Extraterritorial laws as a geopolitical risk to multinational enterprises: the subtle and not-so-subtle use of power and unilaterally imposed legislation

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Abstract

Multinationals are currently operating in an (re-)emerging context of legal imperialism linked to the use of extraterritorial regulation. As a geopolitical phenomenon, legal imperialism involves actions by nation-states extending and enforcing political policy beyond their boundaries by means of unilaterally imposed legislation, thereby potentially infringing on the sovereign status of other jurisdictions. We consider two recent types of new trade regulations with extraterritorial reach that have come into effect during 2018, the US sanctions on Iran and the EU trade deal sustainability clause and explore the implications of this form of extraterritoriality on multinationals' strategies, the one clearly unilateral, the other at least nominally bilateral and subject to negotiations between parties. The growing impact of extraterritorial jurisdiction is a phenomenon that has received little scholarly attention in the international business literature, despite being relatively salient in international relations and legal studies. This lacuna is unfortunate since understanding extraterritorial jurisdiction holds implications for the theory of the firm and international business, also significant managerial implications for MNEs as well as nation-state policymakers. It may also put the discussion on the role and nature of globalisation in a slightly different light.

Introduction

Multinational enterprises (MNEs) have long been thought of as being able to engage in institutional arbitrage and therefore not easily made subject to national governance. With the exception of the obligation of home countries to assume responsibility for human rights violations of the transnationally engaged corporation (e.g. McCorquodale and Simons 2007), the fact that this does not necessarily extend to all types of conceivable violations of national (be it home or host country) or international law has created an impression that MNEs are beyond if not above the law (e.g. Beck 2005). They operate in an "accountability vacuum" where the tools to make such corporations assume responsibility "are woefully inadequate" (de Jonge 2011: 66).

While this legal vacuum might, somewhat ironically, create "overintegration" of the vertically integrated international operations of MNEs and hence can be seen as suboptimal from a competition or welfare point of view (e.g. Calliess and Mertens 2011), all along the primary concern has been the ability of MNEs to circumvent legitimate demands on their operations. Furthermore, by virtue of being footloose and playing on their capacity to make use of institutional arbitrage, they may wield a marked influence on the policy process not just at home but also in (potential) host economies. As Beck (2005: 113) argues, they are instrumental in making "nation state politics becom[e] the sites where transnational politics are worked out."

Against this, Ip (2010: 637) suggests that "state law has a remarkable capacity to adapt to different environments and to constrain the actions of transnational actors." Not only are there continuous efforts by international organisations and their member states to find cooperative ways and means of bridging the global governance gap. A less easily seen, or at least less frequently commented upon, phenomenon is the increasing use of unilateral, extraterritorial action on part of nation states, actions that potentially infringe on the sovereign status of other jurisdictions (e.g., Hudson 1998; Parrish 2008; Verdier 2019). In part it is legitimate action supported by international private and public law, often based on international conventions. Yet in part it operates at the fringes of such established procedures or at times in opposition to it. To the extent that it does so, we may perhaps think of it as the (re-)emergence of legal imperialism (Kayaoğlu 2014).

To explore this issue further, we look into two cases. The first one is clearly unilateral and not approved by the international community. The other is considerably more ambiguous as it is typically seen as legitimate but might even so hinge on asymmetric bilateral relations. Indeed, the common denominator is not only an effort to fill the governance gap, but the exercise of power.

Extraterritoriality and business

While public international law regulates, and is legally binding, for states that interact with each other or when state and non-state actors (such as firms and other organisations) cross paths, the formal legislation we are concerned with here is of a slightly different order. The former is based on consent and implies "equal sovereign rights [that] both constitutes and guarantees state law's independent constitutional identity and autonomy" (Ip 2010: 637) and much the same is true of private international law. We are instead concerned with cases where a state has the capacity to unilaterally assert its own laws beyond its own territory, that is, potentially on someone else's, and in particular when it is directed at non-citizens. For, while the state may well have the right and duty to assume responsibility for the actions of its own corporate citizens (e.g. McCorquodale and Simons 2007; Schrempf-Stirling 2018), it is not always that particular class of firms that is in focus – nor, for that matter, the phenomena that are subject to the extensive body of international conventions as exist (be it with respect to human rights, labour rights or the environment). As a result, it may well contribute novel ways of filling the global governance gap, and to do so in a manner that come across as consonant with the nationalist and protectionist sentiments currently on the rise. Yet it may also serve to undermine the predominant ways in which the international community have tried and continues to try to address that gap, that is, by means of international agreements and collective action to match. In either case, it is likely to have consequences for the operations of MNEs and, we would argue, is potentially of considerable materiality to the strategies of such firms.

