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A New Global Corporate Regulatory Power?: Market Entry as the Basis for Prescriptive Jurisdiction

Rachel Brewster†

ABSTRACT

The rules of international economic law are changing. In a range of areas, governments are asserting that if a multinational firm touches the state’s market, the state can claim the authority to regulate the firm everywhere. This departure from multilateral economic coordination and towards more unilateral regulatory power over firms’ global operations represents an important shift in international economic policy. We have entered an era where governments are embracing more unilateral tools to resist foreign economic influence and reinvigorating national industrial policies. This Article examines the political dynamics that lead states to use access to their national markets as the basis for global corporate regulation in the national security and corporate social responsibility (CSR) fields. Specifically, this Article analyzes how market-entry-based global regulations represent an expansive conception of states’ extraterritorial jurisdiction and what constraints there are on states’ exercise of these jurisdictional claims. For national security and CSR regulation, the Article addresses three questions: (1) how states are using entry into their markets to gain global regulatory power, (2) why states are adopting this approach, and (3) what the limits are to this market-entry-based extraterritorial jurisdiction. The Article concludes by exploring how the jurisdictional claims will likely intensify conflict between governments as nations seek to push their own priorities on foreign corporations. These conflicts will exist between allies and adversaries as states disagree over the ideal level of corporate regulation, as well as the best means to implement it.

I. INTRODUCTION

The rules of global commerce are changing. From the suspension of the World Trade Organization’s Appellate Body¹ to the intensifying

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U.S.-China geopolitical rivalry, the last five years have seen a dramatic deterioration in international economic cooperation. As nation-states lose faith in multilateral economic institutions, there is a growing demand in many countries to develop more unilateral tools to rewrite global economic policy. This Article focuses on one novel and significant development on this front: an effort by some nation-states with large internal markets to exert broad jurisdictional authority over multinational firms’ activity anywhere they do business.

In a range of areas, governments have or are proposing to base their jurisdiction to regulate a firm’s worldwide operations on the firm’s entry into the state’s market through the purchase or sale of goods within a state’s borders. Although states have long used territorial links to regulate firms’ actions in their territory, this market-entry basis for global corporate regulations is remarkable because it represents a significant expansion of the jurisdictional claims of states on firms’ transnational conduct. The new laws assert that if a multinational firm touches the state’s market, the state can claim the authority to regulate the firm everywhere.

This departure from multilateral economic coordination and towards more unilateral regulatory power over firms’ global operations represents an important shift in international economic policy. To understand its impact on the trajectory of global commerce, it is necessary to identify the phenomenon, analyze government motivations for enacting these laws, and establish the limits of this power. We have entered an era where governments are embracing more unilateral tools to resist foreign economic influence and reinvigorating national industrial policies. While states may directly spar with each other, they are also seeking control over private firms and their engagement in other states’ economies.

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3 Kim B. Olsen, Diplomatic Realisation of the EU’s “Geoeconomic Pivot”: Sanctions, Trade, and Development Policy Reform, 10 POL. & GOVERNANCE 5, 5–6 (2022) (discussing the EU’s measure for a more assertive use of their economic policy including an anti-coercion instrument); see also HENRY S. GAO, WILL THE EUROPEAN UNION’S NEW ANTI-COERCION INSTRUMENT WORK WITH CHINA? (2022), https://ink.library.smu.edu.sg/cgi/viewcontent.cgi?article=6036&context=sol_research [https://perma.cc/9788-UYJQ] (discussing the likely effectiveness of an EU anti-coercion instrument in relations with China).

The efforts by governments to exert a global regulatory power derives from seemingly divergent sources: "hard" national security concerns and "soft" corporate social responsibility (CSR) goals. In both areas, governments are leveraging their prescriptive jurisdiction to govern their own territory into an extraterritorial regulatory power that can control global corporate practices and strategically sensitive trade flows. In doing so, states are using the markets within their national borders to expand the boundaries of their global regulatory power.

This Article examines the political dynamics that lead states to use access to their national markets as the basis for global corporate regulation. In the security field, increased geopolitical tensions have made governments far more concerned about the sale of sensitive goods. As commerce globalizes, governments are finding that regulating national firms is insufficient to achieve their national security goals. Governments can also achieve commercial goals by acting unilaterally and pulling foreign firms into their regulatory program, thereby limiting the economic harm to national firms.

