

SUBSIDIARITY AND THE LAW OF JURISDICTION

Abstract

Domestic courts and regulators, as well as international legal instruments and international supervisory mechanisms allow bystander States to exercise extraterritorial jurisdiction to protect global values and norms related to human rights and the environment. Such exercise appears to be conditioned, however, by a requirement of subsidiarity, pursuant to which bystander States should only exercise extraterritorial ‘global justice’-based jurisdiction where the primary jurisdiction State – the State where the impugned acts occurred or where the allegedly responsible person is registered – is unable or unwilling to intervene. Such techniques have essentially been developed to limit jurisdictional overreach and to prevent one State from imposing its own regulatory solutions on another State. Seen from this perspective, they embody the negative, sovereignty-based dimension of subsidiarity, rooted in the sovereign equality of States. Nevertheless, other techniques, embody a more positive, international community-driven dimension of subsidiarity, to be used with a view to upholding the integrity of international norms regarding human rights and the environment.

Article

The international law of jurisdiction sets out under what circumstances States can apply their laws to situations and persons, possibly even beyond their own territory. The law offers a number of ‘permissive’ jurisdictional principles to this effect, notably territoriality, nationality, security, and universality. These principles are *not* hierarchically structured: legally speaking, no principle enjoys priority over another. Admittedly, the territorial principle is generally considered to be the cornerstone of global jurisdictional order, with other principles – of extraterritorial jurisdiction – being in need of specific justification.¹ But once these other principles have come to be accepted, they are not subordinate to the territoriality principle.

At first sight, this state of affairs is not entirely satisfactory, as it allows bystander States to impose their laws on other nations that may have a much stronger – in particular *territorial* – connection to the situation. The exercise of universal jurisdiction over gross human rights violations is a case in point. At the same time, the existence of a variety of principles of

¹ A. Bianchi, ‘Jurisdictional Rules in Customary International Law’, at 87 in K.M. Meessen, (ed.), ‘Extraterritorial Jurisdiction in Theory and Practice’, The Hague: Kluwer Law International (1996).

jurisdiction tends to ensure that at least *one* State's regulation will apply. Especially in case of territorial under-regulation in respect of 'global problems' (e.g., world-wide antitrust conspiracies, global warming, gross human rights violations), the availability of a plurality of jurisdictions that recast these problems in local terms² may appear to be a blessing. However, to bring some order, and in particular to prevent normative conflict from coming to a head, it is advisable for the international community to agree on procedures that circumscribe single States' unilateralist instincts. The principle of subsidiarity has been suggested in this respect, as a procedural tool of 'reconciling competing norms' and of 'encourag[ing] dialogue among multiple jurisdictions', which, however, does not cast doubt on the legitimate desire of such jurisdictions to apply *their* norms to a given act or actor.³

Subsidiarity may have two functions in the law of jurisdiction. It can be understood as a *shield* that qualifies the exercise of State jurisdiction by requiring a particular connection to the forum,⁴ or by requiring deference to good faith efforts made by other States that arguably have a stronger link to the situation. This 'negative' understanding of subsidiarity is rooted in the classic Westphalian worldview of States as actors endowed with quasi-exclusive sovereignty within their own territory, and lacking competence to strongly project power beyond their frontiers. This understanding mitigates the interventionist excesses which the liberal exercise of multiple State jurisdiction may spawn. Subsidiarity may also be understood, however, as a *sword* that allows bystander States to jurisdictionally protect global public goods or values which States having a stronger regulatory (territorial) link, or the international community at large fail to address.⁵ This 'positive' understanding of subsidiarity acknowledges that sovereignty as the defining characteristic of global public order may impede rather than encourage the realization of community values pertaining to human rights and the environment, as sovereigns may have an interest in regulatory failure. For instance, a regime's failure to dispense justice for gross human rights violations committed by its henchmen may ensure its

² See H.L. Buxbaum, 'National Jurisdiction and Global Business Networks', 17 *Ind. J. Global Legal Stud.* 165, 167 (2010) (arguing that 'a global problem can be recast in local terms, in order to take advantage of local political or social resources' and suggesting use of the concept of scale to understand this analytically).

³ P.S. Berman, 'A Pluralist Approach to International Law', 32 *Yale J. Int'l L.* 301, 321, 328 (adding that "although people may never reach agreement on *norms*, they may at least acquiesce in *procedures* that take pluralism seriously").

⁴ I.B. Wuerth, 'The Supreme Court and the Alien Tort Statute: *Kiobel v. Royal Dutch Petroleum*', 107 *Am. J. Int'l L.* 601, 619 (2013) (defining subsidiarity in the context of universal civil jurisdiction, *per* Justice Breyer's opinion appended to the U.S. Supreme Court's *Kiobel* judgment – discussed in Section 2 in the context of universal civil jurisdiction – as a "requirement, pursuant to which there must be some connection between the forum state and defendant, such as the defendant's residence there").

⁵ See also N. Krisch, 'The Decay of Consent: International Law in an Age of Global Public Goods', 108 *Am. J. Int'l L.* 1 (2014).

very survival, or a flag State's failure to adequately regulate shipping may boost registration fees, and thus its trade interests. Given the primary jurisdiction's failure to protect inherent community values, States may be attracted to 'subsidiary unilateralism', not so much to vindicate their own national interest-based sovereign rights, but rather to urgently protect inherent community values.⁶ In so doing, State authorities in effect become international authorities in accordance with Scelle's *dédoublement fonctionnel* theory.⁷ Because of this international mandate States fulfil, and the common values and concerns of mankind they thus further, it is arguable that State sovereignty, as the hallmark of the inter-State based system of international law, should be 'relativized'.⁸ Subsidiarity may be a helpful procedural tool strike a new balance between the traditional pull towards respecting State sovereignty and consent, and the more recent pull toward realizing common goals, possibly through nonconsensual, unilateral mechanisms.

The aim of this contribution is not in the first place to normatively to defend a particular understanding of subsidiarity. Rather, I want to critically analyze how the principle of subsidiarity has recently been applied or promoted with respect to two areas that issue-areas could be considered as 'global public goods',⁹ or as raising 'global problems' *par excellence*¹⁰: environmental goods and human rights. Because collective action problems cause environmental goods to be chronically undersupplied at the international level, States, or groups of States, may decide to go it alone, and exercise subsidiary unilateral jurisdiction for want of a better international alternative.¹¹ Similarly, because human rights may be insufficiently enforced at the international level, or in the territory where the violations take place, bystander States may open their courts to hear claims regarding such violations, thus allowing the exercise of extraterritorial jurisdiction on a subsidiary basis. What informs such unilateral action may be

⁶ Compare M. Gavouneli, 'Functional Jurisdiction in the Law of the Sea', Martinus Nijhoff Publishers, at 82 (2007).

⁷ See G. Scelle, 'Le phénomène juridique du dédoublement fonctionnel' in W. Schätzel and H.-J. Schlochauer (eds.), *Rechtsfragen der internationalen Organisation: Festschrift für Hans Wehberg zu seinem 70. Geburtstag* Frankfurt am Main: Klosterman, 324, 356 (1956) ("the constitutional authorities become, through functional splitting, international authorities").

⁸ See H. Aufricht, 'On Relative Sovereignty', 30 *Cornell L. Rev.* 137 (1944).

⁹ See on the nexus between international law and global public goods: G. Schaffer, 'International Law and Global Public Goods in a Legal Pluralist World', 23 *Eur. J. Int'l L.* 669 (2012); D. Bodansky, 'What's in a Concept? Global Public Goods, International Law, and Legitimacy', 23 *Eur. J. Int'l L.* 651 (2012).

¹⁰ R. Michaels, 'Global Problems in Domestic Courts', in S. Muller, S. Zouridis, M. Frishman, L. Kistemaker (eds.), 'The Law of the Future and the Future of Law', 11 *FICHL Publication Series* 165, 167 Torkel Opsahl Academic EPublisher, Oslo (2011).

¹¹ Directive 2008/101/EC of the European Parliament and of the Council of 19 November 2008 amending Directive 2003/87/EC so as to include aviation activities in the scheme for greenhouse gas emission allowance trading within the Community, *O.J. L* 8/3 (2009).

the conviction that human rights and environmental norms are endowed with an *erga omnes* character.¹² This implies that every single State has an interest in protecting the integrity of basic human rights and environmental norms, which it cannot only vindicate by *in abstracto* invoking the responsibility of the State violating such norms,¹³ but also by *in concreto* taking jurisdictional action against the actual violators of the norms as a trustee of mankind.

The issue-areas of ‘environment’ and ‘human rights’ may be jurisdictionally addressed via different mechanisms: State prosecutors may start criminal proceedings, foreign plaintiffs may bring transnational tort claims in a domestic forum, or States may impose international trade restrictions to further environmental or human rights goals. Depending on the mechanism used, subsidiarity may come in different shades and colors, but in all situations it serves as a principle that allows for the taking of unilateral stopgap measures in cases where the primary jurisdiction State is not able or willing to take adequate measures to protect the environmental goods or human rights at issue.

As far as (1) human rights are concerned, the subsidiarity analysis will pertain to two mechanisms: (a) the exercise of universal criminal jurisdiction over atrocity cases, and (b) transnational tort litigation over human rights violations. As far as (2) environmental goods are concerned, the analysis is focused on (a) how the law of the sea framework facilitates or inhibits the exercise of subsidiary port State jurisdiction in the field of marine resource protection, and (b) how the law of the World Trade Organization (WTO) facilitates or inhibits subsidiary jurisdictional protection of environmental goods through trade measures.

1. Human rights violations

¹² See on *erga omnes* obligations in general: International Court of Justice, *Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain)* (New Application: 1962), Judgment of 5 February 1970, paras. 33-34, available at <<http://www.icj-cij.org/docket/files/50/5387.pdf>>. See on the possible *erga omnes* character of international environmental law obligations: International Court of Justice, *Gabčíkovo-Nagymaros Project (Hungary v. Slovakia)*, Separate Opinion of Vice-President Weeramantry, 1997 I.C.J. 7 (Sept. 25, 1997) at 85 (stating that issues relating to environmental damage are ‘problems with an *erga omnes* connotation’), 114 (stating that ‘cases involving environmental damage of a far-reaching and irreversible nature’ concern ‘rights and obligations of an *erga omnes* character’.), and 115 (‘International environmental law will need to proceed beyond weighing the rights and obligations of parties within a closed compartment of individual State self-interest, unrelated to the global concerns of humanity as a whole.’).

¹³ International Law Commission, Draft Articles on the Responsibility of States for Internationally Wrongful Acts 2001, Article 41.

(a) Universal criminal jurisdiction

The principle of subsidiarity has probably gained most traction in the context of bystander States' prosecutions of international crimes under the universality principle. In international criminal law, subsidiarity means that bystanders should defer to a State which has a stronger connection with an atrocity case – normally the territorial, or less frequently, national State – provided that the latter State is able and willing to investigate or prosecute the case. *Vice versa*, it means that bystanders may, or perhaps should, exercise jurisdiction where directly affected States do *not* prove able and willing to pursue the case. This understanding of subsidiarity, which integrates its positive and negative dimensions, is most famously enunciated in Article 17 of the Rome Statute of the International Criminal Court (ICC), which allows the Court to exercise *complementary* jurisdiction in case of State inability or unwillingness to prosecute. Complementarity is *vertical* subsidiarity as it speaks to the relationship between a supranational institution and a State. What we are considered with here is substantively the same principle, but applied in a *horizontal* context, between States, with a bystander State willing to exercise universal jurisdiction over crimes committed elsewhere.

