



Deconstructing blocking statutes: why extraterritorial legislation cannot violate the sovereignty of other states

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Blocking statutes are national provisions that aim to combat the legal consequences of foreign, extraterritorial legislation. They are often justified by an alleged necessity to protect domestic sovereignty. This article challenges this assumption based on an in-depth discussion of the sovereignty principle and its interplay with the exercise of state power regarding foreign facts. In particular, it shows why a distinction between the law's territorial scope of sovereign validity and its potentially extraterritorial scope of application is warranted and why, based on these foundations, extraterritorial legislation cannot violate foreign sovereignty. Since Blocking Statutes cannot be understood to protect domestic sovereignty, the article also discusses how they serve to enforce international principles on extraterritorial legislation instead.

Keywords: blocking statutes; extraterritorial legislation; sovereignty; public international law; *Lotus* case; China; EU

A. Introduction

The term “Blocking Statute” has held various meanings over the years. For example, in the US, it was and still is used to refer to foreign legislation prohibiting or obstructing discovery abroad.¹ However, nowadays, the term is mainly employed to refer to domestic provisions that intend to counteract extraterritorial effects of foreign legislation or other actions of foreign states with (alleged)

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¹S S Rosdeitcher, “Foreign Blocking Statutes and U.S. Discovery: A Conflict of National Policies” (1983) 16 *New York University Journal of International Law and Politics*, 1061ff; V G Curran, “United States Discovery and Foreign Blocking Statutes” (2015) 76 *Louisiana Law Review* 1141, 1141ff; D Ventura, “Contemporary blocking statutes and regulations in the face of unilateral and extraterritorial sanctions”, in C Beaucillon (ed), *Research handbook on unilateral and extraterritorial sanctions* (Edward Elgar Publishing Limited, 2021), 222.

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extraterritorial impacts.² This shift in meaning can be attributed mainly to the adoption of the Helms-Burton Act³ by the US Congress in 1996 and the subsequent reaction of the European Community in the same year.

The Helms-Burton Act codified, strengthened and extended the existing trade embargo against Cuba by applying it to foreign corporations with business ties to Cuba.⁴ In particular, the Act allowed US citizens to sue foreign corporations for “trafficking” property confiscated by the Castro regime.⁵ In doing so, the Helms-Burton Act introduced so-called unilateral secondary sanctions, which are penalties concerning foreign entities engaging in transactions with the sanctioned state, even if those foreign entities are not under the immediate jurisdiction of the sanction-imposing country.⁶ Hence, insofar as foreign entities outside the sanctioning country’s territory are concerned, unilateral secondary sanctions such as those contained in the Helms-Burton Act have extraterritorial effects.

The EU Council Regulation (EC) No 2271/96 of 22 November 1996 (EU Blocking Statute),⁷ which was consolidated and amended in 2018,⁸ tried to counter such extraterritorial effects of secondary US sanctions by prohibiting EU entities from complying with them. The EU Blocking Statute consists of several elements, which can usually also be found in other states’ Blocking

²J Huber, “The Helms-Burton Blocking Statute of the European Union” (1996) 20 *Fordham International Law Journal* 699; Ventura, *supra* n 1, 22; D A Sabalot, “Shortening the Long Arm of American Antitrust Jurisdiction: Extraterritoriality and the Foreign Blocking Statutes” (1982) 28 *Loyola Law Review* 213; R E Price, “Foreign Blocking Statutes and the GATT: State Sovereignty and the Enforcement of the U.S. Economic Laws Abroad” (1994) 28 *George Washington Journal of International Law and Economics* 315; J R Atwood, “Blocking Statutes and Sovereign Compulsion in American Antitrust Legislation” (1986) 27 *Swiss Review of International Competition Law* 5. The term has also been used to refer to domestic legislation trying to block legal consequences of foreign proceedings based on forum non conveniens (H Saint Dahl, “Forum Non Conveniens, Latin America and Blocking Statutes” (2003) 35 *University of Miami Inter-American Law Review* 21).

³Cuban Liberty and Democratic Solidarity (Libertad) Act of 1996 (Helms-Burton Act) 22 U.S.C. ch. 69A § 6021 et seq.

⁴A F Lowenfeld, “Congress and Cuba: The Helms-Burton Act” (1996) 90 *American Journal of International Law* 419.

⁵Cuban Liberty and Democratic Solidarity (Libertad) Act of 1996 (Helms-Burton Act), *supra* n 3, Subchapter III.

⁶Cf. T Ruys and C Ryngaert, “Secondary Sanctions: A Weapon out of Control? The International Legality of, and European Responses to, US Secondary Sanctions” (2020) *British Yearbook of International Law* 1, II; C Fabre, “Secondary Economic Sanctions” (2016) 69 *Current Legal Problems* 259, 261.

⁷Council Regulation (EC) No 2271/96 of 22 November 1996 protecting against the effects of the extra-territorial application of legislation adopted by a third country, and actions based thereon or resulting therefrom ([1996] OJ L309/1). Consolidated and amended by Commission Delegated Regulation (EU) 2018/1100 of 6 June 2018 ([2018] OJ L199/1–6).

⁸For further details see B Immenkamp, “Updating the Blocking Regulation” (European Parliament Briefing, PE 623.535 – June 2018).

Statutes. Article 4 of the EU Blocking Statute prohibits the recognition of foreign decisions by stating that.

no judgment of a court or tribunal and no decision of an administrative authority located outside the Community giving effect, directly or indirectly, to the laws specified in the Annex or to actions based thereon or resulting there from, shall be recognised or be enforceable in any manner.

Article 5(1) of the EU Blocking Statute extends this prohibition both to the application of the blocked foreign laws and to cross-border legal assistance measures that might give it any effect.⁹ This is accompanied by a so-called “claw back”¹⁰ mechanism in Article 6(1) of the EU Blocking Statute,¹¹ which is a claim for damages of parties who suffered losses from any form of enforcement or application of the blocked foreign laws that occurred despite their prohibited application. Further sanctions following a violation of the Blocking Statute are left to the discretion of the EU member states. The blocked foreign laws are listed in the annexe of the EU Blocking Statute, which currently consists only of US Sanctions against Cuba and Iran. For economic operators, the EU Blocking Statute usually creates a dilemma: Compliance with blocked foreign rules automatically results in a violation of the Blocking Statute, while compliance with the Blocking Statute results in a breach of the blocked foreign rules.¹²

Blocking Statutes exist in some other countries as well, such as Canada,¹³ the UK,¹⁴ France,¹⁵ Mexico¹⁶ and China, with the Chinese Blocking Statute¹⁷ being the latest addition. While the legal consequences of the Chinese Blocking Statute appear to be generally comparable to the EU Blocking Statute,¹⁸ the Chinese

⁹“No person [...] shall comply, whether directly or through a subsidiary or other intermediary person, actively or by deliberate omission, with any requirement or prohibition, including requests of foreign courts, based on or resulting, directly or indirectly, from the laws specified in the Annex or from actions based thereon or resulting therefrom.”

¹⁰Ventura, *supra* n 1, 236.