As such it addresses a void in the international business (IB) literature, a body of research that so far has been oblivious to a phenomenon that has been around for quite some time. The phenomenon in question, the effects and risks of extraterritoriality, has attracted the attention both of legal scholarship (e.g. Gotlieb 1983; Lowe 1985; Alford 1992; Malanczuk 1997; Parrish 2008; Verdier 2019) and of industry representatives such as the International Chamber of Commerce (ICC 2006). It has also been touched upon in the political CSR literature (Schrempf-Stirling 2018), if only fleetingly so far. In essentially all of these cases, scholars have noted its relevance on account if its impact on business. Beyond their typical focus on the costs and other obstacles extraterritorial legislation might put in the way of business, it also has potentially important implications, or so we argue, for both the manner in which businesses organise operations beyond their home turf and for the wider system of governance.

Indeed, the issues of how MNEs handle their relationships to states have multiplied in the post-War era and spread well beyond the original interest in the management of business–state relations (Boddewyn 1988, 2016). Our contribution is to provide insight on the nature and

implications of one dimension of such business–government relations, one that issues from a phenomenon that so far has by and large been overlooked by IB scholars. This is of some consequence. Just as Lan and Heracleous (2010) are able to show that when legal theory is allowed to bear on agency theory it redefines the roles of the board and the shareholder (and thereby opens up for a different set of theoretical and practical implications), the introduction of extraterritorial jurisdiction to the study of international business shift the roles and relative might of nation-states and the MNEs, also in the presence of a global governance gap.

Our ultimate aim is to find out if, and if so how, this might make a difference for MNEs strategies. For now, however, we are primarily concerned with working out the preliminaries for such an investigation. Our approach, therefore, is to look at two cases that may serve to set the bounds within which a study of MNE strategy might take place. We do so because existing work in the IB field, work that is partly inspired by institutionalism, has taken a step in this direction. What we have in mind is the "strategy tripod" of Peng *et al.* (2008, 2009) and its "institution-based view" that goes some way towards integrating the importance of law to MNEs. So far, that perspective has tended to leave out the dimensions – those of government agency and the power that nation-states may wield – that are at the heart of the type of extraterritorial legislation that we focus on. This is particularly apposite, we think, because just a tiny fraction (Lee and Hong 2012; Karhunen and Ledyaeva 2012: Meyer and Thein 2014; Lee *et al.* 2015; Boddewyn 2016) of the large literature that the ideas of Peng and associates has spawned explicitly addresses extraterritoriality at all. Indeed, to the best of our knowledge, just one of them go beyond considering the effects of home country legislation on the foreign operations of MNEs. The one that does, Weismann *et al.* (2014; cp. Weismann 2009), suggests that it fails to influence global market entry strategy. We are not equally sure, if for no other reason because of the arbitrariness of the enforcement of legal provisions such as the FCPA that Weismann and associates bring forth. Besides, market entry is not the only issue at stake, but so is market exit as an integral part of MNC business strategy.

Our empirical cases

Extraterritorial reach: unilaterally imposed sanctions and ditto legislation

The return, on 5 November 2018, of US sanctions on Iran implies unilaterally imposed restrictions not only on US firms but also foreign companies pursuing business in Iran. Both US and non-US firms face penalties in the form of multimillion dollar fines and foreign companies additionally risk exclusion from the US market. Although it was announced about half a year in advance (on 8 May 2018), and while there were some temporary exceptions relating to oil exports where eight countries

were given a respite of half a year, the sanctions were intended to take effect immediately. Justified on grounds of a need to reduce or eliminate the influence of Iran in military and political conflicts primarily in Syria, it attempts to choke flows of support (including financial) to the Assad government in Damascus and to various terrorist organisations (US Department of State 2018; US President 2018).