In the CSR field, governments consider the regulations' effectiveness as well as their impact on the competitiveness of their national firms. By regulating foreign firms that sell goods or services within its border, the government can cast a wider regulatory net than they could by only regulating national firms. This both increases the impact of the policy as far more enterprises fall under the law’s reach and alleviates concerns that the nation’s own firms will face a competitive disadvantage due to uneven regulatory burden.

As governments increasingly enact global unilateral corporate regulations, firms will confront a multiplying set of overlapping, and sometimes conflicting, unilateral regulations that govern production and sales. Conflict between governments is also likely to intensify as nations seek to push their own priorities on foreign corporations. These conflicts will exist between allies as states disagree over the ideal level of corporate regulation, as well as the means of implementing regulations.

This Article analyzes how market-entry-based global regulations represent an expansive conception of states’ extraterritorial jurisdiction and what constraints there are on states’ exercise of these jurisdictional claims. For national security and CSR regulation, the Article addresses three questions: (1) how states are using entry into their markets to gain global regulatory power, (2) why states are adopting this approach, and (3) what the limits are to this market-entry-based extraterritorial jurisdiction.

This Article proceeds in four parts. The first part briefly discusses the relevant jurisdictional principles. This part concludes that disputes over jurisdiction are likely to be resolved by the state’s ability to exert extraterritorial jurisdiction rather than legal principles. Consequently,
the next two parts discuss the advantages and drawbacks of trying to claim extraterritorial jurisdiction. The second part provides an analysis of the Biden Administration’s export controls, and the third part does the same for several mandatory CSR regulations proposed by several European states and the European Union. The fourth part concludes.

II. PRESCRIPTIVE JURISDICTION: STATES’ JURISDICTION OVER FIRMS’ EXTRATERRITORIAL CONDUCT

A state’s power to make law is its prescriptive jurisdiction. This jurisdiction refers to legislative authority to prescribe conduct rather than judicial authority to adjudicate claims (adjudicatory jurisdiction). Customary international law permits states’ assertion of prescriptive jurisdiction so long as there is a genuine connection between the state and the regulated activity, even if this leads to concurrent, and possibly conflicting, jurisdictions between states. As a result, states often have the authority to assert broad claims over foreign corporations engaged in international economic activity. As this section discusses, states can contest each other’s assertions of jurisdiction, but it will often be diplomatic, economic, or retaliatory measures, rather than legal arguments, that constrain jurisdictional claims.

States’ broad prescriptive jurisdiction to regulate corporations stems from three sources: the territoriality, nationality, and protective principles. The territoriality principle gives states the power to regulate any firm’s conduct within the nation’s borders, such as local employment and working conditions. The territoriality principle has further been used to justify a state’s authority to regulate foreign conduct where that conduct has a “substantial effect” in the nation’s territory. Effects-based jurisdiction is now generally accepted in some areas of international economic law. This is most prominent in the antitrust context, where foreign cartels’ ability to have a substantial economic impact on a state’s market is well recognized. There is, however, a grey area regarding what qualifies as a sufficient effect in a state’s

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5 Restatement (Fourth) of Foreign Relations Law § 402 cmt. a (AM. L. INST. 2018).
6 Id.
7 Id. § 407 cmt. d and reps.’ note 3.
8 See CEDRIC RYNGAERT, JURISDICTION IN INTERNATIONAL LAW 190–91 (2d ed. 2015).
9 Restatement (Fourth) of Foreign Relations Law § 402(1)(a) (AM. L. INST. 2018).
10 Restatement (Fourth) of Foreign Relations Law § 402(1)(b) and cmt. f (AM. L. INST. 2017). The Restatement (Fourth) maintains that customary international law permits states to regulate whenever there is a “genuine connection between the subject of the regulation and the state seeking to regulate.” See id. § 407.
11 See id. § 409 reps.’ note 2 (discussing the acceptance effects-based jurisdiction in antitrust); see also RYNGAERT, supra note 8, at 83–84 (addressing effects-based jurisdiction in antitrust law).
A NEW GLOBAL CORPORATE REGULATORY POWER?