¹¹“Any person [...] shall be entitled to recover any damages, including legal costs, caused to that person by the application of the laws specified in the Annex or by actions based thereon or resulting therefrom.”

¹²Cf. Ventura, *supra* n 1, 222.

¹³Foreign Extraterritorial Measures Act (Canada) R.S.C. 1985, c. F-29.

¹⁴Protection of Trading Interests Act 1980.

¹⁵Loi n° 68–678 du 26 juillet 1968 relative à la communication de documents et renseignements d'ordre économique, commercial, industriel, financier ou technique à des personnes physiques ou morales étrangères (France).

¹⁶Ley de Protección al Comercio y la Inversión de Normas Extranjeras que Contravengan el Derecho Internacional, 1996 (Mexico).

¹⁷MOFCOM Order No 1 of 2021 on Rules on Counteracting Unjustified Extra-territorial Application of Foreign Legislation and Other Measures.

¹⁸Cf. A Svetlicinii, “China’s defense against secondary sanctions: lessons from the EU blocking statute” (2022) 21 *Journal of International Trade Law and Policy* 217, 220.

version does not list the affected foreign laws itself but instead leaves this categorisation to domestic authorities.¹⁹ Concerning its intent and justification, Article 1 of the Chinese Blocking Statute explicitly states that it was enacted.

for the purpose of counteracting the impact on China caused by unjustified extraterritorial application of foreign legislation and other measures, safeguarding national sovereignty, security and development interests, and protecting the legitimate rights and interests of citizens, legal persons and other organisations of China.

Consequently, Chinese authorities must, among other things, take into account whether “international law or the basic principles of international relations are violated” as well as any “potential impact on China’s national sovereignty, security and development interests” (Article 6 Chinese Blocking Statute).²⁰ The wording of the EU’s Blocking Statute is slightly more cautious and ambiguous but generally subscribes to a comparable idea by claiming that the blocked “laws, regulations and other legal acts, by their extraterritorial application, violate international law.”²¹

These statutory statements on the purpose of Blocking Statutes are widely echoed in the legal literature. Both in European and non-European legal scholarship, the existence of Blocking Statutes is often justified as a necessary tool to protect domestic sovereignty.²² However, the notion of sovereignty is usually

¹⁹According to its Art 7, the competent authorities can issue a so-called prohibition order that will then trigger the general legal consequences laid out in the Chinese Blocking Statute.

²⁰The notion of an alleged sovereignty violation due to the foreign law’s extraterritorial scope of application can also be found in the Canadian Blocking Statute (Foreign Extraterritorial Measures Act (Canada), *supra* n 13 s 3(1), 5(1), 8(1)).

²¹Preamble, EU Blocking Statute.

²²Cf. Immenkamp, *supra* n 8, 5; M Martyniszyn, “Extraterritoriality in competition law: changing frictions”, in A Parrish and C Ryngaert (eds), *Research handbook on extraterritoriality in international law* (Edward Elgar Publishing, 2023), 3; Price, *supra* n 2, 315, 340; N Tilahun, “Resisting (US) Sanctions: A Comparison of Special Purpose Vehicles, Blocking Statutes and Countermeasures” (2022) 17 *Global Trade and Customs Journal*, 7, 12; A V Lowe, “Blocking Extraterritorial Jurisdiction: The British Protection of Trading Interests Act, 1980” (1981) 75 *American Journal of International Law* 257, 270, 281; R Bismuth, “The Ambiguous Relations between Corporate Compliance and Sovereignty”, in M-A Frison-Roche (ed), *Compliance Monumental Goals* (Bruylant, 2023); S Bonifassi and C Goussé, “The impact of blocking statutes on the enforcement of anti-corruption laws”, in R Bismuth, J Dunin-Wasowicz and P M Nichols (eds), *The Transnationalization of Anti-Corruption Law* (Taylor & Francis Group, 2021), 490, 504; D Rishikesh, “Extraterritoriality versus Sovereignty in International Antitrust Jurisdiction” (1990) 14 *World Competition* 33, 44, 61. The reference to protecting domestic sovereignty can also be found in Chinese legal scholarship: W Zhang, “Counteracting the Extraterritorial Jurisdiction through Refusing Recognition and Enforcement” (2022) 13 *Beijing Law Review* 806, 821; B Zhang, “A Critical Evaluation of China’s New Blocking Statute against Unfair Extraterritoriality” (2021) 51 *Hong Kong Law Journal* 775, 777.

merely brought up in passing and without a sufficiently precise definition or explanation, making its role somewhat dubious. In some cases, the term is used with respect to domestic private actors, whose freedom from foreign influence is (arguably) protected by Blocking Statutes.²³ However, most authors appear to equate sovereignty with the domestic state's independence. In these cases, the term typically refers to a defence against an alleged extension of the foreign state's prescriptive jurisdiction beyond accepted international law limits.²⁴ The latter perspective also aligns with the broader literature on extraterritoriality, with some scholars considering any unjustified extraterritorial extension of a law's scope or a court's jurisdiction a sovereignty violation.²⁵

Therefore, with their focus on sovereignty and international law, Blocking Statutes represent a prominent manifestation of a widespread and intuitively convincing critique against state actions concerning foreign facts. Given that, as a general rule, the exercise of state power is restricted territorially,²⁶ it appears that extraterritorial legislation covering facts abroad needs a reasonable justification under international law and, in the absence of such a justification, might violate the sovereignty of the states concerned.

However, the sovereignty concerns surrounding extraterritoriality and Blocking Statutes are rarely discussed in detail. Instead, they typically seem to be considered valid arguments that might then be superseded by other interests such as comity, free trade or the fight against corruption,²⁷ or mitigated by international law principles on extraterritorial legislation. This article adopts a different perspective. It aims to discuss and challenge the underlying premise of the prevalent view that extraterritorial legislation somehow conflicts with sovereignty. To do so, the theoretical underpinnings of the sovereignty principle and the distinction between the exercise of state power abroad and state power concerning foreign facts are

²³Tilahun, *supra* n 22, 6; Price, *supra* n 2, 318.

²⁴See Ventura, *supra* n 1, 221 for further details.

²⁵Cf. M A Banna, "The Long Arm US Jurisdiction and International Law: Extraterritoriality against Sovereignty" (2017) 60 *Journal of Law, Policy and Globalization* 59, 60; A Parrish, "The Effects Test: Extraterritoriality's Fifth Business" (2008) 61 *Vanderbilt Law Review* 1455, 1482, 1491 (in the context of the effects doctrine as a justification for extraterritorial legislation); A L Parrish, "Reclaiming International Law from Extraterritoriality" (2008) 93 *Minnesota Law Review* 815, 859ff. See also H Buxbaum, "Territory, Territoriality, and the Resolution of Jurisdictional Conflict" (2009) 57 *American Journal of Comparative Law* 631, 654; C Beaucillon, "Practice Makes Perfect, Eventually? Unilateral State Sanctions and the Extraterritorial Effects of National Legislation", in N Ronzitti (ed), *Coercive diplomacy, sanctions and international law* (Brill Nijhoff, 2016), 110; M T Kamminga, "Extraterritoriality", in A Peters (ed), *Max Planck Encyclopedia of Public International Law (MPEPIL)* (Oxford University Press), 6; T Stein, C Buttler and M Kotzur, *Völkerrecht* (Franz Vahlen, 14th edn, 2017), 608; C Ryngaert, *Jurisdiction in international law* (Oxford University Press, 2nd edn, 2015), 49 ff.