This is not the first time Iran has been made subject to international sanctions. On the most recent previous occasion, it was on account of Iran's nuclear programme and more specifically its (alleged) capacity to acquire and develop weapons of mass destruction. Thus, also in addition to the sanctions imposed following the occupation of the American embassy in Tehran in 1979 – which included a trade embargo and the freezing of Iranian assets abroad – and the 1987 round following attacks on US and other ships in the Gulf (which, starting 1995, also included sanctions against firms conducting business with the government of Iran), a UN Security Council Resolution (# 1696) was adopted in July 2006 with a view to stopping Iran from continuing its enrichment programme for uranium. As Iran choose not to comply, a new UN Security Council Resolution (# 1737) was passed in December the same year, this time imposing sanctions. Its initial focal points were investments in the fossil fuels industry, exports of its products and firms conducting business with core Iranian public organisations including the Revolutionary Guard which in addition to its ideological and military functions engage extensively in commercial activities. This round of sanctions, which were expanded over time, were in place until January 2016 when they were finally lifted as a result of the Joint Comprehensive Plan of Action agreed upon by the five permanent members of the UN Security Council and Germany on the one hand and Iran on the other.

The crucial point from the perspective of this paper is that the 2006 round of sanctions was supported by decisions in the UN Security Council. It gave the sanctions international legitimacy and presumably also helped in making them at least partly effective (international sanctions do not always enjoy that particular quality); as Katzman (2019) notes, "[s]anctions have had a substantial effect on Iran's economy and on some major decisions, but little or no effect on Iran's regional malign activities."

As for the new round, the effects remain to be seen. Irrespective of its ultimate results, it lacks the international legitimacy of the previous set of sanctions, the reason being that it has not been supported by the UN Security Council. It therefore qualifies as unilateral action and it goes beyond US trade with and investment in Iran as it also impacts foreign companies of non-US (or non-Iranian) origin or domicile. In many respects it marks a resumption of previously applied decisions, including for instance the Comprehensive Iran Sanctions, Accountability, and Divestment Act (CISADA) of 2010, the previous trade sanctions having been resumed in full by

August 2018. While comprehensive as the name suggests, it does not extend into every nook and cranny. Thus for instance private remittances from the US to Iran are allowed and the sanctions do not preclude foreign banks from using US dollars in transactions with Iran (e.g. paying for Iranian goods). What it does aspire to, though, is to prevent Iran from having direct access to the US financial system.

Hence, also as the new round of sanctions are fairly recent, as of August 2019 at least two foreign banks have been forced to major settlements accepting very substantial fines (both in April 2019) (a comprehensive list is maintained by the Office of Foreign Assets Control, US Treasury 2019). This includes Standard Chartered of the UK, the Dubai branch of which processed transaction related to Iran through the New York branch of the same bank. The sum to be paid in this case is USD 649 million. That is roughly half of the fine facing UniCredit Bank AG headquartered in Germany, which helped processing transactions for the Islamic Republic of Iran Shipping Lines, using the US financial system to do so. This illicit activity brought down a USD 1.3 billion fine on the bank.

Less damaging, economically speaking, but at least as visible was the grounding of a Norwegian Air B737 MAX 8 airliner, its 186 passengers and crew of 6 being stranded in Shiraz, Iran, following an emergency landing on 14 December 2018 (e.g. Dahl and Mjaaland 2018; Lorentzen 2019). On its way from Dubai to Oslo, because of technical problems – a low oil warning (i.e., not the same type of problem that currently keeps the entire fleet of this particular aircraft type grounded) – flight DY1933 had no choice but to find a spot where to land. While the passengers were able to continue their journey the next day, the aircraft did not. It was prevented from leaving Iran because the airline needed to obtain a license from US authorities allowing the spare parts to be delivered to Iran. (At the beginning there was also a concern that the technicians would automatically be prevented from visiting the US as a result of needing an Iranian visa to service the aircraft. That would have been an ordeal, not least because Boeing technicians may have to train in the US. However, this turned out not to be the case.)

Similarly visible, and potentially more damaging to the business community at large if not immediately as costly as a new airplane sitting on the tarmac for six weeks, was the detention of the CFO of Huawei in Vancouver on 1 December 2018 and the subsequent decision 1 March 2019 to honour the request for her extradition from Canada to the US. The explicitly stated reason for US action in this case was charges of bank fraud and evasion of sanctions against Iran.