The nationality principle provides states with the power to regulate a corporation’s worldwide activity if the corporation is incorporated or has its principal place of business in the state. This principle enables states’ laws to have extraterritorial effect, which in turn allows the law to govern a national firm’s foreign conduct. Lastly, the protective principle gives states that authority to regulate foreign persons acting outside its territory that may harm its security.

The national security and CSR regulations examined in Parts II & III claim prescriptive jurisdiction over firms’ global activity concerning sales or purchases in the regulating state’s market, not just the firms’ activity in the regulating state’s territory. This broad conception of jurisdictional authority potentially gives all states (or at least all states with significant internal markets) the ability to regulate non-national corporations’ worldwide practices. As Cedric Ryngaert emphasizes, if national regulators use a territorial link as a trigger to cover a firm’s worldwide activities, then almost all states will be able to claim global regulatory power over corporations. This could oust the regulatory power of the state with the strongest nexus of the activity and create conflicts between nations.

Nonetheless, these transactions may well be a sufficient connection to justify prescriptive jurisdiction under the territoriality principle. As Timothy Meyer argues, states’ jurisdiction over firms has traditionally depended on where a firm’s production is based. However, states are increasingly seeking to regulate based on where the goods are consumed due to governments’ growing concerns about foreign

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12 Restatement (Fourth) of Foreign Relations Law § 409 reps.’ note 1 (AM. L. INST. 2018) (noting that “the extent to which [effects-based jurisdiction] can be invoked remains disputed.”).

13 Id. § 402(1)(c), cmt. g and reps.’ note 7.

14 This Article defines “extraterritorial regulation” as rules regulating conduct outside of the state’s territory. See Ryngaert, supra note 8 at 101 (discussing extraterritorial jurisdiction). The term “extraterritorial” can have multiple meanings, see Restatement (Fourth) of Foreign Relations Law § 402 reps.’ note 1 (AM. L. INST. 2018).

15 Restatement (Fourth) of Foreign Relations Law § 402 reps.’ note 7 (AM. L. INST. 2018).

16 Id. § 402(1)(e) and reps.’ note 9.

17 Ryngaert, supra note 8, at 95–96 (arguing that “the territorial regulator may consider this [territorial] link as a trigger to exercise nearly universal jurisdiction in that it subjects the operator’s worldwide activities, including those taking place outside the territory, to territorial law, just because the activities, or the operator, happen to have some territorial link. As almost all States will have such a link, they could potentially all exercise jurisdiction, thereby supplanting regulation enacted by regulators who may in fact have a stronger nexus to the situation, e.g. the home State regulator of the foreign economic operator.” (footnote omitted)).

18 Id. at 96.

19 Id. at 96, 142–44.

production.\textsuperscript{21} For instance, states now believe that they have an interest in the carbon footprint of the goods their nationals consume, even if the goods were produced abroad.\textsuperscript{22} Similarly, a state’s national security concerns with the use of their technology by foreign governments may be sufficient to justify regulation on the protective principle.\textsuperscript{23}

States will almost certainly disagree on the validity of these broad assertions of prescriptive jurisdiction, yet current law does not provide crisp answers. Customary international law places few limits on concurrent jurisdiction and no requirements that states defer to regulators with a greater interest.\textsuperscript{24} As a result, the resolution of these disputes will almost certainly turn on the practicality of successfully exercising broad extraterritorial power.\textsuperscript{25} This Article will now address the political dynamics that lead to these expansive claims of jurisdiction and their diplomatic and economic limits. The next two sections examine the practical and political elements of jurisdiction in the context of American export controls and European mandatory CSR regulation.

III. U.S. EXPORT CONTROLS AND THE FOREIGN DIRECT PRODUCT RULE

National security concerns have long led the U.S. and other nations to impose export bans or export controls on goods that have military or strategic importance.\textsuperscript{26} After World War II, the U.S. and NATO allies, acting through the Coordinating Committee for Multilateral Export