²⁶Ryngaert, *supra* n 25, 42 ff.

²⁷Cf. Price, *supra* n 2, 342; Bonifassi and Goussé, *supra* n 22, 499ff; Beaucillon, *supra* n 25, 105ff; Rishikesh, *supra* n 22, 48.

examined. Based on these foundations, it is shown why extraterritorial legislation does not come into conflict with the sovereignty of other states, even if international law principles on extraterritorial legislation are violated. It is then discussed which functions Blocking Statutes typically fulfil and how they relate to the conflict of laws. Since the article mainly refers to concepts from international law and general conflict of laws doctrine, it is not per se restricted to any particular legal system, even though the examples are taken mainly from EU law.

B. Example: *Bank Melli Iran v Telekom Deutschland GmbH*

The case *Bank Melli Iran v Telekom Deutschland GmbH*²⁸, which was subject to a preliminary ruling by the European Court of Justice (ECJ), might help to illustrate the scope and function of Blocking Statutes further. It is also one of the few cases where the EU Blocking Statute was subject to a dispute in front of a court of an EU member state.²⁹

The German corporation *Telekom Deutschland GmbH* provided telecommunication services to the Hamburg branch of the state-owned Iranian *Bank Melli Iran*. *Telekom Deutschland GmbH* is a subsidiary of the holding company *Deutsche Telekom AG*, which also owns *T-Mobile US Inc.*, a major wireless network operator in the United States. Due to the US sanctions against Iran, which were reimposed in 2018 by the Trump administration, any person was and still is prohibited from trading with certain Iranian persons or entities. As a secondary sanction, this even applies to business conducted abroad and by other entities within a group of companies. Due to the US-based business activities of *T-Mobile Inc.*, *Telekom Deutschland GmbH* terminated the contract with the Hamburg branch of *Bank Melli Iran* to comply with the US sanctions.

Given that the respective US sanctions against Iran are listed in the EU Blocking Statute, *Bank Melli Iran* argued that terminating the contract was unlawful since it gave legal effects to the blocked US laws. Therefore, *Bank Melli Iran* sued for the continued supply of telecommunication services in front of the *Hanseatic Higher Regional Court of Hamburg*. However, *Telekom Deutschland GmbH* claimed that compliance with the US sanction was admissible under Article 5(2) of the EU Blocking Statute since this provision permits observing blocked laws in exceptional circumstances, such as substantial economic hardship. The *Hanseatic Higher Regional Court of Hamburg* eventually found that, following the ECJ's clarifications and a subsequent weighing of both parties' interests, the cancellation of the telecommunication contract was void based on the EU Blocking Statute and that, therefore, *Telekom Deutschland GmbH* was obliged to continue supplying *Bank Melli Iran* with telecommunication services.³⁰

²⁸*Bank Melli Iran v Telekom Deutschland GmbH* (C-124/20) EU:C:2021:1035.

²⁹See also Immenkamp, *supra* n 8, 6.

³⁰*Hanseatic Higher Regional Court of Hamburg (OLG Hamburg)*, Judgment of 14 October 2022, 11 U 116/19. In particular, the court argued that *Telekom Deutschland*

C. Theory³¹

1. Sovereignty

A state's internal sovereignty within its territory can be dissected into a normative and an empirical component. The normative element of sovereignty refers to a state's supreme authority, while the empirical element designates its ultimate power.³² Supreme authority means that a state issues (normative) "Ought" statements within its territory, eg, by enacting a law that prohibits murder ("You shall not kill"). Ultimate power refers to the fully defeasible (truth-apt) fact that a state not only demands certain conduct in a given territory but also realises it, mainly by putting its "Ought" statements into practice.³³ In other words, ultimate power equates to the synchronisation of "Ought" and "Is" (eg, by punishing murderers).³⁴

Only the union of supreme authority and ultimate power within a territory allows a state to enact laws as its own, apply them through courts and other

GmbH did not plausibly explain why and how providing the Hamburg branch of *Bank Melli Iran* with telecommunications services (amounting to approximately 2,000 € per month only) might lead to a considerable loss of reputation and economic hardship in the US (for further details see: T Schöffski, "Urteil des EuGH in der Rechtssache „Bank Melli Iran“ – endlich mehr Klarheit bei der Anwendung der EU-Blocking-Verordnung im Umgang mit extraterritorialen Sanktionen?" (2022) *Corporate Compliance Zeitschrift* 74–78; T A Shipley Gozalo, "Bank Melli Iran: the court of justice boosts the eu blocking statute at the expense of the freedom to conduct business" (2022) *Revista General de Derecho Europeo* 17).

³¹Parts of the following section are based on a translation of A Hemler, "Virtuelle Verfahrensteilnahme aus dem Ausland und Souveränität des fremden Aufenthaltsstaats" (2022) 86 *Rabels Zeitschrift für ausländisches und internationales Privatrecht* 905.

³²S Besson, "Sovereignty", in A Peters (ed), *Max Planck Encyclopedia of Public International Law (MPEPIL)* (Oxford University Press), 56; *Netherlands v. USA (Island of Palmas)*, UN Reports of International Arbitral Awards, 829, 839. Internal Sovereignty should not be confused with territorial integrity, which forms the physical framework within which territorial sovereignty is exercised (S Blay, "Territorial Integrity and Political Independence", in A Peters (ed), *Max Planck Encyclopedia of Public International Law (MPEPIL)* (Oxford University Press), 1).

³³Ultimate power is subject to empirical validation or refutation, meaning we can observe the extent to which a state is actually able to realise change in its territory. While the exercise of supreme authority is observable as well, its results are not. Although we can observe the extent to which a state issues "Ought" provisions, their normative contents as such are not defeasible. See also O Weinberger, *Norm und Institution: Eine Einführung in die Theorie des Rechts* (Manz, 1988), 59; E Bulygin, "Norms and logic" (1985) 4 *Law and Philosophy* 145, 145 ff. Weinberger rightly pointed out that the lacking truth-aptness of "Ought" propositions does not mean that logical relationships between legal rules are impossible.

³⁴The Is-Ought distinction (also called fact-value distinction), which can be traced back to *David Hume*, is an established principle in several branches of philosophy (M Black, "The Gap Between 'Is' and 'Should'" (1964) 73 *The Philosophical Review* 165).

domestic authorities and enforce them through executive power.³⁵ The *American Law Institute's* distinction between “jurisdiction to prescribe”, “jurisdiction to adjudicate”, and “jurisdiction to enforce” reflects this³⁶ but is somewhat misleading due to the multiple meanings of the term “jurisdiction”. “Jurisdiction” is not only used to refer to the exercise of sovereign power but also to the international competence or subject-matter jurisdiction of domestic authorities, such as courts, to deal with disputes with cross-border elements. Furthermore, in the *Lotus* verdict, the Permanent Court of International Justice (PCIJ) even subscribed to another slightly different understanding of “jurisdiction” (see below).