While we may quibble over whether this is international policing that is required to fill the governance gap or simply strong arm tactics from a major power, the effects on business and their

strategies should be quite clear. It is not merely an issue of staying clear of Iran – and as the Norwegian Air grounding shows that might be easier said than done – but how to steer a course that might not subsequently land you in court or force the MNE into a major settlement. Also under existing law, such as the US Foreign Corrupt Practices Act (1977) (FCPA), it is not always entirely clear what the rules are. Not only may such legal provisions change over time so as to reflect changing concerns (including, possibly, in the case of FCPA from providing a level playing field to giving American firms an edge, as e.g. Perlman and Sykes 2017 suggests), but the interpretation or at least the willingness to pursue it may vary over time as well and then perhaps in a less than fully transparent fashion.

A further dimension to it is that it is the US that does the policing. This implies that there is a great chance that, if pursued, it will be successful (provided that there is a case to start with). The resources and the respect that the US commands will see to that. Furthermore, smaller powers might not be half as important to businesses and therefore any company that does or aspires to engage in business in the US, or depends on its financial markets, need to think twice before business opportunities are pursued. Also as the rule of law is resolutely up-held in the US, and respected in full by US federal or state level agencies such as the Securities Exchange Commission and the New York Department of Financial Services, and therefore a safeguard against law being applied retroactively, the fact that implementation might not be consistent over time creates great uncertainty.

The ability of these government agencies to project their capacity and competence well beyond the territory of their home country, and to extend it to non-US citizens abroad (including corporate ones) is a clear indication of what power might do. Not many countries possess such capabilities.

The US is naturally not the only country that use unilateral extraterritorial legislation. The Bribery Act (2010) and the Modern Slavery Act (2015) are examples of British laws with extraterritorial reach, and the Chinese National Intelligence Law (NIL) that entered into force in June 2017 compels Chinese citizens to support, provide assistance and collaborate with Chinese national intelligence also when residing outside China. The laws that contest human trafficking might receive strong legitimacy and support from in the public opinion of most home and host countries and is typically seen as protecting individuals regardless of the legislation of the country in which they currently reside in, often against their own will. The Chinese National Intelligence Law instead seems to put state interests first, and not the individual rights of citizens living abroad. As some employers can suspect that there is a risk that Chinese intelligence will force Chinese citizens to breach the commercial confidentialities of their business, such extraterritorial law might

put Chinese employees at serious disadvantages compared to other citizens when applying for positions. It might reduce the scope of MNEs in their quest for skills in general and the option of seeking entry to, in this case, the Chinese market.

Such situations highlight a peculiarity of this type of legislation, namely the issue of conflict of law. These laws may be directly conflicting with other legislations and can make it impossible for law-abiding citizens to comply with both the law in their home country and the law in the country in which they reside. If Chinese intelligence forces a Chinese employee to reveal information protected by commercial laws in another country, the individual must break at least one of the two legislations. In addition, an employer in a country outside China that refuses to hire Chinese citizens because of the Chinese National Intelligence Law are also likely to break anti-discrimination laws.

The US law Clarifying Lawful Overseas Use of Data Act (Cloud Act) is yet another example of how unilaterally imposed extraterritorial laws give rise to conflict of law as it allows the US government the right to demand data from American companies, regardless of where the data is stored. This is in conflict with the General Data Protection Regulation (GDPR) unilaterally imposed by the EU, which stipulates other conditions for when information may be shared with a country outside the EU and EES. For MNEs targeting global markets, compliance with these different forms of unilaterally imposed extraterritorial laws are increasingly difficult, not only because the laws with extraterritorial reach makes it hard for companies to delegate legal responsibility to local markets, but also because these laws to some extent may entail conflict of law. It the instances of conflict of law, matters must be resolved using a rationale that go beyond legal expertise, and it seems likely that such matters instead could be decided upon with the consequences and the power and importance of the respective legislation in mind.

There are indeed many cases of unilateral extraterritorial laws where MNEs may find themselves less free to pursue their business than they would like. There might be cases where a country can mount sanctions against another country (including third party entities that engage with it) with a measure of success also without the formal power or legitimacy that support from the international community at other times would afford. Therefore we now turn to a case where it is certainly not self-evident that asymmetric power relations might be present.