Reference to such subsidiarity was first made in a separate opinion authored by three judges of the International Court of Justice in the *Arrest Warrant* decision,¹⁴ which may have been meant to counter Judge Guillaume's concern that the exercise of universal jurisdiction would lead to 'total judicial chaos'.¹⁵ Arguably the first doctrinal contribution to the subject was Professor Cassese's statement, in a 2003 article, that "it would seem that at least at the level of customary international law, universal jurisdiction may only be exercised to substitute for other countries that would be in a better position to prosecute the offender, but for some reason do not,"¹⁶ a statement that was seconded by the *Institut de droit international* in a 2005 resolution.¹⁷ Later scholarship has cast doubt on the customary status of this subsidiarity

¹⁴ *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, Joint separate opinion of Judges Higgins, Kooijmans and Buergenthal, para. 59.

¹⁵ *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, Separate opinion of President Guillaume, para. 15.

¹⁶ A. Cassese, 'Is the Bell Tolling for Universality? A Plea for a Sensible Notion of Universal Jurisdiction', 1 *J. Int'l Crim. Just.* 589, 593 (2003), adding that "[t]hese countries are the territorial state or the state of active nationality: they may stake out a sort of 'primary claim' to jurisdiction, on account of their strong link with the offence or the offender. In other words, under customary international law universal jurisdiction may only be triggered if those other states fail to act, or else have legal systems so inept or corrupt that they are unlikely to do justice. Universality only operates, then, as a *default* jurisdiction."

¹⁷ Resolution on Universal criminal jurisdiction with regard to the crime of genocide, crimes against humanity and war crimes, *Justitia et Pace Institute of Int'l Law*, 17th Session (August 26, 2005), at 2, para. 3(c) ("Any State having custody over an alleged offender should, before commencing a trial on the basis of universal jurisdiction,

principle,¹⁸ but most scholars writing on universality are in agreement that application of the principle to bystander States' international crimes prosecutions at least makes sense from a practical and policy perspective.¹⁹ Subsidiarity indeed makes for sensible policy in that it is respectful of the sovereignty of other nations, where the evidence is also located for that matter, ensures that scarce prosecutorial and judicial resources are not wasted, while enabling the exercise of bystander State jurisdiction in case the State with the stronger connection is not able and willing to investigate and prosecute an atrocity case.²⁰

States, when applying the 'horizontal' subsidiarity principle can draw inspiration from how the ICC applies its (vertical) complementarity principle.²¹ At the same time, however, a higher level of deference on the part of the bystander State, as compared to the ICC, may be called for, given the former's lack of expertise and legitimacy to pass judgment on the territorial/personal State's judicial system and prosecutorial willingness.²² In some quarters, the idea has been advanced to give the ICC a say in whether a bystander could move forward with a case,²³ although it appears to be rather fanciful to assume that the ICC could take up this additional role. One author is of the view that the principles of extradition law, which apply in a State-to-State context, rather than the ICC's complementarity principle, should govern the subsidiarity principle,²⁴ although it remains somewhat elusive how extradition law can address

ask the State where the crime was committed or the State of nationality of the person concerned whether it is prepared to prosecute that person, unless these States are manifestly unwilling or unable to do so").

¹⁸ C. Ryngaert, 'Applying the Rome Statute's Complementarity Principle: Drawing Lessons from the Prosecution of Core Crimes by States Acting under the Universality Principle', 19 *Crim. L. F.* 153 (2008)'.

¹⁹ A. J. Colangelo, 'Universal Jurisdiction as an International "False Conflict" of Laws', 30 *Mich. J. Int'l L.* 881, 900 (2008-2009); H. van der Wilt, 'Universal Jurisdiction under Attack An Assessment of African Misgivings towards International Criminal Justice as Administered by Western States', 9 *J.I.C.J.* 1043, 1050 (2011). See also AU-EU Expert Report on the Principle of Universal Jurisdiction, 16 April 2009, para 14 and R9, available at <http://ec.europa.eu/development/icenter/repository/troika_ua_ue_rapport_competence_universelle_EN.pdf>

(observing that while "[p]ositive international law recognizes no hierarchy among the various bases of jurisdiction that it permits", "states should, as a matter of policy, accord priority to territoriality as a basis of jurisdiction").

²⁰ See also A. J. Colangelo, 'Universal Jurisdiction as an International "False Conflict" of Laws', 30 *Mich. J. Int'l L.* 881, 900-01 (2008-2009).

²¹ K. Coombes, 'Universal Jurisdiction: A Means to End Impunity or a Threat to Friendly International Relations?', 43 *Geo. Wash. Int'l L. Rev.* 419, 463 (2011).

²² C. Ryngaert, 'Applying the Rome Statute's Complementarity Principle: Drawing Lessons from the Prosecution of Core Crimes by States Acting under the Universality Principle', 19 *Crim. L. F.* 153 (2008). See also J. Stigen, 'The Relationship between the International Criminal Court and National Jurisdictions: The Principle of Complementarity', Leiden/Boston: Martinus Nijhoff Publishers (2008), 157 (referring to the potential for international fiction). Compare also F. Lafontaine, 'Universal Jurisdiction – the Realistic Utopia', 10 *J.I.C.J.* 1277, 1299 (2012) (calling it "dangerous to allow states to stand in judgment of each other").

²³ See, e.g., C. Kress, 'Universal Jurisdiction Over International Crimes and the Institut de Droit International', 4 *J.I.C.J.* 561, 584-85 (2006), approved by A. Zemach, 'Reconciling Universal Jurisdiction with Equality Before the Law', 47 *Tex. Int'l L. J.* 143, 185 (2011).

²⁴ F. Lafontaine, 'Universal Jurisdiction – the Realistic Utopia', 10 *J.I.C.J.* 1277, 1293 et seq. (2012).

the problem of a requesting State seeking a person's extradition while not genuinely desiring to prosecute him, *i.e.*, the unwillingness prong of subsidiarity.²⁵

Irrespective of the theoretical debates, in legal practice, there seems to be considerable support for a horizontal subsidiarity principle, although this practice may not be conclusive of the status of the principle under international law. Prosecutorial application of subsidiarity is required by law in Belgium,²⁶ Spain,²⁷ and Switzerland²⁸. Subsidiarity is applied as a prudential doctrine by courts in Austria,²⁹ and as guiding the exercise of prosecutorial discretion in

²⁵ In all fairness, extradition law may allow the requested (bystander) State to ensure that the requesting (territorial/national) State live up to its international human rights obligations, which could be said to be part of the 'ability' prong of the subsidiarity principle. The limitations of the extradition law approach are in fact admitted by Lafontaine, *supra* note 16, at 1298 (submitting that "it is true that it perhaps offers less leeway to a state to refuse extradition based on the 'unwillingness' part of the subsidiarity equation, for fear that the trial will be made for the purpose of shielding the person concerned from criminal responsibility, for instance", while nevertheless holding that "it remains possible on the grounds of a risk of a discriminatory or 'political' prosecution, for instance").

²⁶ Article 12*bis* of the Preliminary Title of the Belgian Code of Criminal Procedure (PTCCP) requires, *inter alia*, that the Belgian federal prosecutor inquire in the quality of the proceedings that could be brought in an alternative jurisdiction.

²⁷ Article 23(4) of the Fundamental Law of the Judiciary (requiring that Spanish prosecutors inquire whether no proceedings have been initiated in another competent country, leading to an investigation and effective prosecution of the offence). See for applications: A.N. Madrid, Sala de lo Penal, Apelacio´n 31/2009, Auto, No. 1/09, July 9, 2009 (dismissing a case brought against seven Israeli officials allegedly involved in the killing of Hamas commander Shehadeh); J.C.I. No. 6, A.N. Madrid, Diligencias previas 134/2009, Auto, May 4, 2009 (judge deciding to send an international rogatory commission to the United States in a case brought against six former Bush administration officials in respect of abuses committed in Guantánamo, with a view to informing his application of the subsidiarity principle).

See on the former case also S. Weill, 'The Targeted Killing of Salah Shehadeh From Gaza to Madrid', 7 *J.I.C.J.* 617 (2009) and on the latter case K. Ambos, 'Prosecuting Guantánamo in Europe: Can and Shall the Masterminds of the 'Torture Memos' Be Held Criminally Responsible on the Basis of Universal Jurisdiction?', 42 *Case Western Res. J. Int'l L.* 405 (2009).

²⁸ Amended Criminal Code, Article 264m (2)(a) (providing that a case can be dismissed where an authority of another State is investigating and/or prosecuting the alleged crime(s) and where the suspect can be extradited to such authority).

²⁹ Oberster Gerichtshof [OGH] [Supreme Court] July 13, 1994, No. 150s99/94, affirmed; Landesgericht Salzburg [LG Salzburg] [trial court] May 31, 1995, No. 150s99/94.

Germany,³⁰ the United Kingdom,³¹ Denmark,³² Norway,³³ and Sweden³⁴. Subsidiarity is at times applied quite strictly, *e.g.*, in Belgium, which allows the federal prosecutor to pass judgment on the quality of the foreign judiciary,³⁵ and conditions deference to the foreign jurisdiction on the effective submission of a case to a court there.³⁶ Other States are more lenient, and do not require investigation or prosecution of the specific case, but rather of the entire ‘factual complex’;³⁷ or, when deciding whether or not to exercise their jurisdiction, only take into consideration information that proceedings have been or will be instituted in the territorial State³⁸ without necessarily examining the genuine ability or willingness of that State. Yet others are willing to just defer to an extradition request from another State³⁹ (although when acceding to this request they will have to take human rights considerations - part of the ability prong of subsidiarity - into account)⁴⁰.

³⁰ Decision of the Federal Prosecutor of Germany, Oct. 2, 2005, JZ 311.

³¹ It has been reported by the Crown Prosecution Service (CPS) “that there is a clear preference within the CPS for prosecutions in the territorial state”, *e.g.* with respect to Rwandan genocide suspects, and that “[a]ccordingly, the CPS seeks to ensure the extradition to Rwanda of genocide suspects currently residing in the UK, despite jurisdiction over the genocide”. Crown Prosecution Service, Response to FIDH/REDRESS questionnaire, at footnote 1307; REDRESS/FIDH, ‘Extraterritorial Jurisdiction in the European Union A Study of the Laws and Practice in the 27 Member States of the European Union’, December 2010, at 262, fn. 1307, referring to Correspondence on file with REDRESS.

In a note submitted to the UN, the UK acknowledged that restraints may be called for in the view of competing jurisdictional claims with respect to atrocity cases. See United Kingdom of Great Britain and Northern Ireland, ‘Scope and application of the principle of universal jurisdiction’, Note submitted to the Office of Legal Affairs pursuant to General Assembly Resolution 65/33 of 6 December 2010, 15 April 2011.

³² REDRESS/FIDH, ‘Extraterritorial Jurisdiction in the European Union A Study of the Laws and Practice in the 27 Member States of the European Union’, December 2010 (Danish Ministry of Justice stating that “[i]n cases of concurrent jurisdiction, the legitimate interest of Denmark in exercising jurisdiction may be balanced against the interest of other states in retaining (exclusive) jurisdiction on the basis of Section 12 of the Criminal Code”).

³³ Submission by the Permanent Mission of Norway to the United Nations on the issue of Universal Jurisdiction, 7 May 2009, at 5, available at http://www.un.org/en/ga/sixth/65/ScopeAppUniJuri_StatesComments/Norway.pdf (stating that a Norwegian prosecutor, when exercising universal jurisdiction, is required to assess whether the alternative jurisdiction has a “properly functioning legal system”).