Besides a state's capacity to shape its societal order within its borders autonomously (internal sovereignty), it is also evident that states are generally free to organise their relations with other states as they choose. This external dimension of sovereignty, which mutually depends on internal sovereignty,³⁷ can also be understood as the observation that states are subject to no other legal order apart from international law.³⁸

Overall, both dimensions of sovereignty can be conceptualised as the state's general freedom to act, which, in analogy to a person's general freedom to act, is limited by the sovereignty of other states.³⁹ Being both a mandatory component of customary international law and a general principle of international law (cf. Article 38 ICJ Statute⁴⁰), sovereignty also embodies an exclusive defence against interference by foreign states.⁴¹

2. *The exercise of state power regarding foreign facts*

Under international law, the – usually prohibited – exercise of state power abroad and the – typically permissible – exercise of domestic state power regarding

³⁵Cf. W Meng, “Völkerrechtliche Zulässigkeit und Grenzen wirtschaftsverwaltungsrechtlicher Hoheitsakte mit Auslandswirkung” (1984) 44 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 675, 726.

³⁶American Law Institute, *Restatement of the Law Fourth: The Foreign Relations Law of the United States* (2018), para 401; W S Dodge, “Jurisdiction in the Fourth Restatement of Foreign Relations Law”, in A Bonomi and G P Romano (eds), *Yearbook of Private International Law XVIII* (Dr. Otto Schmidt, 2018), 143 ff.

³⁷“Without external sovereignty and the delimitation from other sovereigns, the internal sovereign cannot define its own competences and exercise authority, and without internal sovereignty in the determination of competences and the exercise of authority, there cannot be an external sovereign that can relate to other sovereigns.” (Besson, *supra* n 32, 69 ff).

³⁸Meng, *supra* n 35, 747; Besson, *supra* n 32, 56, 69 ff. See also *Netherlands v. USA (Island of Palmas)*, UN Reports of International Arbitral Awards, 829, 838.

³⁹A Bleckmann, “Das Souveränitätsprinzip im Völkerrecht” (1985) 23 *Archiv des Völkerrechts* 450, 465.

⁴⁰Statute of the International Court of Justice (signed on the 26th of June 1945).

⁴¹Stein, Buttlar and Kotzur, *supra* n 25, 537; Besson, *supra* n 32, 87 ff.

foreign facts must be separated strictly.⁴² This distinction can be traced back to the PCIJ's *Lotus* decisions.⁴³ The case concerned the question of whether Turkey was allowed to try a Frenchman who was steering the French Steamboat "Lotus" when it collided with the Turkish ship "Bozkurt" on the high seas close to Istanbul.

In the *Lotus* verdict, the PCIJ established two dimensions of the term "jurisdiction", which are still accepted today, albeit under different names.⁴⁴

- (1) Territorial "jurisdiction": Now the first and foremost restriction imposed by international law upon a State is that – failing the existence of a permissive rule to the contrary – it may not exercise its power in any form in the territory of another State. In this sense, jurisdiction is certainly territorial; it cannot be exercised by a State outside its territory.⁴⁵
- (2) Territorial "jurisdiction" regarding foreign facts: It does not, however, follow that international law prohibits a State from exercising jurisdiction in its own territory, in respect of any case which relates to acts which have taken place abroad [...]. Such a view would only be tenable if international law contained a general prohibition to States to extend the application of their laws and the jurisdiction of their courts to persons, property and acts outside their territory, and if, as an exception to this general prohibition, it allowed States to do so in certain specific cases. But this is certainly not the case under international law as it stands at present. Far from laying down a general prohibition to the effect that States may not extend the application of their laws and the jurisdiction of their courts to persons, property and acts outside their territory, it leaves them in this respect a wide measure of discretion, which is only limited in certain cases by prohibitive rules; as regards other cases, every State remains free to adopt the principles which it regards as best and most suitable.⁴⁶

Thus, in the case of extraterritorial legislation, the exercise of sovereign power, which the court called "jurisdiction", remains within the state's territory, even though it relates to foreign facts.⁴⁷ Due to the generally permissive nature of international law, the PCIJ also found that states were not bound by any restricting principles when legislating extraterritorially; however, it must be noted that this

⁴²Menzel, *Internationales Öffentliches Recht: Verfassungs- und Verwaltungsgrenzrecht in Zeiten offener Staatlichkeit* (Mohr Siebeck, 2012), 315 ff; Meng, *supra* n 35, 677.

⁴³*S.S. Lotus (France v. Turkey)* 1927 PCIJ (ser. A) No. 10 (Sept. 7).

⁴⁴Kamminga, *supra* n 25, 8; American Law Institute, *supra* n 36, 401, 432.

⁴⁵*S.S. Lotus (France v. Turkey)* 1927 PCIJ (ser. A) No. 10 (Sept. 7).

⁴⁶*S.S. Lotus (France v. Turkey)* 1927 PCIJ (ser. A) No. 10 (Sept. 7).

⁴⁷"Jurisdiction in its own territory, in respect of any case which relates to acts which have taken place abroad". See also W S Dodge, "Breaking the Public Law Taboo" (2002) 43 *Harvard International Law Journal* 161–235, 217.

has changed in modern international law (see below). Therefore, Turkish courts were indeed permitted to try the French Lieutenant steering the vessel and apply Turkish Criminal Law, even though the collision happened offshore.

3. *The law's scope of sovereign validity and its scope of application*

The *Lotus* principles call for a strict differentiation between the law's scope of sovereign validity and its scope of application.

The law's scope of sovereign validity refers to the spatial limits of a state's sovereign power;⁴⁸ hence, it nearly always corresponds to the territory of the legislating state. Since a state can also enforce a rule within its scope of sovereign validity, *Menzel* correctly equated it with the state's "area of enforcement".⁴⁹ Only within the borders of the law's scope of sovereign validity can a state synchronise "Is" and "Ought".

Contrary to this, a rule's scope of application only describes the facts a law aims to cover. If the spatial reach of a law's scope of application extends beyond the domestic territory, which nearly always corresponds to the law's scope of sovereign validity, we call it "extraterritorial".