\textsuperscript{21} Id.
\textsuperscript{22} Id. at 36–39.
\textsuperscript{23} Restatement (Fourth) of Foreign Relations Law § 402 reps.’ note 9 (AM. L. INST. 2018) (noting that “[t]he United States has long taken the position that its controls on exports of ‘U.S.-origin’ goods and technology apply to certain actions, such as reexports of U.S.-origin items, taken outside the United States by persons who have no other connection with the United States.”).
\textsuperscript{24} Id. § 407 cmt. d and reps.’ note 3 (highlighting that customary international law does have a hierarchy for claims of jurisdiction and requires states to defer to other states that have a closer relationship to the activity); RYNGAERT, supra note 8, at 142–44.
\textsuperscript{25} See RYNGAERT, supra note 8, at 195–96 (discussing how concerns about reciprocity could, in theory, be a limit on states’ application of prescriptive jurisdiction but, in practice are not that effective.).
Controls (COCOM), imposed export bans on munitions and products related to atomic energy.\textsuperscript{27} Today, dual-use technologies—goods that contain technology that could have civilian as well as military applications—are subject to export licenses.\textsuperscript{28}

An overarching issue with all export controls is their efficacy. If the relevant good is available from numerous sources, then an export control by one, or even several, states is easy to evade.\textsuperscript{29} This means nations, when implementing export controls, must focus on how to limit access to goods that are produced outside of their borders. Traditionally, this has been done through multilateral means.\textsuperscript{30} Since 1995, the U.S. has coordinated its conventional arms and dual-use technologies export controls through the Wassenaar Arrangement.\textsuperscript{31} The group now includes forty-two states, including Russia but not China.\textsuperscript{32}

Recently, however, the U.S. implemented controls on the export of semiconductors and semiconductor manufacturing equipment sales to China outside of the multilateral framework.\textsuperscript{33} The United States' decision to act unilaterally before gaining multilateral consent from other relevant states could result in these other states serving as alternative suppliers of the good to China. To prevent this from happening, the United States now includes an extraterritorial basis of jurisdiction to its export control regime. Specifically, the U.S. is seeking to expand the scope of its export controls by claiming jurisdiction over foreign producers that have entered the U.S. market by purchasing certain goods or technologies from U.S.-based corporations.\textsuperscript{34} This “Foreign Direct

\begin{footnotes}
\footnotetext[27]{Chad P. Bown, \textit{Export Controls: America's Other National Security Threat}, 30 Duke J. Comp. \& Int'l L. 283, 296 (2020).}
\footnotetext[28]{Id. at 298.}
\footnotetext[29]{Id. at 299–300.}
\footnotetext[30]{Id. at 296-300; Brian Egan, \textit{New US Semiconductor Export Controls Signify Dramatic Shift in Tech Relations With China}, JUST SECURITY (Oct. 24, 2022), https://www.justsecurity.org/83744/new-us-semiconductor-export-contro}ls-signify-dramatic-shift-in-tech-relations-with-china/ [https://perma.cc/D5MX-CMZB] (noting that “[e]xport controls traditionally have been most effective (and least prejudicial to U.S. industry) when they are coordinated across different countries’ export-control regimes through a multilateral regime like the Wassenaar Arrangement . . . or in direct coordination with key jurisdictions like the European Union or the U.K.”).}
\footnotetext[31]{Lynn E. Davis, \textit{The Wassenaar Arrangement}, 7 Dept of State Dispatch 19, 19 (1996).}
\footnotetext[32]{Bown, \textit{supra} note 27, at 298.}
\footnotetext[33]{Egan, \textit{supra} note 30.}
\end{footnotes}
Product Rule” (FDP Rule), historically justified under the protective principle, allows the U.S. to expand the scope of its export controls to non-national corporations producing goods outside of U.S. territory.

This section addresses the Biden Administration’s recent semiconductor export control measures issued on October 7, 2022. The measures are a significant new restriction intended to restrict China and Chinese entities’ abilities to access advanced semiconductors or semiconductor-producing equipment. This section first discusses the contents of the new U.S. restrictions, including the FDP Rule. It then discusses why the U.S. is adopting this position and addresses some limitations of this extraterritorial approach.

A. U.S. Export Controls Concerning the Sale of Semiconductor in China.

Export controls on the sale of semiconductors to China first began under the Trump Administration, which targeted the Chinese telecommunication firm Huawei as a national security threat. In addition to being a significant smartphone producer, Huawei is a major producer of telecom equipment and a primary supplier of 5G networks. In 2011, American national security experts grew increasingly concerned that the Chinese government would be able to use Huawei’s telecom products to spy on users. In 2018, the U.S. government urged allies to avoid using Huawei’s products in building out their 5G networks. This strategy had some success: Germany, the United Kingdom, and France restricted the use of Huawei products in their 5G infrastructure, while Australia, Canada, New Zealand, and Sweden joined the U.S. in banning Huawei telecom products in their 5G networks entirely.