³⁴ REDRESS/FIDH, ‘Extraterritorial Jurisdiction in the European Union A Study of the Laws and Practice in the 27 Member States of the European Union’, December 2010, at 246, fn. 1225, referring to FIDH/REDRESS, MoJ/MFA Questionnaire (“The ability or willingness of the state where the alleged crimes were committed to investigate and prosecute the crimes is taken into account in the practical handling of a case”).

³⁵ Art. 12bis 4° Preliminary Title of the Belgian Code of Criminal Procedure (PTCCP).

³⁶ REDRESS/FIDH, ‘Extraterritorial Jurisdiction in the European Union A Study of the Laws and Practice in the 27 Member States of the European Union’, December 2010, at 80, fn. 481, referring to Response to MoJ questionnaire.

³⁷ See notably the Decision of the Federal Prosecutor of Germany, Oct. 2, 2005, JZ 311 (dismissing complaints against former U.S. Defense Minister Donald Rumsfeld on the ground that the abuses committed by the United States in the Iraqi prison of Abu Ghraib were being addressed by the U.S.).

³⁸ Art. 480 Bulgarian Code of Criminal Procedure.

³⁹ Article 689-11 French CCP .

⁴⁰ See, *e.g.*, REDRESS/FIDH, ‘Extraterritorial Jurisdiction in the European Union A Study of the Laws and Practice in the 27 Member States of the European Union’, December 2010, at 123, fn. 678, referring to Questionnaire response.

This overview goes to show that some bystander States tend to interpret subsidiarity negatively or narrowly, as a welcome tool to get rid of atrocity cases that do not enjoy prosecutorial priority, or that may upset foreign nations⁴¹. Other States may interpret it more positively or expansively, and, as ‘trustees of the international community’, employ subsidiarity as an affirmative tool to exercise universal jurisdiction with a view to dispensing justice for international crimes in the face of investigative and prosecutorial failures of the territorial State or the absence of jurisdiction of an international criminal tribunal. Such ‘trusteeship’ appears to be based on the consideration that international crimes are not only injuries to a specific political community, but also to the international community.⁴² Members of this international community accordingly have an interest in redress and prosecution of such crimes, with a view to furthering international values,⁴³ *i.e.*, the sword function of the principle of subsidiarity.

The application of the expansive version, however, may risk upsetting the “fair balance between sovereignty interests and international justice interests”⁴⁴ which is inherent in subsidiarity. Subsidiarity should arguably not be used to allow bystander States to displace directly affected, or more connected States that are genuinely able and willing to prosecute. Such displacement would not only violate the latter States’ sovereignty, but would even from the perspective of ‘positive subsidiarity’ be unwelcome as it may fail to exert sufficient pressure on the territorial State to put in place the legal reforms that may ultimately make bystander State intervention redundant. It is submitted that the exercise of subsidiary universal jurisdiction should ultimately be seen as a merely temporary measure that plugs territorial regulatory failures, while encouraging local legal reform and strengthening a responsible approach to

⁴¹ The desire not to upset foreign nations may also require that States limit the possibilities for private parties to initiate criminal proceedings (see, *e.g.*, Art. 12*bis* Preliminary Title of the Belgian Code of Criminal Procedure, excluding civil party petition in respect of international crimes prosecuted under the universality principle; and section 25(2) of the Prosecution of Offences Act 1985, as amended, requiring that the Director of Public Prosecutions consent to the issuance of an arrest warrant based on the universality principle when a private prosecutor applies for such an issuance). When initiating criminal proceedings, private parties, unlike public prosecutors, typically do not conduct a subsidiarity analysis or take foreign nations’ interests into account.

See S. Williams, ‘Arresting Developments? Restricting the Enforcement of the UK’s Universal Jurisdiction Provisions’, 75 *Modern L. Rev.* 368, 384 (2012), submitting that “the DPP (and the Attorney General) may consider this possibility [application of subsidiarity] as part of the public interest test, recognising that over-extensive or premature assertions of jurisdiction may be denied by other states and may harm the UK’s international standing”.

⁴² A. Addis, ‘Imagining the International Community: The Constitutive Dimension of Universal Jurisdiction’, 31 *Hum. Rts. Q.* 129, 159 (2009).

⁴³ See also the concept of *erga omnes* obligations, which was relied on by the International Court of Justice in *Belgium v. Senegal* 2012 when upholding the *locus standi* of Belgium to invoke the obligations of Senegal under the UN Torture Convention. Note that Belgium was exercising universal jurisdiction over the person who was on Senegal’s territory. *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, Judgment of 20 July 2012, paras. 68-69, available at <<http://www.icj-cij.org/docket/files/144/17064.pdf>>.

⁴⁴ J. Geneuss, ‘Fostering a Better Understanding of Universal Jurisdiction A Comment on the AU-EU Expert Report on the Principle of Universal Jurisdiction’, 7 *J.I.C.J.* 945, 958 (2009).

territorial sovereignty,⁴⁵ much in the same way as the ICC's complementarity approach is 'positively' conceived of.⁴⁶

(b) Transnational tort litigation

The principle of subsidiarity has played an equally prominent role in the field of transnational tort litigation, especially where courts have been called on to exercise some form of (quasi-)universal jurisdiction over gross human rights violations committed elsewhere. Over the last few decades, courts have heard an increasing number of such cases, as victims of violations, or their relatives, have filed a steady stream of complaints, notably against multinationals corporations in respect of their overseas activities. One of the key legal questions here is under what circumstances forum States could, or should exercise any jurisdiction they might theoretically have over such cases. In particular, should the forum defer its jurisdiction to a 'primary jurisdiction State', which has a stronger connection to the case and is (somehow) able and willing to investigate and provide a forum; or *vice versa*, can the forum exercise its jurisdiction on the ground that another State with a stronger connection to the case does not prove able or willing to hear the case? These are respectively the negative and positive functions of the principle of subsidiarity.

It is of note that, while some of the human rights violations triggering transnational tort litigation duly qualify as international crimes, domestic courts and regulators have not drawn much inspiration from how subsidiarity has been developed and applied in criminal cases brought under the universality principle. Rather, subsidiarity has very much followed its own trajectory, piggybacking on domestic techniques familiar to transnational tort litigation.

⁴⁵ Supplemental Brief of the European Commission on Behalf of the European Union as *Amicus Curiae* in Support of Neither Party, *Kiobel v. Royal Dutch Petroleum Co.*, 133 S.Ct. 1659 (2013) (No. 10-1491), at 33 (submitting that "exhaustion encourages the development of meaningful remedies in countries with a nexus to the tortious conduct, while also preserving the judicial resources of those States that lack such a nexus from unnecessary intervention").

⁴⁶ In practice, for instance, in order to empower territorial States, the bystander States may after concluding the investigation send the results of the investigation to the territorial State and request it to take over the case with a view to possible prosecution. J. Geneuss, 'Fostering a Better Understanding of Universal Jurisdiction A Comment on the AU-EU Expert Report on the Principle of Universal Jurisdiction', 7 *J.I.C.J.* 945, 958 (2009); AU-EU Expert Report on the Principle of Universal Jurisdiction, 16 April 2009, R10, available at <http://ec.europa.eu/development/icenter/repository/troika_ua_ue_rapport_competence_universelle_EN.pdf>.

Still, foreign governments, when intervening in transnational litigation, may draw attention to criminal law-inspired ‘international principles’ mandating qualified deference to other nations. This was at least the tenor of foreign government *amicus briefs* in the landmark *Kiobel* litigation in the U.S., which concerned the application of the Alien Tort Statute (ATS)⁴⁷ to a foreign-based corporation in respect of foreign harm. The European Commission, while in principle supporting universal civil jurisdiction to the extent it applies to the same category of crimes which trigger universal criminal jurisdiction,⁴⁸ conditioned its exercise on the exhaustion of local and international remedies.⁴⁹ According to the Commission, “exhaustion of ‘local’ remedies requires a demonstration by the claimant that those states with a traditional jurisdictional nexus to the conduct are unwilling or unable to proceed.”⁵⁰ This is exactly the approach to subsidiarity or complementarity that is dominant in international criminal law. In a similar vein, the German government, in its *amicus* brief, argued that “litigants suing corporations should use forums with a greater nexus to the dispute and should refrain from using U.S. courts until local remedies have been exhausted”, deriving this requirement from the principle of international comity.⁵¹ This comity-based exhaustion requirement was in fact cited in earlier ATS case-law, notably in *Sarei v Rio Tinto*,⁵² and also features explicitly in the U.S. Torture Victim Protection Act.⁵³ However, after *Kiobel*, which decided the reach of the ATS by applying the presumption against extraterritoriality rather than the principle of subsidiarity,⁵⁴

⁴⁷ 28 U.S.C. para. 1350. The ATS confers jurisdiction on U.S. federal courts to hear tort cases alleging violations of the law of nations.

⁴⁸ Supplemental Brief of the European Commission on Behalf of the European Union as *Amicus Curiae* in Support of Neither Party, *Kiobel v. Royal Dutch Petroleum Co.*, 133 S.Ct. 1659 (2013) (No. 10-1491), at 4-5, (“the United States’ exercise of universal [civil] jurisdiction [with no U.S. nexus of the parties or conduct] under the ATS is consistent with international law in accordance with these well-established constraints”).

⁴⁹ *Id.*, at 30-31.

⁵⁰ *Id.* at 30 fn.77.

⁵¹ Brief of the Federal Republic of Germany as *Amicus Curiae* in Support of Respondents, *Kiobel v. Royal Dutch Petroleum Co.*, 133 S.Ct. 1659 (2013) (No. 10-1491), at 2, 14 available at <http://www.americanbar.org/content/dam/aba/publications/supreme_court_preview/briefs/101491_respondent_a_m_cufederalrepublicofgermany_authcheckdam.pdf>. It has been observed that this statement is informed by the German rule that a legal entity cannot be blameworthy. See C. Kaeb, D. Scheffer, ‘The Paradox of *Kiobel* in Europe’, 107 *Am. J. Int’l L.* 852, 856 (2013).

⁵² *Sarei v. Rio Tinto*, PLC, 671 F.3d 736 (9th Cir. 2011) (en banc), *vacated*, 133 S.Ct. 1995 (2013); *Sarei v. Rio Tinto*, PLC, 550 F.3d 822, 825–26 (9th Cir. 2008) (en banc).

⁵³ Pub. L. No. 102-256, 106 Stat. 73 (March 12, 1992) § 2(b) (“A court shall decline to hear a claim under this section if the claimant has not exhausted adequate and available remedies in the place in which the conduct giving rise to the claim occurred”).