The distinction between the law's scope of sovereign validity and its scope of application is identical to the two dimensions of the term "jurisdiction" in the *Lotus* verdict. The law's scope of sovereign validity refers to the area where a state exercises territorial "jurisdiction", ie, ultimate authority and sovereign power, as described by the PCIJ in the first quote from the *Lotus* decision above. The (extraterritorial) scope of application of a rule corresponds to the exercise of territorial "jurisdiction" *regarding foreign facts* (see the second quote above). As already mentioned, the use of the term "jurisdiction" should be avoided in this respect due to its multiple meanings and tendency to conflate the exercise of state power abroad and regarding foreign facts. For these reasons, this article refrains from using the more established distinction between "jurisdiction to enforce" and "jurisdiction to prescribe". However, it must be noted that both terminological frameworks can be reconciled easily. With respect to (extraterritorial) legislation, "jurisdiction to enforce" refers to the law's scope of sovereign validity, ie, the area where the state enforces its

⁴⁸Meng, *supra* n 35, 728; C Ohler, "Internationales Verwaltungsrecht – ein Kollisionsrecht eigener Art?", in S Leible and M Ruffert (eds), *Völkerrecht und IPR* (Jenaer Wissenschaftliche Verlagsgesellschaft, 2006), 148. Even if a state explicitly claimed that it aims to extend not only the scope of application but also the scope of sovereign validity to foreign territories (eg, in the case of territorial disputes), this would need to be considered a meaningless fiction as long as ultimate authority is not actually observed in the respective areas. Hence, since it can be assumed that states aim to behave in conformity with international law, an extraterritorial reach of a rule that is not specified in more detail must be read as an extraterritorial extension of the scope of application only (Hemler, *supra* n 31, 922).

⁴⁹Menzel, *supra* n 42, 303 ff.

legal rules as genuine domestic sovereign pronouncements. “Jurisdiction to prescribe” refers to the law’s scope of application, which might or might not be extraterritorial.⁵⁰ The *American Law Institute* also appears to subscribe to the distinction between a law’s scope of sovereign validity and its (extraterritorial) scope of application since the Institute concedes that “jurisdiction to prescribe” might go beyond the area where a state has “jurisdiction to enforce”.⁵¹ Overall, the distinction between the law’s scope of sovereign validity and the law’s (extraterritorial) scope of application also follows from an observation of legal reality, given that states issue normative statements regarding foreign facts without having ultimate authority abroad.

Consider the following example: According to Art 6(3)(a) Rome II Regulation,⁵² German private antitrust law also covers cartel agreements in the US if these impact the German market. Hence, German antitrust law covers foreign facts abroad, rendering only its scope of application extraterritorial; the law’s scope of sovereign validity remains territorial since German law is not enforceable on US soil.⁵³

This example also illustrates the relationship between extraterritorial legislation and the conflict of laws. The legal device used to prescribe the law’s extraterritorial scope of application is a unilateral or multilateral conflict rule. Unilateral (“one-sided”) conflict rules only prescribe the scope of application of certain rules of one particular state (not necessarily, but typically, the domestic one).⁵⁴ They can be found in written and unwritten forms.⁵⁵ In Private

⁵⁰Cf J Adolphsen, “The Conflict of Laws in Cartel Matters in a Globalised World: Alternatives to the Effects Doctrine” (2005) 1 *Journal of Private International Law* 151, 155: “Legislative or prescriptive jurisdiction describes the authority of a state to make its substantive law applicable to conduct, relationships or status.” See also M Hook, “The ‘statutist trap’ and subject-matter jurisdiction” (2017) 13 *Journal of Private International Law* 435, 446, who equates prescriptive jurisdiction with an extension of domestic law to foreign facts. However, although extraterritorial legislation is certainly more problematic, there is no reason why legislation covering only domestic facts should not be considered an exercise of prescriptive jurisdiction as well.

⁵¹American Law Institute, *supra* n 36, para 401, Comm d.

⁵²Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II) ([2007] OJ L199/40).

⁵³Due to the empirical nature of ultimate power, it would also not be sufficient if it was merely claimed but not actually observed that German law was also enforceable abroad (see n 47).

⁵⁴Cf J Basedow, *The law of open societies: Private ordering and public regulation in the conflict of laws* (Brill Nijhoff, 2015), 459; W S Dodge, “Extraterritoriality and Conflict of Laws Theory: An Argument for Judicial Unilateralism” (1998) 39 *Harvard International Law Journal* 101, 143 ff; A A Ehrenzweig, “Lex Fori – Basic Rule in the Conflict of Laws” (1959) 58 *Michigan Law Review* 637, 661, 686 ff; S Symeonides, “American Choice of Law at the Dawn of the 21st Century” (2001) 37 *Willamette Law Review* 1, 16 f.

⁵⁵For example, § 3 of the German Criminal Code stipulates that “German criminal law applies to offences committed on German territory” and is, therefore, a unilateral conflict rule. It should be noted that, in this case, the (territorial) scope of sovereign validity and the

International Law, unilateral conflict rules usually exist as unilateral fragments of multilateral conflict rules. As the example above on Art 6(3)(a) Rome II Regulation showed, such unilateral fragments can be explicated to illustrate how multilateral rules also prescribe the scope of application of one particular state (in the above-mentioned example, this concerned the unilateral fragment prescribing only the extraterritorial reach of domestic German antitrust law).⁵⁶

4. Conflict of laws, extraterritorial legislation and international law

The relationship between the conflict of laws and international law has always been complicated. In the nineteenth century, many leading European scholars, such as *Savigny* and *Mancini*, subscribed to a so-called supranational perspective, which arguably considered the conflict of laws as a subject of international law.⁵⁷

(territorial) scope of applicability are identical. However, they can still be distinguished with respect to their different functions.

⁵⁶To be more specific, multilateral (“all-sided”) conflict rules can be understood to treat unilateral (“one-sided”) fragments jointly for conflict of laws purposes. This joint treatment is called “horizontal grouping” because one might picture unilateral fragments relating to the laws of one particular state within the respective substantive domain positioned next to each other on a horizontal axis. In a process called fragmentation, the unilateral fragments can be explicated, which was carried out above, albeit parenthetically, regarding Art 6(3)(a) of the Rome II Regulation. Let us consider another example: German conflict of laws incorporates the *lex rei sitae* in Art 43 of the Introductory Act to the Civil Code as follows: “Interests in property are governed by the law of the State in which the property is situated”. This multilateral conflict rule is grouped horizontally since it treats all states jointly for conflict of laws purposes. Three of its many one-sided fragments might sound as follows: “French property law is applicable if the property is situated in France”, “German property law is applicable if the property is situated in Germany”, “Singaporean property law is applicable if the property is situated in Singapore.” It must be noted that the fragmentability of a rule into more specific elements is not a peculiarity of conflict rules but can be observed in substantive law as well. For example, if several comparable contract types share a joint written form requirement, this is sometimes explicated in a general rule that applies to all contract types in question. Such a general written form requirement can be understood to consist of several fragments that order the validity of the written form requirement for each contract individually. This shows that grouping is usually simply a matter of concise, dense lawmaking. The so-called grouping theory (“*Bündelungsmodell*”) was first introduced by K Schurig, *Kollisionsnorm und Sachrecht: Zu Struktur, Standort und Methode des internationalen Privatrechts* (Duncker & Humblot, 1981) and has been developed further by A Hemler, *Die Methodik der »Eingriffsnorm« im modernen Kollisionsrecht: Zugleich ein Beitrag zum Internationalen Öffentlichen Recht und zur Natur des ordre public* (Mohr Siebeck, 2019), 122 ff.