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37 Hill et al., supra note 34, at 1.
38 Rasser & Wolf, supra note 26.
39 Bown, supra note 27, at 289.
40 See Ren-aisance, THE ECONOMIST, Oct. 29, 2022, at 68, 68.
41 Id.; Chad Bown, How the U.S. Marched the Semiconductor Industry into Its Trade War with China, 24 E. ASIAN ECON. REV. 349, 377 (2020).
42 Ren-aisance, supra note 40, at 68 (discussing France and the UK); Guy Chazan & Nic Fildes, Germany Telecoms Crackdown Set to Exclude Huawei from 5G Rollout, FIN. TIMES (Oct. 1, 2020), at 1, ProQuest, Doc. No. 245619268640 (discussing German restrictions on Huawei).
43 Ren-aisance, supra note 40, at 68. Italy and Portugal have avoided using Huawei equipment due to concerns that export restrictions will make Huawei’s products unreliable. Id.
The U.S. also imposed export controls on sales of semiconductors to Huawei with the aim of limiting the company's ability to produce their smartphone and 5G telecom equipment. Within the U.S., export controls are issued by the Commerce Department's Bureau of Industry and Security (BIS). The Export Control Reform Act of 2018 gives BIS the power to establish export controls on "emerging and foundational technologies" whose use implicates American national security. Using this power, BIS placed Huawei on the Entities List, a list of foreign persons, including businesses, that are subject to licensing requirements for the export, re-export, or transfer of specified items. For Huawei, its placement on the Entities List restricted its access to imported technologies—most notably advanced semiconductors—that it needed to manufacture its products.

Because Huawei could source many of these goods from suppliers outside of the U.S., BIS incorporated an FDP Rule in its regulation. The FDP Rule extended the restrictions to non-American producers working outside of U.S. territory if the items they produce use specified American technology, such as inputs or software. Additionally, the FDP Rule extended restrictions to non-American producers if the items are produced in plants that incorporate specified American technology, such as manufacturing equipment or software. Huawei's FDP Rule

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44 Id.

45 Bown, supra note 27, at 292–93.


47 Ren-aissance, supra note 40, at 68, 70 (discussing the impact of American export controls on Huawei's ability to obtain semiconductors from American or Taiwanese manufacturers); see also Froehlich, supra note 36 (discussing Huawei's placement on the entities list and how this listing (along with the expansion through the FDP) limited Huawei's ability to procure semiconductors).


49 See Froehlich, supra note 36 (describing the Foreign Direct Product Rule as:

The FDP Rule expands the jurisdictional reach of the US Export Administration Regulations (EAR). The EAR is the principal commercial and dual-use regime regulating exports, reexports, and transfers of US-origin items, items in the U.S. (regardless of origin), and foreign-produced items comprising threshold amounts of controlled US-origin content. The FDP Rule enables regulation of a broader range of items: (1) the direct product of National Security (NS)–controlled US-regulated technology and software; or (2) are produced from plants, or major components of plants, that are the direct product of US-regulated NS-controlled technology and software. In simple terms, foreign-produced items can fall within the scope of US regulation even if they do not actually incorporate US-origin content, as long as they are produced...
was different from the traditional application of FDP Rules that govern goods or software already “controlled” for national security reasons. The Huawei FDP Rule expanded the scope of the export control to cover “uncontrolled” items that were not already subject to foreign export controls.

The use of an FDP Rule provided BIS with greater regulatory control over foreign firms based on their entry into the U.S. market. Specifically, the foreign firms’ purchases of specified American products (as an input or in its manufacturing process) provided the U.S. government with the jurisdictional hook to restrict the foreign firms’ sales to Huawei. Without the FDP Rule, the U.S. would need to engage in multilateral negotiations to restrict Huawei’s access to advanced semiconductors. These negotiations would have slowed down the process, allowing Huawei to have access to advanced semiconductors for longer. In addition, other governments might not have agreed that such restrictions were necessary and might have resisted adopting similar measures. The U.S. was able to avoid both issues by incorporating an FDP Rule into its regulation. This allowed the U.S. to expand the range of firms upon which it could impose the export licensing requirement quickly and without international debate.