⁵⁴ *Kiobel v. Royal Dutch Petroleum Co.*, 133 S.Ct. 1659 (2013). The Court limited the role of bystander State protection to victims of human rights violations committed abroad by requiring that claims under the ATS “touch and concern” the U.S. Applying this test, the Court held that “it would reach too far to say that mere corporate presence [of the defendant] suffices” (*Kiobel*, 133 S.Ct. at 1669). Note that the Court only ruled that the ATS does not provide for universal civil jurisdiction, not that the exercise of such jurisdiction violates international law.

it will have a more limited role to play.⁵⁵ Still, to the extent that future ATS claims “touch and concern” the United States, the exhaustion of local remedies may be taken into account by courts when deciding on the exercise of jurisdiction.⁵⁶

In practice, the requirement of exhaustion as an instantiation of the principle of subsidiarity is applied less frequently in tort litigation than the doctrine of *forum non conveniens*. This prudential doctrine, based on procedural economy rather than on comity,⁵⁷ also operationalizes subsidiarity, at least in its negative dimension, insofar as it may result in the dismissal of cases that have a stronger connection to another, reasonably available forum. Under *forum non conveniens*, which has common law origins, courts can stay proceedings where another available foreign court is more appropriate, provided that it is not unjust to require the claimant to sue in that court.⁵⁸ This doctrine prevents claimants from shopping for the most convenient forum, even if the claim concerns international law-based claims.⁵⁹

It is of note that, conceptually, *forum non conveniens*, like other prudential doctrines, only applies after courts have established jurisdiction; successful application of the doctrine then leads to courts not exercising such jurisdiction on the grounds that there are no good reasons for the exercise of ‘subsidiary’ forum jurisdiction. This is line with our previous observation that subsidiarity is a procedural technique aimed to reconcile competing normative orders, which does not detract from the principled legitimacy of the exercise of pre-existing jurisdiction. At times, however, the jurisdictional and *forum non conveniens* analysis have collapsed in judicial reasoning. The High Court of England, for instance, decided in a tort case filed by South African miners against a South African corporation that “the English court is not obliged to assume jurisdiction over claims that have little if anything to do with this country”,

⁵⁵ Note that in *Sosa*, the U.S. Supreme Court refused to take position on the exhaustion requirement, explicitly leaving open issues of deference and exhaustion. *Sosa v. Alvarez-Machain*, 542 U.S. at 724–25, 733 n.21 (2004).

⁵⁶ R.G. Steinhardt, ‘*Kiobel* and the Weakening of Precedent: A Long Walk for a Short Drink’, 107 *Am. J. Int’l L.* 841, 843 (2013).

⁵⁷ But see *Kiobel v. Royal Dutch Petroleum Co.*, 133 S.Ct. at 1659, 1674 (Breyer, J., concurring) (suggesting reliance, not only on the principles of exhaustion and comity, but also *forum non conveniens*, to “minimize international friction”).

⁵⁸ See *Spiliada Maritime Corp v. Cansulex Ltd.*, [1987] A.C. 460 (H.L.); *Connelly v. RTZ Corp.*, [1998] 1 A.C. 854 (H.L.); *Lubbe v. Cape PLC*, [2000] 4 All E.R. 268 (H.L.).

⁵⁹ See *Bil’in (Village Council) v. Green Park Int’l Inc.*, No. 500-17-044030-0, paras. 326-27 (Can. Montreal Sup. Ct. July 7, 2008) (holding that the plaintiffs engaged in “inappropriate forum” shopping and chose a Québec forum to “avoid[] the necessity . . . of proving [their case in Israel] . . . thus ensuring for themselves a juridical advantage based on a merely superficial connection of the Action with Québec.”); *Bil’in (Village Council) v. Green Park Int’l Inc.*, [2010] C.A. 1455, para. 86 (Can. Que.) (observing that “[i]t requires a great deal of imagination to claim that the action has a serious connection with Quebec”).

and hence that the miners should bring their claims before a South African court.⁶⁰ This case, like *Kiobel*, seems to be based on the principled absence of jurisdiction rather than on the criteria for the *exercise of subsidiary jurisdiction* not being met: the *ratio decidendi* was not the availability of an alternative forum, but the absence of a jurisdictional (territory-, personality-, or interest-based) link with the forum.

In spite of being rooted in the negative concept of subsidiarity as a shield to prevent foreign cases from reaching domestic courts, *forum non conveniens* need not be seen as a blunt tool for a court to easily rid its desk of unwelcome cases. Indeed, it does not suffice that a claimant has theoretical access to a foreign court; he should also have *practical* access to this court.⁶¹ Such an approach may have particular relevance for international law-based claims, which often concern violations committed in States with weak institutions where a forum may not be readily available. Whether a relaxed or strict version of *forum non conveniens* may apply to such claims, may however matter less in the United States after *Kiobel*. As argued above, *per Kiobel*, most cases arising under the ATS will be dismissed on the basis of the presumption against extraterritoriality, thus obviating the need for an application of a subsidiarity requirement, *e.g.*, pursuant to *forum non conveniens*.

On a comparative note, in the European Union (EU), with respect to intra-EU cases, *forum non conveniens* has even disappeared entirely since the adoption of the Brussels Regulation.⁶² This Regulation sets out a self-contained, strict jurisdictional regime in which courts hearing civil or commercial disputes are obliged to exercise their jurisdiction (mainly the courts of the defendant's domicile or the place of the wrongful act), without their having the option to dismiss on the basis of *forum non conveniens* upon establishing their jurisdiction.⁶³ The Brussels Regulation does however not apply to civil cases straddling an EU member State (in practice the United Kingdom or Ireland, as civil law countries do not normally apply *forum non conveniens*) and a third country, thus leaving application of *forum non conveniens* analysis to these cases intact.

⁶⁰ *Vava v. Anglo American South Africa Ltd.*, [2013] EWHC2131 (QB), para. 76 (concluding statement in decision by Justice Andrew Smith).

⁶¹ If the plaintiff is not entitled to court assistance in another jurisdiction, he may practically speaking have no access to court. See, *e.g.*, *Lubbe v. Cape PLC*, [2000] 4 All E.R. 268 (H.L.), para. 24.

⁶² Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, *O.J.* L 012 (2001).

⁶³ Case C-281/02 *Andrew Owusu v. N.B. Jackson, trading as 'Villa Holidays Bal-Inn Villas', Mamme Bay Resorts Ltd, Mamme Bay Club Ltd, The Enchanted Garden Resorts & Spa Ltd, Consulting Services Ltd, Town & Country Resorts Ltd*, E.C.R. I-01383 [2005].

The techniques of *forum non conveniens*, exhaustion and comity discussed so far are mostly used to operationalize the negative function of subsidiarity. They are used as a shield to fend off unwelcome jurisdictional assertions, mainly with a view to paying deference to the interests of other (territorial) States. Subsidiarity could however also have a *positive* function in transnational tort litigation. This function has notably been emphasized by the United Nations, whose Guiding Principles on Business and Human Rights, while stopping short of endorsing universal civil jurisdiction, require that corporations' home States provide access to judicial remedies for human rights violations if such violations have occurred abroad, where the claimants "cannot access [their] home State courts regardless of the merits of the claim".⁶⁴ This suggests that subsidiarity can also be used as a sword to extend a bystander State's jurisdiction in case the primary jurisdiction State fails to assume its responsibility.

In civil litigation, one specific technique could operationalize such 'sword subsidiarity': *forum necessitatis*, a doctrine pursuant to which States can exercise quasi-universal civil jurisdiction on a necessity basis, when no traditional ground confers jurisdiction.⁶⁵ Application of this doctrine may in particular be called for when the victim does not have reasonable access to another (territorial) forum, and the alleged violations are of sufficient gravity. On this ground, the District Court of The Hague established its jurisdiction over a torture claim filed by a Palestinian doctor against unnamed Libyan agents (2012), and subsequently awarded damages to the claimant.⁶⁶ Plaintiffs may however face a high bar in convincing the court to exercise necessity-based jurisdiction. A court in Québec recently held that the fact that a lawyer in the alternative forum is not willing to pursue the case may not suffice to trigger application of the principle of *forum necessitatis*, even if the case involves gross human rights violations.⁶⁷ In the

⁶⁴ Office of the High Commissioner on Human Rights, Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework, UN Doc. HR/PUB/11/04, princ. 26, commentary (2011).

⁶⁵ The European Commission's *amicus* brief in *Kiobel* indicates that at least ten EU member States can exercise such jurisdiction. Supplemental Brief of the European Commission on Behalf of the European Union as *Amicus Curiae* in Support of Neither Party, *Kiobel v. Royal Dutch Petroleum Co.*, 133 S.Ct. 1659 (2013) (No. 10-1491), at 24, fn. 66 available at [http://www.sdshhlaw.com/pdfs/European%20Commission%20on%20Behalf%20of%20the%20European%20Union%20\(Revised\).pdf](http://www.sdshhlaw.com/pdfs/European%20Commission%20on%20Behalf%20of%20the%20European%20Union%20(Revised).pdf)

⁶⁶ *El-Hojouj v. Unnamed Libyan Officials*, Arrondissementsrechtbank Den Haag [District Court of The Hague], Mar. 21, 2012, Case No. 400882/HAZA11-2252 (ECLI:NL:RBSGR:2012:BV9748) (Neth.) (applicant claimed to have suffered damages following unlawful imprisonment in Libya for allegedly infecting children with HIV/AIDS).

⁶⁷ *Anvil Mining Ltd. v. Canadian Ass'n Against Impunity*, [2012] C.A. 117, para. 96-103 (Can. Que.). The case was brought by an NGO against a mining company accused of complicity in human rights violations committed in the Democratic Republic of the Congo.

United States, the principle is not well-known, although courts may give effect to it as part of a multifactor test when deciding on whether or not to exercise jurisdiction, also in human rights tort cases brought after *Kiobel*.⁶⁸

In respect of ‘positive’ applications of jurisdictional subsidiarity, it is observed that a forum court’s exercise of jurisdiction need not imply that this court will of necessity also apply forum law. Under conflict of laws rules, the forum State may still want, or have to defer to the law of the place of commission of the wrongful act (*lex causae*),⁶⁹ unless this law runs counter to the public policy of the forum. This could also be seen as an application of the principle of subsidiarity: the law of the State with the strongest connection to the case will be respected and applied in the ordinary course of events, and only in exceptional circumstances will the forum apply its own law, on a subsidiary basis, when foreign law does not satisfy minimum standards. Use of this applicable law mechanism soothes the sovereignty concerns with which the exercise of extraterritorial jurisdiction is often associated, since it prevents the forum State from imposing its own laws and values on ‘foreign-cubed’ cases.⁷⁰

Concluding, it appears that, in various jurisdictions, the legal policy consideration that the territorial forum should have first right of way when it comes to exercising tort jurisdiction over violations of international law and human rights,⁷¹ and that another forum steps in only on a subsidiary basis, is crystallizing as sound legal policy. This occurs through a variety of legal techniques, such as the requirement of exhaustion of domestic remedies, *forum non conveniens*, and *forum necessitatis*.⁷² These techniques allow for the dismissal of cases brought in a non-territorial forum, e.g., in a corporation’s home State or even in a bystander State exercising universal jurisdiction, insofar as the territorial forum is able and willing to hear the case. At the

⁶⁸ R.G. Steinhardt, ‘*Kiobel* and the Weakening of Precedent: A Long Walk for a Short Drink’, 107 *Am. J. Int’l L.* 841, 843 (2013).

⁶⁹ Regulation (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), *O.J. L* 199/40 (2007). Note that in ATS litigation, the applicable law is *public international law*; as a result, the *lex causae* is normally not applied.

⁷⁰ See, e.g., R. McCorquodale, ‘Waving not Drowning: *Kiobel* Outside the United States’, 107 *Am. J. Int’l L.* 846, 847 (2013).

⁷¹ J. Nolan, M. Posner, S. Labowitz, ‘Beyond *Kiobel*: Alternative Remedies for Sustained Human Rights Protection’, *Am. J. Int’l L. Unbound* e-48, e-50 (2014) (“Logically, recourse to local law and a system of enforcement and judicial relief in the host countries where global corporations operate should be the first option for ensuring greater respect for human rights”).