A more subtle use of power: trade agreements and environmental concerns

Following a decision by the European Court of Justice in May 2017, in which it is established that "the objective of sustainable development henceforth forms an integral part of the common

commercial policy" (ECJ 2017: para. 147), the European Union is free to require that sustainability clauses are added to free trade agreements entered into. This includes clauses that require that the Paris Agreement is honoured also in bilateral trade relations. Thus, although agreements concluded earlier do at times include provisions to protect and enhance sustainable development, the EU–Japan European Partnership Agreement signed in July 2018 is the first to contain a comprehensive such clause. By the time it entered into force in February 2019, similar arrangements have been concluded with Singapore and Canada, in the latter case implying a revision of the recently concluded Comprehensive Economic and Trade Agreement (CETA) that provisionally went into force in September 2017.

This suggests that agreements that have entered into force can be leveraged to maintain sustainability standards also when the principle of free trade is established. EU member states are thus not reduced to invoking the needs of sustainability at stages prior to its ratification and the risk for it becoming a case of Vernon's (1971) obsolescing bargaining is therefore averted. (Which is not to say that for instance a refusal to sign on to an agreement might not be effective, as the very recent threats by France and Ireland not to ratify the newly concluded free trade agreement EU–Mercosur unless Brazil changes its stance on the clearing of more land in the Amazonas shows.)

In one sense, it is less of a radical departure than it at first might seem. Clauses to honour both international environmental conventions (e.g. on biodiversity) and those that relate to labour rights (e.g. ILO conventions) have been part and parcel of free trade agreements of this sort, including ones concluded by the EU, for quite some time. More recently, the Sustainability Development Goals (SDGs) have been accorded the same status. As importantly, for close to three decades it has been possible to prohibit (others might say obstruct) the import of products with reference to the negative environmental impact of the type of product or the nature of the process whereby it is produced. This is so despite that in particular the predecessor of the World Trade Organization (WTO), the General Agreement on Tariffs and Trade (GATT), took a very clear stand on the matter, suggesting that protectionist inclinations easily can be dressed up as environmental concerns. Such worries about 'green protectionism are still widely spread At times conspiratorial in tone, suggesting that environmental concerns are purely an issue of wanting to introduce trade barriers, more balanced accounts look at both the potential negative and positive impacts and above all note that while there might be strong interests involved the environmental case has seen its position advance (e.g. Weber 2001; Johnson 2015).

Thus, also as GATT was of the opinion that US attempts to restrict imports of tuna from Mexico (on grounds of the fishing techniques threatening dolphin populations in the Eastern

Tropical Pacific Ocean) were not legitimate and would in fact make its multilateral framework for trade amongst signatories impossible, the US got its way. Close on the heels of that decision, however, the establishment of WTO opened up for greater opportunities to taking the environment into account; right from the start the WTO has been more open to sustainable development, as seen in the preamble of the so-called Marrakesh Agreement (WTO 2017). Even so, it is by no means the case that environmental concerns self-evidently will carry the day and also when they do it might be after protracted battles within the organisation and its Appellate Body. This is true, for instance, also of the sequel to the *US–Tuna I* and *II* decisions where Mexico fought a ten year-long battle against US labelling rules, resolved in the latter's favour in 2018 (e.g. Sifonios 2018). In other areas relevant to sustainability, including its social dimensions (such as labour rights and above all human rights in general), not much seems to have changed as GATT finally became WTO (e.g. Joseph 2011).

Against this background, the EU trade sustainability clauses appears to imply a step forward; since it is not unilateral but bilateral it avoids at least part of the problems of the regulatory autonomy of member state that might result in decisions that run up against WTO free trade rules. The problem is by no means solved in full, however. One instance is extra-jurisdictional effects of measure taken by WTO member states which remains an matter of concern (Will 2016), another is the problem of making WTO adjudication procedures operate without friction – one powerful member currently blocks the work of the Appellate Body charged with the task of dispute settlement, and does so in a rather blatant fashion – and the issue of just how the bilateral agreements are arrived at remains an open letter.

As in all negotiations, compromises are necessary, but the possibility of unequal power being imposed are not done away with. Thus, nations that fail to meet the demands of the Paris Climate Accord may find that they have a weak position relative the EU – possibly also if EU itself falls short in this regard. A country that fails to ratify or that decides to pull out of the Paris Climate Accord entirely may also be unable to negotiate new trade deals as long as a potential major trading partner such as the EU insists on such clauses.