For Huawei, its placement on the Entities List was devastating. Not only did Huawei lose access to American suppliers, upon whom it was reliant, but it also choked off Huawei’s supply of chips manufactured by Taiwanese chip manufacturer TSMC. These export restrictions have wreaked havoc on Huawei’s smartphone business as well as its 5G network sales, resulting in a significant loss of market

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50 McCarthy et al., supra note 26, at 14.
51 Id.
52 Froehlich, supra note 36 (describing the Huawei FDP Rule this way: “The Huawei FDPR effectively broadened the scope of foreign-produced items that can be regulated under the EAR—and therefore licensable. In short, the Huawei FDPR enlarged the range of US technology and software whose use outside the U.S. would subject foreign-produced items to US regulatory control, and required licensing for the provision of such items to Huawei, or for transactions involving such items to which Huawei is a party.”).
53 Id.
54 Yuan Yang, How Trump Blacklisting Affects the Inside of a Huawei Smartphone, FIN. TIMES, June 2, 2019, Factiva, Doc. No. FTCOM00020190603e63001bd (noting that “Huawei is highly dependent on the US for the design of the chips it uses in its smartphones and telecoms equipment” and that it would lose access to American and non-American suppliers).
share in both businesses.\textsuperscript{56} Huawei is still in business but in order to do so, it has dramatically changed its operations, including selling off certain product lines.\textsuperscript{57} Its CEO, Ren Zhengfei, describes the company as “in a fight for survival.”\textsuperscript{58}

Against this backdrop of success for U.S. export restrictions, the U.S. is significantly expanding its export controls for semiconductors, semiconductor manufacturing equipment, and supercomputers destined for sale to China or Chinese entities.\textsuperscript{59} The impetus for these export controls grows out of a reevaluation of American national security policy regarding computing-related technologies. National Security Advisor Jake Sullivan outlined the new American policy by rejecting the prior strategy that the U.S. could maintain a relative advantage over competitors by staying a few generations ahead on technology (the “sliding scale approach”). The new policy instead seeks to maximize the U.S.’s absolute advantage over rivals by maintaining “as large of a lead as possible.”\textsuperscript{60}

This strategic ambition to maintain “the largest lead” in technological advancement over geopolitical competitors has had direct payoffs in the export control area.\textsuperscript{61} For many of the new export controls, BIS has included an FDP Rule such as one on the sale of cutting-edge


\textsuperscript{57} Id.; see also Ren-aissance, supra note 40.

\textsuperscript{58} Ren-aissance, supra note 40.

\textsuperscript{59} A full accounting of the new export control measure is beyond the scope of this Article, but for an overview, see Vishnu Kannan & Mubashar Rizvi, What’s in the Commerce Department’s Recent Export Controls on Technology Bound for China?, LAWFARE (Nov. 23, 2022), https://www.lawfareblog.com/whats-commerce-departments-recent-export-controls-technology-bound-china# [https://perma.cc/7WQT-3W2Z]; Bown, supra note 27; see also McCARTHY ET AL., supra note 26; Rasser & Wolf, supra note 26.


The third pillar is protecting our technology advantages, and preventing our competitors from stealing America’s intellectual property, and using our technologies against us or their own people. Our competitors are using increasingly sophisticated means to illicitly acquire sensitive technologies, information, and know-how, and we must adapt accordingly. On export controls, we have to revisit the longstanding premise of maintaining “relative” advantages over competitors in certain key technologies. We previously maintained a “sliding scale” approach that said we need to stay only a couple of generations ahead. That is not the strategic environment we are in today. Given the foundational nature of certain technologies, such as advanced logic and memory chips, we must maintain as large of a lead as possible."

\textsuperscript{61} Egan, supra note 30. The U.S. banned U.S. citizens or green card holders (working for American or foreign firms) from providing any support for the development of semiconductor facilities in China. Id.
graphics processing unit (GPU) semiconductors to China.\textsuperscript{62} Given that all semiconductor production plants currently use some covered American-made materials, this extends the new order’s effect to all GPUs made worldwide.\textsuperscript{63} BIS also extended the “uncontrolled goods” FDP Rule (similar to that applied to Huawei) to companies on the BIS’s Entities List.\textsuperscript{64}

As of this writing, the effects of the new export controls are still undetermined. American commentators are optimistic that the BIS’s measures will be successful in restricting China’s access to cutting edge semiconductors and semiconductor manufacturing tools in the near term, thereby limiting China’s development of its semiconductors and artificial intelligence sectors for the next few years.\textsuperscript{65} The long term effects, including whether the American restriction will spur more Chinese domestic technological innovation, are harder to predict.