⁷² See also I.B. Wuerth, ‘The Supreme Court and the Alien Tort Statute: *Kiobel v. Royal Dutch Petroleum*’, 107 *Am. J. Int’l L.* 601, 619 (2013) (“The favorable reference to [comity, exhaustion, and *forum non-conveniens* doctrines] could similarly accord preference to forums with a strong connection to the defendant or to the conduct at issue in the lawsuit, also consistent with universal jurisdiction tempered by *subsidiarity*.”) (emphasis added), citing the *Kiobel* decision, and Justice Breyer’s opinion in particular.

same time, they may allow for the exercise of *subsidiary* non-territorial jurisdiction where the territorial forum fails to provide redress, in particular with respect to human rights violations, or possibly, other global regulatory failures affecting individuals and collectivities.

In some jurisdictions, however, courts appear to have shut the door for such subsidiary protection, by requiring a strong jurisdictional connection of the case with the forum in the first place, thereby effectively excluding ‘foreign-cubed’ cases which do not ‘touch and concern’ the forum. The much-discussed U.S. Supreme Court’s decision in *Kiobel* is a case in point. As Ralph Steinhardt has insightfully observed, this decision regrettably stands for “international law in its ancient “negative” form of jurisdictional line drawing and abstention, instead of its contemporary “affirmative” forms of substantive law for resolving communal problems, like environmental degradation and egregious human rights violations.”⁷³ This is exactly the transformative power of the positive dimension of the principle of subsidiarity in the law of jurisdiction: it may encourage, rather than limit the exercise of unilateral jurisdiction over violations of international values or interests, while calling for deference to territorial fora that are able and willing to grant redress. Especially in the field of corporate social responsibility, in the absence of stringent host State regulation, multilateral regulation and monitoring, workable transnational private regulatory initiatives, or an International Civil Court, such positive subsidiary jurisdiction may be necessary to provide accountability and raise standards.⁷⁴

2. Environmental goods

As set out in the first part, bystander States may use subsidiary jurisdiction as a stopgap measure to prevent impunity for gross human rights violations from arising, or to offer a forum to those victims who would otherwise be denied one. Such regulatory intervention could be justified by the *erga omnes* character of human rights, which implies that violations of these rights could be considered as violations of the international community’s values. Any State accordingly has an interest in upholding the integrity of the norm, including by providing redress through its

⁷³ R.G. Steinhardt, ‘*Kiobel* and the Weakening of Precedent: A Long Walk for a Short Drink’, 107 *Am. J. Int’l L.* 841, 845 (2013).

⁷⁴ *Contra*: A.L. Parrish, ‘*Kiobel*’s Broader Significance: Implications for International Legal Theory’, *Am. J. Int’l L. Unbound* e-19, e-23 (2014) (“The hope after *Kiobel* is that the human rights community will turn away from unilateral enforcement and focus its attention on rebuilding international law and its institutions”).

own court system. Apart from human rights, the international community may also have an interest in *environmental* norms and values, and individual States, as trustees of the international community, may want to, or be called on to protect if other States fail to do so. For economic reasons, certain States may indeed be disinclined to strictly enforce environmental norms or protect environmental values, whereas other States, may favor a high level of environmental protection and enforcement, and be inclined to extend their domestic regulation and enforcement to foreign economic operators who are subject to lax rules in their home State. Often, these bystander States may do so to protect environmental values globally or extraterritoriality, but also to level the international playing field so as to ensure that domestic operators are not put at a competitive disadvantage as a result of strict domestic environmental regulation.

When thus intervening, such States may be considered to be exercising subsidiary jurisdiction to compensate for the primary jurisdiction State's failure to provide minimum levels of environmental protection and enforcement. Because the protection of their own trade interests incentivizes bystander States to exercise their jurisdiction, they will normally give effect to the positive dimension of subsidiarity. Obviously, primary jurisdiction States may highlight the negative dimension of subsidiarity, and protest the undue imposition of foreign regulation on affairs that purportedly belong to their *domaine réservé*.

In the first section of this part, I will examine how bystander States can unilaterally protect the marine environment and marine resources from oil pollution, and especially illegal or unsustainable fishing on the high seas, where primary jurisdiction States – in the case the vessel's flag State – fail to address such activities by their vessels. I will in particular analyze what options, or limitations, the law of the sea, as codified in the UN Convention on the Law of the Sea (UNCLOS), offers for the exercise of unilateral jurisdiction by *port States* – these are the States in whose ports foreign vessels dock (*e.g.*, for transshipment of fish catch). In the second section, I will proceed to analyze the *international trade law* consequences of such regulatory environmental intervention, in light of the law of the World Trade Organization. The exercise of port state jurisdiction, or any other jurisdictional measure that regulates the flow in goods for environmental reasons, could indeed restrict international trade in ways that are prohibited under the General Agreement on Tariffs and Trade (GATT). This trade law analysis will ascertain, in general terms, to what extent GATT allows for the exercise of subsidiary jurisdiction with a view to protecting environmental values and goods.

(a) Port State jurisdiction and marine resources

As such, UNCLOS does not use the term “subsidiarity” or “subsidiary” jurisdiction. Nonetheless, the Convention makes an explicit distinction between the primary – and even exclusive – jurisdiction of the flag State over its vessels, and the possibilities for other States to exercise jurisdiction over foreign-flagged vessels.⁷⁵ These other States are in particular *coastal States* and *port States*. Coastal States have limited jurisdiction over the activities of foreign-flagged vessels in their maritime zones (territorial sea, contiguous zone, exclusive economic zone). Such jurisdiction is in the first place geared towards protecting coastal States’ own legitimate interests.⁷⁶ What interests us here, however, is whether bystander States could also exercise jurisdiction over acts committed in areas beyond national jurisdiction, with a view to protecting *international* interests in the face of flag State regulatory failure. As such bystander States do not normally have enforcement powers in such areas,⁷⁷ such jurisdiction can only be enforced in those States’ *ports*. Through port State measures, States may exercise subsidiary jurisdiction in the face of a flag State’s regulatory failure that threatens common concerns, *e.g.*, the flag State fails to prevent and repress pollution or dumping on the high seas, it fails to adequately regulate the high seas fishing activities of its vessels, or it does not enforce minimum labor standards on board its ships.

⁷⁵ That flag States have primary jurisdiction as a well-established principle of the law of the sea. Article 97 UNCLOS even enshrines the *exclusive* penal or disciplinary jurisdiction of the flag State with respect to collisions or other incidents of navigation on the high seas. Article 97(1) UNCLOS (“In the event of a collision or any other incident of navigation concerning a ship on the high seas, involving the penal or disciplinary responsibility of the master or of any other person in the service of the ship, no penal or disciplinary proceedings may be instituted against such person except before the judicial or administrative authorities either of the flag State or of the State of which such person is a national”). Note that in the past, flag States did not have exclusive jurisdiction over their vessels. See *S.S. "Lotus", (France v. Turkey)*, Judgment, PCIJ Series A no 10 7 September 1927, at 25-27 (holding that there was no rule of international law prohibiting Turkey from exercising jurisdiction over a collision on the high seas caused by a French vessel). Under the law of the sea, such primary jurisdiction comes with responsibilities, however: pursuant to Article 94 UNCLOS, every State is required to “effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag”. This immediately invites the question whether, where flag States do not live up to jurisdictional expectations, *other* States that have a connection to the vessel or its activities may not have jurisdiction too, possibly on a subsidiary basis.

⁷⁶ See, *e.g.*, in respect of pollution: Article 220 UNCLOS (allowing a coastal State, when a vessel is voluntarily within its port, to “institute proceedings in respect of any violation of its laws and regulations adopted in accordance with this Convention or applicable international rules and standards for the prevention, reduction and control of pollution from vessels when the violation has occurred within the territorial sea or the exclusive economic zone of that State”).

⁷⁷ See for limited exceptions Article 110 UNCLOS on war ships’ right to visit foreign vessels (*e.g.*, piracy, slave trade).

It is well-established that port States have limited jurisdiction over foreign-flagged vessels docking in their ports, insofar as these disturb the public peace of the State.⁷⁸ It is unclear, however to what extent port States could exercise subsidiary jurisdiction over vessels where flag State regulatory failure jeopardizes common concerns.

UNCLOS is largely silent on the existence of such ‘subsidiary’ port State jurisdiction. Still Article 218 UNCLOS provides that a (port) State may, when a vessel is voluntarily within a port, undertake investigations and possibly institute proceedings “in respect of any discharge from that vessel outside the internal waters, territorial sea or exclusive economic zone of that State in violation of applicable international rules and standards established through the competent international organization or general diplomatic conference.”⁷⁹ This provision allows for the exercise of port State jurisdiction in respect of a vessel’s activities in areas *beyond* national jurisdiction, although such exercise is limited to *discharges*.

That UNCLOS only provides for the exercise of subsidiary port State jurisdiction over discharges, does not mean that States are not allowed to exercise such jurisdiction in respect of vessels’ *other* activities beyond national jurisdiction, especially when – like port State jurisdiction over discharges – such jurisdiction is exercised with a view to protecting global or regional interests laid down in international arrangements. Indeed, while UNCLOS does not provide for such jurisdiction, it does not prohibit it either. In practice, States and regional organizations have proved willing to exercise (limited) port State jurisdiction over fisheries on the high seas to compensate for the flag State’s perceived regulatory failure, often by reference to the flag State’s non-cooperation regarding the management of straddling fish stocks.⁸⁰ Such jurisdictional assertions occasionally lead to protest by the flag State, who may even be willing

⁷⁸ In the traditional understanding, port State law only applies, in the words of the U.S. Supreme Court in 1887, to acts ‘which disturb the public peace’; it does not extend to ‘[d]isorders which disturb only the peace of the ship or those on board’, which ‘are to be dealt with exclusively by the sovereignty of the home of the ship’ (*i.e.*, through flag State jurisdiction). *Mali v. Keeper of the Common Jail (Wildenhus’s Case)*, 120 U.S. 1, 18 (1887). See also *McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 19-21 (1963) (applying the “well-established rule of international law that the law of the flag state ordinarily governs the internal affairs of the ship”, and raising concerns over “international discord” in case U.S. labour law would apply to a foreign ship). The non-extension of domestic law to the internal affairs of a docking ship may not be required by international law, however, but is a matter of State discretion. See Restatement (Third) of U.S. Foreign Relations Law, para. 512 Reporter’s Note 5. Knox has argued that domestic courts could yet apply domestic law - on what one could call a subsidiary basis - in the latter situation, but only on the basis of a clear congressional statement in this respect. J. Knox, ‘A Presumption against Extrajurisdictionality’, 104 *Am. J. Int’l L.* 351, 396 (2010).

⁷⁹ Article 218(1) UNCLOS.

⁸⁰ See notably the UN Straddling Fish Stocks Agreement. United Nations, General Assembly, *Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks*, A/CONF.164/37 (8 September 1995).

to initiate litigation, citing the protection of domestic trade interests rather than a perceived ‘common’ or ‘global interest’.

The most well-known dispute in this respect is probably the *Swordfish Dispute*, which related to Chile’s ban on Spanish fishing vessels landing swordfish caught on the high seas in Chilean ports. In 2000, the (then) European Community started proceedings against this measure before ITLOS and the WTO,⁸¹ which were however discontinued in 2002. Chile’s port State measures were aimed to further a ‘common interest’ in sustainable swordfish fishing, laid down in a regional fisheries agreement, that was allegedly undermined by Spanish vessels’ activities in the high seas.⁸² It is doubtful, however, whether such measures were justifiable as Spain was not a party to this agreement. And even it had been a party, it would have been taken hostage by the veto power of the coastal States which initially signed the agreement.⁸³ This would run counter to Article 64 UNCLOS, which provides that coastal States *and* other States whose nationals fish in the region for highly migratory fish species shall cooperate.⁸⁴ In other words, in the *Swordfish Dispute*, coastal States’ national interests just masqueraded as common interests. As the coastal States had essentially excluded non-coastal States from the regional fisheries agreement, coastal State’s subsidiary port measures may legally be questionable.