Interestingly, in the first instance this seemed likely to apply to the Transatlantic Trade and Investment Partnership (TTIP) between the US and EU. This is an agreement that was first embarked upon in 2013 but which stalled in late 2016. Since then, and despite that it was signed by the US on 22 April 2016 and subsequently approved on 3 September the same year, the US has declared its intention to leave the Paris climate accord. There would seem to be very slim prospects, therefore, that the TTIP would move forward anytime soon.

Yet, this is not the full story. A decision by the Council of European Union as recently as 15 April 2019 (CEU 2019), made the following observations:

(1) The European Union and the United States of America (United States) have the largest and deepest bilateral trade and investment relationship in the world and have highly integrated economies. This relationship could be further improved.

(2) The United States has announced its intention to withdraw from the Paris Agreement[1] on climate change, while the Union seeks the negotiation of deep and comprehensive free trade agreements only with Parties to that Agreement.

(3) The negotiating directives for the Transatlantic Trade and Investment Partnership must be considered obsolete and no longer relevant.

(4) Past efforts with the United States have demonstrated difficulties in negotiating mutually acceptable commitments in areas identified as priorities by the Union. It is therefore appropriate to pursue with the United States a more limited agreement covering the elimination of tariffs on industrial products only, and excluding agricultural products.

(5) It is important to take particular sensitivities into account, for example in the energy-intensive product and fisheries sectors, by providing appropriate phasing out periods for the elimination of tariffs, and exclusions for the most sensitive tariff lines,

leading on to the following set of decisions

Article 1

1. The Commission is hereby authorised to open negotiations with the United States for an agreement on the elimination of tariffs for industrial goods.

2. The negotiations shall be conducted on the basis of the negotiating directives of the Council set out in the addendum to this Decision.

Article 2

The negotiations shall be conducted in consultation with the Trade Policy Committee as provided for in the third subparagraph of Article 207(3) of the Treaty on the Functioning of the European Union.

Article 3

The negotiating directives for the Transatlantic Trade and Investment Partnership have become obsolete

Both the justification and the implications of this *volte-face* is open to discussion. On the one hand it is clearly an adjustment to realities and is perhaps best seen as part of standard diplomatic work pragmatically moving forward also in the face of adversity. On the other hand, although for want of counterfactual evidence it cannot be established, could it be that USA is far too important to be left out in the cold? Bilateral trade across the Atlantic is very substantial, as are other forms of economic interaction. Could the EU therefore afford to simply drop the TTIP by the wayside without some compensating action? If so, it is clearly not a case of strong arm tactics on part of the United States and it is questionable if it issues from that country's unquestionable ability to project its soft power. But could it be interpreted as the US wielding power by virtue of its share size and/or the importance of maintaining good relations also in face of a protectionist turn? It is simply too important to disregard, thereby in effect ensuring the upper hand in negotiations even before they are embarked upon.

This might seem far-fetched, on the verge of being conspiratorial. However, the same type of asymmetries might be observable in the free trade negotiations that the EU holds with other, smaller economies, such as the Central American or Andean states. Or, for that matter Vietnam. Can any of those afford not to accept EU's terms on, say, labour standards and environmental protection? In most cases both sides will be signatories of the various ILO conventions on the protection of labour rights and similar agreements on the environmental side ranging from the protection of rare species and biodiversity to the provision of the Paris climate accord. Yet the European Union at times tries to push the negotiations beyond what is decided by international conventions, and this for the simple reason that internationally agreed standards might fall seriously short of that which applies within the Union itself and its common market. The choice, then, becomes one of hollowing out EU rules, eroding the ability of EU firms to compete or forcing others to comply with EU rules that might be more stringent than elsewhere.

The difficulties of imposing a carbon tax on aviation can illustrate the case. In 2012, EU's Emission Trading System was to be extended to aviation. In face of opposition from foreign airlines and their governments, an EU parliamentary committee therefore proposed an exemption for foreign flights from the requirement that emission rights (or credits) had to be bought. This should apply up to such a time when the UN's International Civil Aviation Organization managed to launch its Carbon Offsetting and Reduction Scheme for International Aviation (CORSIA). The reason for taking this stance has as much to do with China threatening not to buy Airbus airliners as a belief in CORSIA becoming an effective instrument that is a worthy counterpart of EU's system already in place. Lax as the latter was at that point, and many argue still is, the EU has

subsequently raised concern that the global system implies a significantly reduced level of ambition compared to what is already in place in Europe, but finds itself battling an uphill struggle to convince the rest of the world of the necessity of more stringent requirements. Here, clearly, the negotiating strength of EU meets its match, as is probably the case in the trade negotiations with USA. But when it has the upper hand, what will prevent the European Union from exercising is superior strength, should it be at its disposal?

