (military, and economic), and competitive context. To view these legislative case studies only in terms of their legal function is to miss some of the key ways in which the EU can protect and advance its own interests.

Appendix 1:

May 2011 - US Administration sanctions under CISADA.

Of the seven companies cited and penalised three could be described as being in the European area, although registered within tax-havens: Petrochemical Commercial Company International (PCCI) of Bailiwick of Jersey and Iran, Societie Anonyme Monegasque Et Aerienne (SAMAMA, Monaco, subsidiary of Ofer Brothers) and Associated Shipbroking (Monaco). The other four companies were registered respectively in the United Arab Emirates, Singapore, Israel, and Venezuela, although in the Venezuelan case the Administration allowed a clarification that left the sale of Venezuelan oil to the United States unaffected.

The impact on Iran has not just been felt in terms of its energy industry. There is some evidence to suggest that the norm established by the ISA of isolating Iran has spread into civilian trade, which is not prohibited. Such a spread may be accounted for by an anticipation of the provisions of ISA being enlarged and therefore companies do not feel able to take the risk of investing in a trade relationship with Iran or there is a business-cultural move away from trading with a nation which for at least ten years has occupied pariah status in the west. It does have to be said that there still is a sizable trade between European telecommunications and car-manufacturing companies and the Iranian market but the notable examples of voluntary exits from Iranian civil markets include:

- **Siemens** telecommunications infrastructure arm (Germany),
- the **Thyssen-Krupp** steel-maker (Germany),
- the transportation company **Finemeccanica** (Italy),
- the car and heavy goods vehicle manufacturer **Daimler** (Germany) although not its parent company Mercedes-Benz,
- **Toyota** vehicles (which while not owned in Europe has large manufacturing plants within the EU),
- and **Maersk** commercial shipping (Denmark), which will add considerable costs to the transportation of goods to Iran, particularly when taken in conjunction with the US sanctions against the Iranian ports operator, Tidewater Middle East Co (Executive Order 13382, 23 June 2011).

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ISBN 978-92-823-3717-2

PHOTO CREDIT: iStock International Inc.

ISBN 978-92-823-3717-2
doi: 10.2861/75161

Publications Office