Similar questions arose regarding Norway’s 1995 ban on Icelandic vessels entering its ports, a ban imposed after Iceland had unilaterally increased its catch limit in the Barents Sea Loophole, a high seas area where fishing stocks straddling Norway’s maritime zones were present. In so doing, Iceland arguably engaged in unsustainable and illegal fishing. As in the *Swordfish Dispute*, it was unclear whether at the time there was a violated international law norm in the first place, which Norway could then unilaterally enforce via subsidiary port State jurisdiction: the UN Fish Stocks Agreement had not yet entered into force and there was no regional fisheries agreement.⁸⁵ Still, unlike in the *Swordfish Dispute*, Norway and Iceland were coastal States,

⁸¹ *Conservation and Sustainable Exploitation of Swordfish Stocks in the South-Eastern Pacific Ocean (Chile/European Community) (Order)* ITLOS Case No. 7 [20 December 2000]; *WTO Chile—Measures Affecting the Transit and Importation of Swordfish—Request for Consultations by the European Communities* [26 April 2000] WT/DS193/1.

⁸² Galapagos Framework Agreement for the Conservation of Living Marine Resources on the High Seas of the South Pacific (‘Galapagos Agreement’), 14 August 2000.

⁸³ In particular, Article 12(1) of the Galapagos Agreement gives a veto right to coastal States regarding substantive matters. Article 16(1) allows non-coastal States, such as Spain, to join once the agreement has entered into force and for a 12-month period only.

⁸⁴ Note that at the time Chile was not a party to the Fish Stocks Agreement. See more at length on the law of the sea issues raised by the *Swordfish Dispute*: P.-T. Stöll, S. Vöneky, ‘The *Swordfish* Case: Law of the Sea v. Trade’, 62 *ZaöRV* 21, 23-26 (2002).

⁸⁵ EFTA Surveillance Authority, Letter to Ambassador Einar Bull, Norwegian Mission to the European Union, at 3, EFTA Doc. No. 98-3393-D (May 14, 1998), p. 3. Note that the EFTA Surveillance Authority refused to hear

and it is arguable that through its unilateral action Norway was allowed to vindicate a *common interest* that had already become legally relevant. Indeed, while the Fish Stocks Agreement had not yet entered into force, it had already been adopted, and thus created ‘emerging expectations’ for States.⁸⁶

It may even be submitted that where common interests have not yet become legally relevant (they have not yet been laid down in a fisheries agreement) port State measures vindicating such interests may be legitimate if they objectively further a public good, *e.g.*, sustainable fishing, in a non-discriminatory manner where other States are unjustifiably dragging their feet. As Hakimi has pointed out, port States may then in fact vindicate a common interest with a view to *changing* international law, insofar as this interest has not yet been (sufficiently) translated into the law.⁸⁷ Canada’s actions against ships flagged in the EU, which had objected to the allocation of halibut catch stock by the Northwest Atlantic Fisheries Organization and subsequently increased its catch stock in a way that could not be considered as sustainable, provide a good example: rather soon, these actions, which included port State action, led to the adoption of a new agreement with a strict oversight mechanism that ensured more sustainable halibut fishing practices (1995).⁸⁸

A similar measure was taken by the EU in 2013, when it banned vessels flying the flag of the Faeroe Islands from its ports, insofar as they fished herring and mackerel,⁸⁹ with a view to forcing it to cooperate with the EU and other coastal States in sustainable mackerel and herring management.⁹⁰ Somewhat similar to the *Swordfish Dispute*, this EU measure led to a dispute

the dispute. *Id.*, (“[T]he underlying dispute is one between Norway and Iceland relating to Icelandic fishing in international waters . . . for which the Authority has no competence”).

⁸⁶ See in this respect also M Hakimi, ‘Unfriendly Unilateralism’, 55 *Harvard Int’l L. J.* 105, 125 (2014). (“More than reinstating the law as it was, Norway was supporting emerging expectations on what the law would become”). *Id.*, at 138 (unfriendly unilateralism supported emerging expectations on the duty to cooperate in UNCLOS).

⁸⁷ Hakimi, above note 86, 131-132 (adding that, with this agreement, the organization’s conservation interests were better satisfied).

⁸⁸ Agreed Minute on the Conservation and Management of Fish Stocks, Can.-Eur. Community, Apr. 20, 1995, 34 I.L.M. 1260. The example is given by Hakimi to support her thesis that ‘unfriendly unilateralism can help strengthen legal regimes’.

Agreed Minute on the Conservation and Management of Fish Stocks, Can.-Eur. Community, Apr. 20, 1995, 34 I.L.M. 1260. The example is given by Hakimi to support her thesis that ‘[u]nfriendly unilateralism can also help strengthen legal regimes’. M Hakimi, ‘Unfriendly Unilateralism’, 55 *Harvard Int’l L. J.* 105, 131-32 (2014), adding that, with this agreement, the organization’s conservation interests were better satisfied.

⁸⁹ Or vessels transporting such fish or fishery products caught by vessels flying the flag of or authorized by the Faroe Islands. See Request for the Establishment of a Panel by Denmark in Respect of the Faroe Islands, *European Union - Measures on Atlanto-Scandian Herring*, WT/DS469/2 (Jan. 10, 2014).

⁹⁰ Regulation (EU) No 1026/2012 of the European Parliament and of the Council of 25 October 2012 on certain measures for the purpose of the conservation of fish stocks in relation to countries allowing non-sustainable fishing, *O.J. L* 316/34 (2012). See for the relevant international arrangement, involving the EU, Norway, the Russian Federation, Iceland, and initially also the Faeroe Islands: Agreed Record of Conclusions of Fisheries Consultations

before both an UNCLOS Arbitral Tribunal and a WTO panel.⁹¹ It is not clear, however, whether these may have an opportunity to review the exercise of the measures. Soon after the cases were brought, the EU backpedalled, at least with respect to mackerel fishing, and entered into a joint agreement with the Faroe Islands and Norway on the conservation and management of the North East Atlantic mackerel stock.⁹² Unlike the EU-Canada agreement, which cemented the sustainability of halibut fishing, the EU-Faeroe agreement substantially increased the Faroe Islands' fishing quotas in ways that cannot be considered sustainable, at least not according to the International Council for the Exploration of the Sea.⁹³ Thus, it appears that, in this case, EU unilateralism, including the exercise of EU port State jurisdiction with a view to protecting common interests, has backfired. Possibly, the threat of litigation in two fora caused the EU to pull back. Still, by acting unilaterally, the EU may have forced the Faeroe Islands to at least make some concessions *vis-à-vis* its initial position. Accordingly, while it may not truly have contributed to the protection of global values, it may at least have prevented even more unsustainable fishing.

This overview demonstrates that port States' jurisdictional reach to protect the common interests may be contested, especially by flag States, which see their jurisdictional prerogatives on the high seas undermined by port State score-settling in a fiercely competitive environment. One can surely have sympathy with flag States' concerns. Indeed, such port State jurisdiction may not have a clear basis in an international legal mandate, and could in reality be a smokescreen for the protection of national economic interests, or result in the undue extraterritorial imposition of a State's own values on vessels which only have an accidental connection with it.⁹⁴

on the Management of the Norwegian Spring-Spawning (Atlanto-Scandian) Herring Stock in the North-East Atlantic for 2007, Jan. 18, 2007. The Faeroe Islands withdraw from this arrangement in 2013: Commission Implementing Regulation (EU) No 793/2013 of 20 August 2013 establishing measures in respect of the Faeroe Islands to ensure the conservation of the Atlanto-Scandian herring stock, *O.J. L* 223/1, Preamble ¶ 7.

⁹¹ Request for the Establishment of a Panel by Denmark in Respect of the Faeroe Islands, *European Union - Measures on Atlanto-Scandian Herring*, WT/DS469/2 (Jan. 10, 2014).

⁹² Agreed Record on a Fisheries Arrangement Between the European Union, the Faroe Islands and Norway on the Management of Mackerel in the North-East Atlantic from 2014 to 2018, London, 12 March 2014, available at <<http://www.regjeringen.no/pages/38649623/Makrellavtale2014.pdf>>.

⁹³ ICES, Mackerel in the Northeast Atlantic (combined Southern, Western, and North Sea spawning components), Report of the ICES Advisory Committee, ICES Advice 2013, Book 9, Section 9.4.17.

⁹⁴ Concerns over extraterritoriality and illegitimacy explain why States have sometimes placed the jurisdictional focus on the *territorial* implementation or continuation of wrongful acts committed extraterritorially, rather than on the extraterritorial acts themselves. For instance, they have taken measures against vessels for misrepresenting their activities to port State authorities, when the captain declared that he had not dumped materials or that he did not engage in illegal fishing activities – although he did just this. See E.J. Molenaar, 'Port State Jurisdiction', Max Planck Encyclopedia of Public International Law (2014), para. 17. The idea clearly is that, while the dumping or

The subsidiary jurisdiction which port States exercise can take a variety of forms. Ordinarily, as could be gleaned from the above overview of common interest-inspired unilateral measures, port States impose port entry bans or landing prohibitions on foreign vessels. Such bans may exert considerable influence over the targeted vessels where these cannot reasonably reach other ports (*e.g.*, to transship fish), thus effectively forcing them to bring their contested activities to a halt. UNCLOS however also contemplates a limited array of other enforcement measures, notably in respect of discharges, where it allows the coastal State to institute proceedings in its ports, including detention of the vessel, if the discharge causes major damage or threat of major damage to the coastline or related interests of the coastal State, or to any resources of its territorial sea or exclusive economic zone.⁹⁵ The earlier-cited Article 218 UNCLOS does not contain similar limitations for port States which are not coastal States. Arguably, as this article gives a mandate to port States to address “violation[s] of applicable international rules and standards established through the competent international organization or general diplomatic conference”,⁹⁶ few enforcement restrictions should apply. States and regional organizations have, in any event, interpreted Article 218 as also allowing for the imposition of such far-reaching measures as criminal penalties.⁹⁷ Far-reaching enforcement measures are not contemplated in the UN Fish Stocks Agreement, however, although this agreement pertains, in part, to fish catch “taken in a manner which undermines the effectiveness of sub-regional, regional or global conservation and management measures on the high seas”.⁹⁸ The Agreement allows (and even requires)⁹⁹ port States to prohibit landings and transshipments of such a fish catch, but stops short of allowing, let alone ordering penalties. Still, as the relevant provision of the Agreement “does not [affect] the exercise by States of their sovereignty over ports in

fishing may have taken place outside national jurisdiction, the misrepresentation has occurred within the port, over which the State can duly exercise *territorial* jurisdiction.

⁹⁵ Article 220(6) UNCLOS. Even then, the coastal State will be bound by procedures and requirements established through competent international organizations (in practice the IMO) with respect to bonding or financial securities. Article 220(7) UNCLOS. In case of “a substantial discharge causing or threatening significant pollution of the marine environment”, only physical inspection of the vessel can be undertaken, and this only “if the vessel has refused to give information or if the information supplied by the vessel is manifestly at variance with the evident factual situation and if the circumstances of the case justify such inspection.” (Art. 220(5) UNCLOS).

⁹⁶ Article 218(1) *in fine*. See, *e.g.*, Annexes to International Convention for the Prevention of Pollution from Ships (MARPOL 73/78).