While CORSIA and similar agreements that home in on a minimum common denominator (i.e. what can be accepted by all parties to the agreement) might be good news for both airlines and aircraft manufacturers within the EU – it is, after all, a levelling of the playing field – and similarly may allay fears that green protectionism is at work, we would argue that not only the efforts to stop climate change might suffer. It may also impose the additional costs that come with regulatory uncertainty and therefore are likely to have an impact on the internationalisation decisions of firms, including established MNEs. Whether for good or bad as judged from the short term point of view of businesses, it does after all imply that not even the direction of regulatory change is given. Combine this with the free trade agreements that include clauses on the need to follow the Paris Agreement, and we have another instance of potential conflicts between different sets of decisions (if not necessarily as conflict of law). Although not backed up by the enforcement unilateral extraterritorial legislation, it still may reflect differential access to power and hence may create difficulties or advantages for MNEs depending on the extent to which home, host or third countries show a propensity to enforce their policy preferences which MNEs need to take into account.

Conclusion

With a view to improving our understanding of the importance, or otherwise, of unilateral action of extraterritorial reach and its potential impact on MNE strategy, we have here primarily been concerned with two cases that in a sense defines the bounds within which we may explore an under-studied aspect of economic globalisation. Our starting point is that the growing impact of extraterritorial jurisdiction is a phenomenon that has received little scholarly attention in the business literature, and this despite being relatively salient in international relations, legal studies and also in discussions on political CSR (Scherer et al. 2006, 2014). To the extent that scholars in international business and management at all have taken an interest, the focus has been on the ability (and willingness one might presume) of home countries to assume the responsibility for the actions of corporations abroad. Even so, a familiarity with the manner in which states assume that

responsibility indicates that there is more to it than at first meets the eye. In particular, extraterritorial action that extends beyond the responsibility for the exploits of national citizens and firms is becoming more visible, yet it is by and large absent from the business studies literature. This lacuna is unfortunate since understanding extraterritorial jurisdiction holds implications for the theory of the firm and international business (Scherer et al., 2015), and may also have significant managerial implications for MNEs as well as nation-state policymakers.

What the implications for MNE strategy might be need of course to be worked out in greater detail. Yet a first conclusion is that a mere discussion on institutional distance, however defined, will not do. Third party action falls outside the scope of that literature and yet also the power that a third actor (i.e. other than the home or host country) can wield also beyond what international law and various conventions stipulate is likely to be a potential candidate for influence on MNE strategy. Similarly, the notion of institutional arbitrage focusing on home and host country settings will not allow us to assess the full picture. Also pioneering work on the type of extraterritorial legislation that we focus on here falls short. Thus, the study by Weissman *et al.* (2009) on the Foreign Corrupt Practices Act (FCPA) of the US, the conclusion of which is that because of a less than fully systematic application its impact on MNEs willingness to use corruption to lubricate market entry is minimal, might be premature. For while the application of FCPA, and possibly also kindred pieces of legislation elsewhere such as the Bribery Act (2010) and the Modern Slavery Act (2015) of the United Kingdom, might not imply that every breach of these sets of laws are identified and acted upon, the mere existence of an "absence of meaningful enforcement" (Weissmann *et al.* 2009: 592) and the arbitrariness it implies is likely to make many MNEs to think twice. This is equally true of market entry – both destination and mode – and decisions on market exit.

Precisely because power, including that wielded by third countries, is a major factor we thus intend to move beyond the current discussions on home and host country effects on MNE strategies and operations. In order to appreciate the room for manoeuvre that both MNEs and nations states have in an era where a widening global governance gap is often seen as inevitable, third country action needs to be taken into account. What we suggest is that not everyone appears to think that the widening of that gap is inevitable; there are powerful players out there who set sight on finding new ways of filling it, players who are not particularly keen, it appears, to wait for a world government or other forms of supra-national governance as typically thought necessary to replace a Westphalian order that is increasingly found wanting. Instead they are exploring ways and means to closing that gap by projecting precisely the powers of the nation state by the unilateral use of extraterritorial means.

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