⁵⁷F A Mann, *Further studies in international law* (Clarendon, 1990), 15; Hemler, *Die Methodik der »Eingriffsnorm« im modernen Kollisionsrecht*, *supra* n 56, 91 ff. It must be conceded that the mentioned scholars (and supranationalists in general) did not explicitly claim that they considered the conflict of laws to be a subject of international law, which is unsurprising given that, in the 19th century, international law was not yet fully formed. However, the claim does not seem to be too farfetched: *Savigny*, for example,

According to this view, conflict of laws rules were considered “supranational” or “universalist” provisions that defined the geographical area where states are permitted to exercise sovereign legislative power. Hence, in today’s terms, supranationalists believed that conflict rules delineated the law’s scope of sovereign validity and that extraterritorial legislation equates to an extraterritorial exercise of sovereign power. This premise also commits to the assumption that applying foreign law must be translated to polite deference to an element of foreign sovereign power and that extraterritorial legislation is akin to a potentially sovereignty-violating exercise of state power abroad.⁵⁸ However, the supranational approach is no longer advocated today. Even in the nineteenth century, it never existed in practice. Although some remnants of it can occasionally be found in conflict of laws doctrine and thinking, it is firmly established – both doctrinally and in legal reality – that states decide freely if, to what extent and according to which guiding principles they wish to apply domestic and/or foreign law. This is called the “principle of autonomy”.⁵⁹ Due to the autonomy principle, a state is, of course, also free to engage in international harmonisation of conflict rules.⁶⁰

Hence, what is the relationship between the conflict of laws and international law? Essentially, it is identical to any other relationship between international and national law, meaning that, depending on the subject matter, international law might mandate a particular design of national (conflict) rules, just like, for example, human rights-related international obligations

argued that the conflict of laws was a “common property of all cultured nations [...] which also form a joint community under international law” (F C v Savigny, *System des heutigen Römischen Rechts* (Veit, 1849), vol. 8, p. IV, 17, translated by the author).

⁵⁸Hemler, *Die Methodik der »Eingriffsnorm« im modernen Kollisionsrecht*, *supra* n 56, 91 ff. It must be noted that *Huberian* comity is actually fully compatible with a non-supranational concept of conflict of laws (H E Yntema, “The Historic Bases of Private International Law” (1953) 2 *The American Journal of Comparative Law* 297, 306); in this case, comity is ultimately only about a cosmopolitan, polite attitude towards other states. However, comity, as understood by many 19th-century scholars, rested on the assumption that it was needed as a justification for an assumed encroachment on domestic sovereignty by foreign law (see also T Schultz and J Mitchenson, “Navigating sovereignty and transnational commercial law: the use of comity by Australian courts” (2016) 12 *Journal of Private International Law* 344, 350). Hence, the traditional comity approach rested on the premise that a distinction between the law’s sovereign scope of validity and the law’s (extraterritorial) scope of application does not exist.

⁵⁹A Hemler, “Improving Cross-Border Compliance by Applying Foreign Public Law in State-As-Party Cases” (Konstanz 2021), 8; A Hemler, “Bridging the Public-Private Law Divide in the Conflict of Laws”, in K Drličková, R Malachta and P Provazník (eds), *COFOLA International: Current Challenges of Resolution of International (Cross-Border) Disputes* (Masaryk University Press, 2022), 23.

⁶⁰In this respect, it is essential to note that only the principle of autonomy and, accordingly, the national origin of conflict of laws rules condition the possibility of international harmonisation (not the other way around). See Hemler, “Bridging the Public-Private Law Divide in the Conflict of Laws”, *supra* n 59, 18 for further details.

might commit states to specific changes within their criminal justice systems. A few conflict of laws-specific international rules concerning extraterritorial legislation have emerged indeed. Hence, contrary to what the PCIJ assumed in the *Lotus* case, a state is no longer “free to adopt the principles which it regards as best and most suitable” (see above). Instead, a sufficient connection between the legislating state and the foreign conduct or facts covered is usually necessary.⁶¹ Generally accepted international principles are the territoriality principle, the active and passive personality principle, the universality principle and – arguably – the effects principle and the protection principle.⁶² For example, the extraterritorial scope of application of private antitrust law following Art 6(3)(a) of the Rome II Regulation (see above) appears to be permissible under the (controversial) effects principle, given that the domestic market must be affected by foreign cartel agreements in order to apply domestic antitrust law.⁶³ Another example is the extraterritorial application of specific domestic criminal sanctions concerning extremely severe crimes, such as war crimes or crimes against humanity,⁶⁴ without any domestic connecting factor, which is justified by the universality principle. Furthermore, following the *Barcelona Traction* decision of the ICJ, a general principle of moderation and restriction with respect to extraterritorial legislation is accepted as well.⁶⁵ A rule that might give a particular state priority to regulate a certain matter or conduct does, however, not exist.⁶⁶

The existence of these international principles on extraterritorial legislation can be explained without recourse to the sovereignty principle. International law is concerned not only with sovereignty but also with many other issues of international importance. One of these issues is steering clear of cross-border situations where subjects of the law might be required to fulfil conflicting or overlapping obligations to multiple states. International principles that require some reasonable connecting factor regarding extraterritorial legislation can mitigate this, at least to a certain extent.⁶⁷ The same is true concerning national methodological principles that aim to guide legal interpretation by

⁶¹Cf. Beaucillon, *supra* n 25, 109.

⁶²Kamminga, *supra* n 25, 10 ff; American Law Institute, *supra* n 36, 401 ff; Dodge, “Jurisdiction in the Fourth Restatement of Foreign Relations Law”, *supra* n 36, 154; Fabre, *supra* n 6, 273; Lowe, *supra* n 22, 263 f; Price, *supra* n 2, 316; Beaucillon, *supra* n 25, 119 ff; Rishikesh, *supra* n 22, 34 ff; Dodge, *supra* n 54, 124 ff; Adolphsen, *supra* n 50, 158.

⁶³The European Court of First Instance considered an extraterritorial scope of application of this sort to be in line with the effects doctrine under international law (*Gencor Ltd* (T-102/96) EU:T:1999:65, 90).

⁶⁴For example, § 1(1) of the German Code of Crimes against International Law.

⁶⁵*Barcelona Traction, Light and Power Company Ltd (Belgium v Spain)*, ICJ Reports 1970, 3 ff.

⁶⁶American Law Institute, *supra* n 36, para 402, Rep. Notes 12.

⁶⁷R Jennings and A Watts, *Oppenheim’s International Law* (Oxford University Press, 9th edn, 2008), 456 ff; Kamminga, *supra* n 25, 7.

presuming that, in doubtful cases, the legislator does not intend to legislate extraterritorially.⁶⁸

5. A violation of public international law principles on extraterritorial legislation does not translate to a sovereignty violation

If a certain instance of extraterritorial legislation is not justified by one of the abovementioned international principles, this results in a violation of international law. However, as the Blocking Statutes, some authors⁶⁹ and the notes of protest of some states⁷⁰ suggest, a violation of the international principles on extraterritorial legislation must also be considered a violation of the sovereignty of the affected states. This also concerns the legal nature of the principles on extraterritorial legislation. Do they merely regulate the permissible extraterritorial scope of application, or do they also represent justificatory principles for a (tacitly assumed) encroachment on foreign sovereignty? If the second option were true, then any extraterritorial legislation would per se need to be considered an encroachment on foreign sovereignty that would merely be justified if the principles on extraterritorial legislation covered it.