⁹⁷ See, *e.g.*, Directive 2005/35/EC of the European Parliament and the Council of 7 September 2005 on ship-source pollution and on the introduction of penalties for infringements, *O.J. L* 255/11 (2005). Where discharges have not threatened the port or coastal State, but occurred outside its waters, effective imposition of penalties is unlikely, however. See T.L. McDorman, ‘Port State Enforcement: A Comment on Article 218 of the 1982 Law of the Sea Convention’, 28 *J. Mar. L. & Com.* 305, 321 (1997) (also citing the restrictive application conditions of Article 218).

⁹⁸ Article 23 paras (2) and (3) UN Fish Stocks Agreement.

⁹⁹ Article 23(1) UN Fish Stocks Agreement (“has the right and the duty”).

their territory in accordance with international law”,¹⁰⁰ it is arguable that port States have residual, subsidiary jurisdiction to impose criminal penalties in respect of illegal fishing activities, especially, by analogy with the regime of Article 218 UNCLOS, when such activities violate an international norm.¹⁰¹

It may be submitted that the port State’s options as to enforcement jurisdiction expand the more the underlying substantive norm which the port State wishes to enforce rises to the level of a truly *international norm*, as opposed to a mere national norm, or a purported common interest that is not yet legally relevant. When international consensus has crystallized regarding the wrongfulness of acts committed on the high seas, and the flag State fails to intervene, port States may be allowed to step in as trustees of the international community,¹⁰² and to use the wide powers normally accruing to flag States. In so doing, port States may be seen to offer subsidiary protection in case of threats to common interests, to the extent that flag States do not assume their primary regulatory and enforcement responsibilities.¹⁰³ When a given port State’s regulation protects goods that are as such *not* protected by international regulation, this does not mean that port State jurisdiction over such goods is necessarily internationally unlawful. But it may well mean that the unilateral measures taken to enforce such a regulation cannot be as far-reaching,¹⁰⁴ unless perhaps, as argued above, the port State can somehow objectively establish that the international community unjustifiably fails to protect the goods the former

¹⁰⁰ *Id.*, Article 23(4).

¹⁰¹ A similar regime is contemplated in Article 4(1)(b) of the FAO PSM Agreement, which allows, and even requires, the imposition of onerous enforcement measures “pursuant to a decision of a regional fisheries management organization” (United Nations Food and Agriculture Organization (FAO) Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing). In the latter case, the particular enforcement measure is based on an explicit enforcement authorization by an international body, rather than just on the substantive wrongfulness of a fishing activity laid down in an international legal arrangement. See also Australian Maritime Safety Authority Marine Notice 8/2006 (non-compliance with its compulsory pilotage system by foreign vessels in the Torres Strait – aimed at protecting the Great Barrier Reef - would lead to the imposition of non-custodial penalties in port or, for ships in transit, at the next port of call in Australia), which found its legal basis in IMO Resolution MEPC.133 (53) of 22 July 2005.

¹⁰² See also D. König, ‘The enforcement of the International Law of the Sea by Coastal and Port States’, 62 *ZaöRV* 1, 15 (2002). Note that, more generally, in the law of the sea, and international environmental law a strong international authority is lacking, so that, out of necessity, individual States will have to act as trustees of the international community to uphold the norms. See A.W. Samaan, ‘Enforcement of International Environmental Treaties: An Analysis’, 5 *Fordham Envtl. L. Rev.* 261, 273 (2011); S.M. Anderson, ‘Reforming International Institutions to Improve Global Environmental Relations, Agreement, and Treaty Enforcement’, 18 *Hastings Int’l & Comp. L. Rev.* 771, 779 (1994-1995).

¹⁰³ See E.J. Molenaar, ‘Port State Jurisdiction’, Max Planck Encyclopedia of Public International Law (2014), para. 3. (“By complementing the flag State’s responsibility over its ships (Flag of Ships), port States can make an important contribution to ensuring compliance with national and international regulatory efforts”).

¹⁰⁴ Compare Article 23(1), in conjunction with (2) and (3) of the UN Fish Stocks Agreement, which limits port State enforcement measures to the inspection of documents, fishing gear, and catch in case it is *not* established that the catch was “taken in a manner which undermines the effectiveness of subregional, regional or global conservation and management measures on the high seas”.

wishes to protect unilaterally. Concerns remain, however, over abuse of port State jurisdiction to advance national rather than global interests.

(b) Trade restrictions for environmental purposes

In the first section of this part, reference was already made to two instances of flag States filing a WTO complaint against a unilaterally common interest-based transshipment ban. This shows that such bans, as instantiations of subsidiary port State jurisdiction, not only raise issues under the law of the sea but also under international trade law. Trade restrictions aimed at conserving natural resources and protecting the environment are not limited to marine resources and the marine environment, however. States and the EU have increasingly resorted to such measures to curb global warming or even to raise animal welfare standards abroad.¹⁰⁵ The literature on the interface between trade and the environment is vast,¹⁰⁶ and it is not my aim to give an overview of the main trends here. Rather, I would like to focus the analysis, in light of the research question, on whether, and if so how, international trade law, and WTO law in particular, accommodates the exercise of subsidiary jurisdiction by bystander States or the EU aimed at protecting the environment or raising environmental standards elsewhere. Such jurisdiction falls potentially within the ambit of WTO law where it takes the form of conditioning or prohibiting the import of products harvested or produced in ways that run afoul of national, regional or international standards. It may be called ‘subsidiary’ as it aspires to compensate for regulatory failures by authorities with supposedly primary jurisdiction (notably the State of territorial production), in much the same way as bystander States exercise universal

¹⁰⁵ See as far as the EU is concerned, respectively, Directive 2008/101/EC of the European Parliament and of the Council of 19 November 2008 amending Directive 2003/87/EC so as to include aviation activities in the scheme for greenhouse gas emission allowance trading within the Community, *O.J. L* 8/3 (2009), upheld by the Court of Justice of the EU in Case C-366/10 *Air Transport Association of America and Others v. Secretary of State for Energy and Climate Change*, E.C.R. I-13755 [2011], and Regulation (EC) No 1007/2009 of the European Parliament and of the Council of 16 September 2009 on trade in seal products, *O.J. L*.286/36 (2009).

¹⁰⁶ E.g., N. Jaspers, R. Falkner, ‘International Trade, the Environment, and Climate Change’ in R. Falkner (ed.), ‘The Handbook of Global Climate and Environment Policy’, John Wiley & Sons Ltd, Oxford (2013); E. Trujillo, ‘A Dialogical Approach to Trade and Environment’, 16 *J Int Economic Law* 535 (2013); A.N. Rae, A. Strutt, ‘The WTO, Agricultural Trade Reform and the Environment: Nitrogen and Agro-chemical Indicators for the OECD’, 8 *J. Int’l L. & Trade* 12 (2007); S. Switzer, Stephanie, ‘International trade law and the environment: Designing a legal framework to curtail the import of unsustainability produced biofuels’, 6 *J. Int’l Trade L. Pol’y* 30 (2007); G. Matthew, ‘Border tax adjustments and emissions trading: the implications of international trade law for policy design’, *Carbon & Climate L. Rev.* 33 (2008).

jurisdiction or port State jurisdiction to compensate for human rights or natural resources management failures by primary jurisdiction States.

One may be tempted to object that an import ban or requirement is an exercise of territorial, and thus *primary*, jurisdiction. I am reluctant, however, to espouse this view, as on closer inspection, the trade restriction which it imposes purports to regulate activities taking place, or originating, outside the asserting entity's territory, where the laws of another territorial sovereign apply on a primary basis. In this sense, the asserting State's trade measures can even be characterized as extraterritorial, or at least as producing extraterritorial effects.

Under WTO law, import bans and restrictions on environmental grounds are normally prohibited as quantitative restrictions of international trade under Article XI GATT. Nevertheless, WTO panels and the Appellate Body have proved willing to accept such restrictions to the extent that they can, at least *prima facie*, be justified under one of the exceptions of Article XX GATT, or as a legitimate public policy objective under Article 2.2 Agreement on Technical Barriers to Trade (TBT),¹⁰⁷ also where the restriction pertains to a harvesting or production method that takes place *outside* that State's territory.¹⁰⁸ This implies that in principle, a State can (but obviously need not) exercise subsidiary jurisdiction through trade-restrictive measures so as to compensate for regulatory failures of another 'primary jurisdiction' State, in respect of the protection of environmental interests.

This reading of international trade law was hard-fought, however. It is reminded that in *Tuna/Dolphin* (1991), a case concerning a U.S. trade measure aimed at protecting dolphins - considered here as a global environmental interest - accidentally caught by tuna fishers, a GATT panel did not approve of unilateral measures to further a purportedly global environmental interest, putting instead a higher premium on free trade.¹⁰⁹ The U.S. continued to apply similar measures, however, and eventually, in the *Shrimp/Turtle* case, managed to convince the WTO Appellate Body of the permissibility of the exercise of subsidiary jurisdiction aimed at

¹⁰⁷ The exceptions enshrined in these provisions countenance trade restrictions that are promulgated with a view to protecting environmental interests. See notably the clauses citing the preservation of exhaustible natural resources (Art. XX(g) GATT), and the protection of public morality (Art. XX(a) GATT, or implicitly in Art. 2.2 TBT).

¹⁰⁸ See for the latest WTO panel in this respect: Panel Report, *European Communities – Measures Prohibiting the Importation and Marketing of Seal Products*, WT/DS400/R, WT/DS401/R (Nov. 25, 2013), para. 8.2.c (“The EU Seal Regime is not inconsistent with Article 2.2 [TBT] because it fulfils the objective of addressing the EU public moral concerns on seal welfare to a certain extent, and no alternative measure has been demonstrated to make an equivalent or greater contribution to the fulfilment of the objective as the EU Seal Regime”).

¹⁰⁹ Report of the Panel, *United States—Restrictions on Imports of Tuna*, DS21/R (Sept. 3, 1991), GATT B.I.S.D. (39th Supp.) at 155 (1991) I.L.M. 1594 (1991); Report of the Panel, *United States—Restrictions on Imports of Tuna*, DS29/R (Jun. 16, 1994), 33 I.L.M. 936 (1994).

protecting global environment interests, in the case the interests of sea turtles which happen to find themselves in the nets of shrimp fishers.¹¹⁰ This U.S. action has been usefully described as an instance of ‘unfriendly unilateralism’ that helped ‘reconcile competing objectives within the law’, in the case by giving global environmental interests more weight within the trade regime.¹¹¹ This U.S. leadership thus had an undeniable effect on international law-making or at least interpretation, by the WTO bodies¹¹².

The exercise of subsidiary jurisdiction to pursue extraterritorial or global environmental objectives is not automatically lawful under WTO law, however. Importantly for our purposes, the WTO has limited the categories of States which could exercise such jurisdiction to those which have a “sufficient [jurisdictional] nexus” with the subject-matter,¹¹³ thus excluding true bystander States. In *Shrimp/Turtle*, this nexus was, in the WTO’s view, constituted by the highly migratory nature of a fishing species, which passed in (and out) of waters subject to the jurisdiction of the regulating State.¹¹⁴ This might appear somewhat artificial, but the idea was clearly to preclude an unrestricted number of States from exercising subsidiary ‘universal’ jurisdiction with a view to protecting non-territorial or global environmental interests via unilateral trade measures. This has been denoted as the ‘implicit jurisdictional clause’ of WTO law.¹¹⁵

Apart from requiring a jurisdictional nexus between the regulating State (or regional organization) and the environmental good it wishes to protect, WTO law also requires that States apply their unilateral trade measures in an even-handed manner, which means as to the conservation of natural resources, that the trade measures should "work together with restrictions on domestic production or consumption, which operate so as to conserve an

¹¹⁰ Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R (Oct. 12, 1998), para. 133.