There is no authoritative answer to the question of whether a violation of the principles on extraterritorial legislation must also translate to a sovereignty violation. In fact, it is rarely discussed explicitly. There are several reasons for this unsatisfying doctrinal situation. First, the principles themselves are already quite extensive (in particular, the controversial effects doctrine and protection principle), which shifts the discussion to their extent⁷¹ rather than the consequences of their violation. Therefore, clear-cut cases of violating the principles on extraterritorial legislation are relatively rare. Second, asserting that international law was or was not violated sometimes appears to be sufficient within domestic and international law. The question of a concurrent sovereignty violation is, in some cases, an unnecessary additional layer.⁷² Finally, the discussion is also obscured by several intersections between extraterritorial legislation and sovereignty. Just like any other legislative process, adopting a rule with an extraterritorial scope of application can, of course, be traced back to the state's supreme authority (which is one dimension of its internal sovereignty, see

⁶⁸On the presumption against extraterritoriality in US Law: Hook, *supra* n 50, 450, 457; C O García-Castrillón, "International Litigation Trends in Environmental Liability: A European Union–United States Comparative Perspective" (2011) 7 *Journal of Private International Law* 551, 578.

⁶⁹See *supra* n 25.

⁷⁰Meng, *supra* n 35, 731 f.

⁷¹One example regarding the effects doctrine is the case mentioned in n 63.

⁷²Even the EU Blocking Statute seems to be indifferent in this respect, given that it is content with asserting that the blocked extraterritorial laws "violate international law" (see above).

above). Furthermore, external sovereignty is also the most important, if not the only, foundation for international law and,⁷³ hence, also for the principles on extraterritorial legislation. However, these dependencies do not establish that extraterritorial legislation or non-compliance with the respective international principles must necessarily lead to a concurrent violation of sovereignty. Since international law does not serve to protect sovereignty alone, a state can violate international law without violating foreign sovereignty at the same time.

Therefore, the critical question is whether extraterritorial legislation must be understood as a cross-border extension of domestic state power and, hence, a potential infringement of foreign sovereignty that is only justified if the international law principles cover it. However, I think this is not the case. For the following reasons, it follows that extraterritorial legislation can never violate foreign sovereignty, even if it goes beyond the principles on extraterritorial legislation.

First, the legislating state cannot effectively enforce its extraterritorially applicable laws within foreign territories. This is because the law's scope of sovereign validity remains territorial even if its scope of application is extraterritorial (see above).⁷⁴ Therefore, no executive acts or immediate physical effects⁷⁵ are to be feared in the foreign territories covered by extraterritorial legislation. The states concerned are also neither obliged to comply with extraterritorially applicable laws of other states nor forced to enforce the respective decisions of other states. A state remains, of course, free to apply foreign, extraterritorially applicable laws or recognise the respective foreign decisions which enforce them, but this actually affirms the state's internal sovereignty since it implements the conflict of law's principle of autonomy (see above).

However, it might be argued that extraterritorial legislation nevertheless interferes with the sovereignty of other states, given that their subjects now have to adjust to the applicability of more than one legal system.⁷⁶ Even though the

⁷³Besson, *supra* n 32, 2; Bleckmann, *supra* n 39, 464.

⁷⁴The state cannot synchronise "Is" and "Ought" since at least the ultimate authority of the affected foreign states remains untouched. We might also argue that, in addition, not even the supreme authority of the affected foreign states is questioned. While it is true that the legislating state is exercising legislative authority with respect to foreign territories, it remains that this does not amount to *supreme* legislative authority. The existence of national conflict of laws systems and Blocking Statutes illustrates vividly how only the state with ultimate authority conclusively decides on the scope of domestically applicable laws.

⁷⁵In general, physical effects are a necessary criterion for a sovereignty violation. For further details, in particular concerning cyber operations and virtual state actions, see M N Schmitt (ed), *Tallinn manual 2.0 on the international law applicable to cyber operations* (Cambridge University Press, 2017), 11 ff; Hemler, *supra* n 31, 928 ff.

⁷⁶Meng, *supra* n 35, 608: "How should a state be able to order its economy in a sovereign manner if another state has a de facto say in the size of its corporations, the permissible forms of corporate cooperation or the countries its companies are allowed to export to?" (translated by the author).

legislating state is unable to enforce its laws extraterritorially, such chilling effects⁷⁷ might restrict the affected states' freedom to shape their social and economic order and, thereby, impair their internal sovereignty. As the *Bank Melli Iran v Telekom Deutschland GmbH* case showed, these chilling effects certainly exist. However, internal sovereignty, as defined above, only affords states the autonomy to freely determine their socioeconomic structure *within their territories*. If subjects of the law violate foreign, extraterritorially applicable laws in the domestic state, immediate adverse effects within the domestic territory are not to be feared, given that the legislating state does not possess ultimate authority. Subjects of the law only risk disadvantages due to violating foreign, extraterritorially applicable rules if they somehow decide to expose themselves to the ultimate authority of the foreign legislator. In other words, only if legal subjects voluntarily enter the foreign scope of sovereign validity, eg, by crossing the border or founding a subsidiary in the foreign state, do they risk facing the consequences of having been covered by the foreign law's extraterritorial scope of application previously. For example, if the Kingdom of Ruritania prohibited the worldwide sale of T-shirts with an alienated image of the Ruritanian king, this would only need to worry a corporation aiming to sell T-shirts in Ruritania. In the case *Bank Melli Iran v Telekom Deutschland GmbH*, *Telekom* only needed to worry about the US sanctions because it also conducted business in the United States. The domestic state's sovereignty cannot and must not protect against such adverse effects of an exercise of foreign sovereignty since the effective realisation of the foreign social order within the foreign state's territory is itself protected by the sovereignty principle. Hence, referring to the chilling effects of extraterritorially applicable laws in other states merely emphasises a natural consequence of today's multinational world. Legal subjects wishing to engage in multinational affairs must be prepared for potential consequences of contact with the regulatory autonomy of multiple states.

This should not be misunderstood as an out-of-touch suggestion that one should simply not leave their home country or engage in international trade to avoid exposure to foreign state power. In today's globalised world, this is obviously neither possible nor desirable. This view is also not blind to the fact that exposure to the ultimate power of some hegemonic states might be hard to avoid, particularly concerning fields such as international trade or payments. Furthermore, the view advanced in this article also acknowledges that political pressure to comply with extraterritorially applicable laws might sometimes be enough to realise compliance abroad. Moreover, this article's line of reasoning also does not take a stance on whether unilateral secondary sanctions can ever

⁷⁷Cf J Gordon, "Extraterritoriality: issues of overbreadth and the chilling effect in the cases of Cuba and Iran" (2016) 57 *Harvard International Law Journal Online* 1, 2; M Sossai, "Legality of extraterritorial sanctions", in M Asada (ed), *Economic Sanctions in International Law and Practice* (Routledge, 2019), 66.

be justified.⁷⁸ Extraterritorial legislation can certainly be problematic,⁷⁹ and it makes sense to coordinate and, sometimes, curtail extraterritorial legislation through international principles and domestic law tools such as Blocking Statutes. The goal of the arguments above was merely to clarify that, contrary to popular belief, extraterritorial legislation can never violate foreign sovereignty. Still, it remains that extraterritorial legislation might violate international law if it goes beyond the respective international principles (see below).

D. Application

1. Conflict of laws and Blocking Statutes

With these theoretical clarifications in mind, we can now identify the function that Blocking Statutes fulfil within the conflict of laws. Based on the fundamental freedom to choose if and to which extent states wish to apply foreign laws (autonomy principle), the states issuing a Blocking Statute decide to cut back some conflict rules that previously permitted the application of blocked foreign laws.⁸⁰ For example, a reference to or choice of foreign contract law under the EU's Rome I Regulation⁸¹ would normally entail the application of contract-specific public laws such as sanctions.⁸² Following the application of a Blocking Statute, the reference to blocked foreign laws of a specific state is removed from the domestic conflict rules in question, meaning that, excluding the blocked foreign laws, the foreign *lex causae* remains applicable. Similarly, rules allowing for the recognition and enforcement of foreign court judgments are modified by Blocking Statutes by prohibiting the recognition and enforcement of foreign verdicts aiming to enforce blocked laws.⁸³

Finally, it is essential to note that Blocking Statutes cannot be classified as overriding mandatory provisions.⁸⁴ According to the mainstream view, overriding mandatory provisions are *substantive* laws which are extraordinarily vital for

⁷⁸Concerning an approach to their moral justification see Fabre, *supra* n 6.

⁷⁹Cf Parrish, *supra* n 25, 874.

⁸⁰This includes choice of law rules allowing for the choice of the blocked foreign laws.

⁸¹Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I), [2008] OJ L177/6–16.

⁸²Contrary to widespread belief, the application of foreign public law is doctrinally possible, beneficial and observable in legal reality: Hemler, “Bridging the Public-Private Law Divide in the Conflict of Laws”, *supra* n 59, 26; Hemler, “Improving Cross-Border Compliance by Applying Foreign Public Law in State-As-Party Cases”, *supra* n 59, 2; Hemler, *Die Methodik der »Eingriffsnorm« im modernen Kollisionsrecht*, *supra* n 56, 61 ff; Dodge, *supra* n 47, 217.

⁸³This is illustrated by the case *Service Temps Inc v MacLeod* [2014] CSOH 162; 2014 SLT 375 (Lord Hodge), where s 5 of the Protection of Trading Interests Act 1980 was applied to block recognition and enforcement of a US judgment awarding treble damages.

⁸⁴However, Blocking Statutes might try to combat extraterritorial effects of foreign overriding mandatory provisions (cf J Ungerer, “Explicit legislative characterisation of

safeguarding a state's public interests,⁸⁵ which is why domestic overriding mandatory provisions must always be applied.⁸⁶ However, as shown above, while Blocking Statutes might be justified by public interests, they are not themselves *substantive* provisions⁸⁷ but rather operate on the level of conflict of laws by modifying the extent to which foreign legal contents are applicable. What might spur some confusion in this respect is the fact that, although Blocking Statutes cannot be classified as overriding mandatory provisions themselves, the blocked foreign laws might be, given that they usually are sanctions.⁸⁸

2. Sovereignty and Blocking Statutes

Since it could be established that an extraterritorial scope of application can violate the international principles on extraterritorial legislation without violating the sovereignty of other states simultaneously, what does this mean concerning the justification of Blocking Statutes? The answer is plain: As shown above, extraterritorial legislation never translates to an extraterritorial extension of the law's scope of sovereign validity. The legislating state does not exercise ultimate power abroad. Since a state's sovereignty cannot be threatened by any foreign law's extraterritorial scope of application, Blocking Statutes are doctrinally unfit to protect sovereignty.

However, Blocking Statutes uphold the principles on extraterritorial legislation. This makes sense for various reasons. Given that international law cannot be effectively enforced on the international plane,⁸⁹ this task is essentially assigned to the states. Therefore, states that block extraterritorial sanctions which violate the extraterritoriality principles enforce international law as a proxy, using Blocking Statutes as domestic legal tools. Furthermore, the coordination problems mitigated through the international principles on extraterritorial legislation

overriding mandatory provisions in EU Directives: Seeking for but struggling to achieve legal certainty" (2021) 17 *Journal of Private International Law* 399, 418).

⁸⁵Cf Art 9(1) Rome I Regulation; A Briggs, *The Conflict of Laws* (Oxford University Press, 4th edn 2019), 237.

⁸⁶It must be noted that the mainstream concept of overriding mandatory provisions should be rejected altogether since it represents an unintentionally eliminative, useless and confusing instrument which ultimately amounts to nothing more than a declarative endorsement of the possibility of developing the domestic system of conflict of laws rules further using special conflict rules (Hemler, *Die Methodik der »Eingriffsnorm« im modernen Kollisionsrecht*, *supra* n 56).

⁸⁷At least to the extent that they are of interest in this article, given that they also might provide substantive claims for damages (see above).

⁸⁸Since Blocking Statutes aim to block any application of the foreign laws in question, foreign sanctions covered by the Blocking Statute are also not applicable as foreign overriding mandatory provisions (cf Art 9(3) Rome I Regulation).

⁸⁹M Koskenniemi, "International Legal Theory and Doctrine", in A Peters (ed), *Max Planck Encyclopedia of Public International Law (MPEPIL)* (Oxford University Press), 1 ff.

are not only a matter of inter-state importance but also concern the state's domestic interest in reducing the number of regulatory obligations that its legal subjects ought to fulfil towards a multitude of other states.

E. Summary and conclusion

Blocking Statutes are laws that primarily aim to curtail the extraterritorial effects of foreign legislation. They are often based on the implicit or explicit assumption that the foreign provisions concerned violate the sovereignty of the domestic state. This article challenged this belief based on an in-depth discussion of the interdependencies between extraterritorial legislation, sovereignty and the conflict of laws. It was shown that, following the PCIJ's *Lotus* decision, a distinction must be made between the law's scope of sovereign validity and its scope of application, with only the latter being the subject of conflict rules. Given that the exercise of sovereign power requires both supreme authority and ultimate power within a territory, sovereign power is only exercised within the law's scope of sovereign validity. Extraterritorial legislation, however, merely extends the law's scope of application across the border while the law's scope of sovereign validity remains territorial. Hence, extraterritorial legislation only represents an exercise of domestic state power concerning foreign facts, which cannot interfere with the sovereignty of other states. This is true even if the blocked laws violate the accepted international principles on extraterritorial legislation since these principles do not serve to protect sovereignty but rather aim to solve inter-state coordination problems. Given that Blocking Statutes intend to uphold the principles on extraterritorial legislation mainly by curtailing existing conflict of laws references to the blocked foreign laws, the existence of Blocking Statutes can be justified without any recourse to the sovereignty principle.

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