¹¹¹ M Hakimi, ‘Unfriendly Unilateralism’, 55 *Harvard Int’l L. J.* 105, 129 (2014).

¹¹² *Id.*, at 130 (“All of these restrictions ... were part of a broader effort to create more space for the environment within the trade regime. WTO bodies eventually responded by giving states some discretion to use trade restrictions for the global environment.”) (footnote omitted).

¹¹³ Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R (Oct. 12, 1998), para. 133.

¹¹⁴ *Id.*

¹¹⁵ P. Van den Bossche, N. Schrijver, G. Faber, ‘Unilateral Measures Addressing Non-Trade Concerns. A study on WTO Consistency, Relevance of other International Agreements, Economic Effectiveness and Impact on Developing Countries of Measures concerning Non-Product-Related Processes and Production Methods’, The Hague: the Ministry of Foreign Affairs of The Netherlands, 94-6 and 150 (2007) (referring to ‘implicit jurisdictional limitation’).

exhaustible natural resource."¹¹⁶ What States preach to others, they should also practice for themselves.

Finally – and here subsidiarity comes most strongly to the fore – such jurisdiction should comply with the requirements of the *chapeau* of Article XX GATT, which prohibits trade measures to be “applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade.” In practice, this means *inter alia* that the regulating State should make serious efforts to negotiate before restricting trade,¹¹⁷ should explore less trade-restrictive, reasonably available alternative measures that could realize its policy objective,¹¹⁸ and should not apply its own laws in a rigid and inflexible manner but instead recognize foreign measures that provide protection comparable in effectiveness.¹¹⁹ These criteria are all based on the idea of subsidiarity, namely that a bystander State should *only* exercise its ‘extraterritorial’ jurisdiction where the primary jurisdiction State fails to provide protection to the environmental good in question in a manner that is at least equivalent – but necessarily exactly the same – to the rules applied by the bystander State, where an international regulatory solution remains elusive,¹²⁰ and other less trade-restrictive measures to pursue the same objective have been tried. When these conditions are satisfied, they affirmatively allow third States to protect extraterritorial or global environmental interests through unilateral trade measures. At the same time, however, as the criteria are applied rather strictly, and a

¹¹⁶ Appellate Body Report, *China - Measures Related to the Exportation of Various Raw Materials*, WT/DS394/AB/R, WT/DS395/AB/R, WT/DS398/AB/R (Jan. 30, 2012), paras. 356, 360.

¹¹⁷ Shrimp Products Appellate Body Report, *supra* note 104, para. 166 (emphasizing the need to engage with other Members “in serious, across-the-board negotiations with the objective of concluding bilateral or multilateral agreements for the protection and conservation of sea turtles, before enforcing the import prohibition against the shrimp exports of those other Members.”). Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products, Recourse to Article 21.5 of the DSU by Malaysia*, WT/DS58/AB/RW (Oct. 22, 2001), paras. 115-34.

¹¹⁸ *Id.*, para. 171.

¹¹⁹ *Id.*, paras. 164-65, 177 (holding “that discrimination results not only when countries in which the same conditions prevail are differently treated, but also when the application of the measure at issue does not allow for any inquiry into the appropriateness of the regulatory program for the conditions prevailing in those exporting countries” and that “rigidity and inflexibility also constitute ‘arbitrary discrimination’ within the meaning of the *chapeau*”). See also Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products, Recourse to Article 21.5 of the DSU by Malaysia*, WT/DS58/AB/RW (Oct. 22, 2001), para. 144: “conditioning market access on the adoption of a programme *comparable in effectiveness*, allows for sufficient flexibility in the application of the measure so as to avoid ‘arbitrary or unjustifiable discrimination’”.

¹²⁰ It is of note that the WTO Panel in *EC-Seals* did *not* address Canada and Norway’s arguments, based on *Shrimp/Turtle*, that the regulating State should have made efforts to engage in negotiations to regulate conduct that takes place outside its territory. See Panel Report, *European Communities – Measures Prohibiting the Importation and Marketing of Seal Products*, WT/DS400/R, WT/DS401/R (Nov. 25, 2013), fn. 518 and para. 7.643.

Canada further argued that where a measure is premised on an objection to conduct that takes place outside the territory of the regulating Member, there should be additional efforts to engage in negotiations to regulate the conduct in question. (See Canada’s response to Panel question No. 135(a), paras. 118 and 119).

jurisdictional nexus with the regulating State is required, one may posit that the WTO dispute settlement mechanism favors an essentially *negative* reading of subsidiary environmental jurisdiction. A positive understanding may indeed open the door for protectionist and/or discriminatory trade restrictions based on idiosyncratic norms or value conceptions that undermine the freedom of trade, the global good which the WTO ultimately guards.

Somewhat surprisingly, and perhaps even disquietingly, the WTO Panel and Appellate Body in *EC-Seals* (2013-14) have recently seemed to disavow, at least in part, this *negative* reading of environmental subsidiarity, by allowing the EU to impose, via import measures, its home-grown value conceptions regarding animal welfare on extraterritorial events that had no nexus with the EU, namely seal harvesting outside EU territory (notably in Canada).¹²¹ Such jurisdiction is not supported by an international consensus on the protected norm, and may thus be more clearly unilateral and less ‘subsidiary’. Still, even if the jurisdictional nexus requirement is abandoned, and domestic consumers’ ‘international public morality’ conceptions are allowed to justify trade measures with extraterritorial effect, the number of instances where States could successfully invoke unilaterally defined public policy exceptions with extraterritorial effect will in practice be limited, in light of WTO law requirements of non-discrimination and even-handedness, and the requirement to seek the least trade-restrictive measure possible (as, *e.g.*, flowing from the chapeau of Art. XX GATT).¹²² It is recalled that the EU’s measures in *EC-Seals* stranded in the WTO Panel and Appellate Body on these grounds.¹²³

3. Concluding observations

¹²¹ Panel Report, *European Communities – Measures Prohibiting the Importation and Marketing of Seal Products*, WT/DS400/R, WT/DS401/R (Nov. 25, 2013); Appellate Body report, *European Communities – Measures Prohibiting the Importation and Marketing of Seal Products*, WT/DS400/AB/R, WT/DS401/AB/R, 22 May 2014. As parties had not addressed the systemic impact of an implied jurisdictional limitation of Article XX(a) GATT, the AB refrained from further commenting on the issue. AB report, para.5.173.

¹²² P. Van den Bossche, N. Schrijver, G. Faber, ‘Unilateral Measures Addressing Non-Trade Concerns. A study on WTO Consistency, Relevance of other International Agreements, Economic Effectiveness and Impact on Developing Countries of Measures concerning Non-Product-Related Processes and Production Methods’, The Hague: the Ministry of Foreign Affairs of The Netherlands (2007), at 93 (“[An extraterritorial] measure that imposes in a rigid and inflexible manner purely domestic criteria on the importing Member without consultations or consideration of the different conditions in the exporting Member, will fail to meet the requirements of the chapeau of Article XX [GATT].”)

¹²³ Panel Report, *European Communities – Measures Prohibiting the Importation and Marketing of Seal Products*, WT/DS400/R, WT/DS401/R (Nov. 25, 2013), paras. 7.344, 7.340, 7.398, 7.410, 7.460.

From the above studies of discrete subfields of international law, it becomes apparent that domestic courts and regulators, as well as international legal instruments and international supervisory mechanisms allow bystander States to exercise extraterritorial jurisdiction to protect global values and norms related to human rights and the environment, but that such exercise is conditioned by a requirement of subsidiarity. While ‘subsidiarity’ is not always expressly used in the various issue-areas – the term itself has in fact only acquired a jurisdictional foothold as regards the prosecution of international crimes – there is no denying that throughout these areas some version of subsidiarity is applied. A variety of techniques have been deployed to convey the message that bystander States should only exercise extraterritorial ‘global justice’-based jurisdiction where the primary jurisdiction State – the State where the impugned acts occurred or where the allegedly responsible person is registered – is unable or unwilling to intervene.

Such techniques have essentially been developed to limit jurisdictional overreach and to prevent one State from imposing its own regulatory solutions on another State. Seen from this perspective, they embody the negative, sovereignty-based dimension of subsidiarity, rooted in the sovereign equality of States. In the field of human rights litigation, techniques such as *forum non conveniens*, the presumption against extraterritoriality, ‘factual complex’ approaches to foreign prosecutorial willingness, and the acceptance of foreign prosecutorial assurances at face value fit this mold. As regards environmental concerns, the reluctance to impose hefty penalties on foreign-flagged vessels, and the requirement to exhaust international negotiations, to pursue less-trade restrictive measures if possible, and to establish a jurisdictional nexus can be cited.

Other techniques, however, embody a more positive, international community-driven dimension of subsidiarity, to be used with a view to upholding the integrity of international norms regarding human rights and the environment. Such techniques include mandates for prosecutors to inquire in-depth whether foreign State have genuinely been able and willing to prosecute international crimes, the *ad hoc* creation of a broader jurisdictional base to allow redress for global injustices where normal jurisdictional rules fall short (*forum necessitatis*), the relaxation of the jurisdictional link between the regulating State and the object of regulation for purposes of trade-restrictive measures, and the imposition of more far-reaching port State measures in case of violations of international (rather than just national or regional) environmental norms.

When it comes to the protection of international norms and global public goods, a more liberal approach to subsidiary jurisdiction is arguably called for, given the current state of under-enforcement of human rights law and under-regulation of environmental goods. Too liberal an approach, however, may give an incentive to States to impose their own value conceptions on foreign nations, or to protect their own trade interests via environmental or human rights-based import bans. One need not look far for telling examples. By eagerly imposing trade restrictions on goods produced in a human rights-unfriendly or unsustainable manner in lesser developed States, industrialized States can handily offer protection to their own industries, which face far lower environmental and human rights compliance costs. The ‘common interest’ cited by States to justify port blockades of certain foreign-flagged vessels may be no more than the combined fishing interests of a limited number of coastal States, rather than an international community interest in sustainable fishing. And finally, States may easily get away with moral grandstanding and hectoring foreign nations, thereby emblazoning their self-image to the detriment of others at little cost. In the field of environmental or animal welfare regulation, the EU Seals Regulation, which unilaterally defines certain seal hunting methods as cruel and prohibits importation of its products, can be cited. In the human rights field, universal jurisdiction litigation self-evidently lends itself to national aggrandizement – or rather aggrandizement of prosecutors or private plaintiffs – where the subsidiarity analysis is infected by national understandings of ‘genuine investigation and prosecution’ or ‘due process’ that may not be grounded in an international normative consensus.

For subsidiarity to remain a viable procedural tool of ‘reconciling competing norms’ and ‘encourag[ing] dialogue among multiple jurisdictions’,¹²⁴ jurisdictional applications of subsidiarity should find a middle ground between ‘apology’ and ‘utopia’.¹²⁵ Bystander States and regional organizations should not shirk from their responsibilities to strive for the realization of global justice by applying judicial or regulatory avoidance techniques, but neither should they foist their own interpretations of global justice onto others who may have legitimate reasons to follow rival interpretations.

¹²⁴ See Berman, *supra* note 3.

¹²⁵ I am obviously borrowing here from M. Koskeniemi, ‘From Apology to Utopia: The Structure of International Legal Argument’, Cambridge University Press (2005).