1. Why is the U.S. claiming export control jurisdiction based on market entry?

By exerting jurisdiction over non-national firms producing outside of U.S. territory, the U.S. is engaging in a mixed-motive strategy. One motive is to enhance the effectiveness of its unilateral export controls. But why not act multilaterally and avoid the need for a FDP Rule? Some of the U.S.’s decisions to adopt a unilateral approach can be ascribed simply to differences in foreign policy from its allies. Press reports indicate that the U.S. maintained a more aggressive stance towards China and wanted to move faster than European and Asian allies. Therefore, it chose to issue these regulations before securing a broader multilateral agreement.\textsuperscript{66} Indeed, the U.S.’s recent shift in its national security strategy, from a “sliding scale” towards a more absolutist approach of maintaining as large a technological lead as possible, has left some of its allies frustrated.\textsuperscript{67} This plays out both in terms of the content of the

\textsuperscript{62} Rasser & Wolf, supra note 26. The “uncontrolled goods” FDP rule was also applied to export controls on advanced items related to computing and supercomputers. Kannan & Rizvi, supra note 59.

\textsuperscript{63} Rasser & Wolf, supra note 26.

\textsuperscript{64} See McCarthy et al., supra note 26 at 11–12 (noting that “[i]n the new China-specific rules, BIS has expanded the once-Huawei-specific foreign direct product rule to apply to 28 other listed entities.”); see also Kannan & Rizvi, supra note 59 (discussing the application of FDP Rule to the Entities List).

\textsuperscript{65} Rasser & Wolf, supra note 26 (noting that “[t]he prevailing view is that the new export controls will have a major impact on China’s semiconductor sector and its AI and weapons development over the next few years.”).

\textsuperscript{66} Demetri Sevastopulo & Kana Inagaki, US Tries to Enlist Allies in Assault on China’s Chip Industry, FIN. TIMES, Nov. 13, 2022, Factiva, Doc. No. FTCOM00020221114eibe000ep.

\textsuperscript{67} Id. (reporting on Dutch frustration with change of policy as well as a general skepticism about whether other allies were on board with this maximalist approach).
export controls as well as the timing of their implementation. In terms of content, the U.S. wants to restrict China’s access to more mature chips, as well as chip making equipment, than its allies do. In terms of timing, the U.S. prefers faster implementation.

Despite the reticence of U.S. allies, adopting a broad FDP Rule enhances the power of U.S. unilateral measures by pulling in a greater number of foreign producers whose governments have not explicitly agreed to similar limits. For instance, the FDP Rule on GPU semiconductors allows the U.S. to pull in American and non-American producers of these chips under the export controls. This is the only means to make the export control effective as there are currently no American producers of qualifying GPU semiconductors. Without the FDP rule, this element of the new export control regime would be undermined through foreign sales.

The U.S. is also motivated for commercial and political reasons. Export controls have significant impacts on firms’ revenues because government restrictions cut off profitable foreign markets and result in market share loss to foreign rivals. For instance, the American chip maker, Intel, is expected to lose 10% of its annual revenues as it can no longer sell semiconductors for Chinese supercomputing. While this loss is painful for Intel, it is worse for the company if other competitors, such as Taiwan’s TSMC or South Korea’s Samsung, can gain those sales. These commercial implications not only have the potential to harm American industry, but they may also undermine political support for the controls as industries lobby against them and threaten to relocate. Establishing an FDP Rule limits the commercial losses for Intel by imposing the same costs on covered competitors. Many of the new export restrictions apply to TSMC and Samsung, which can ease many American corporations’ fears that American national security policy will make them uncompetitive. Thus, the FDP Rule performs important commercial goals in terms of protecting the interests of American

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68 Id. (reporting on disagreements over the level of nanometer chips (14nm rather 10nm) that China should be allowed to import or be sold the equipment to produce); see also Rasser & Wolf, supra note 26 (noting that “[t]he Netherlands apparently does not yet see eye-to-eye with U.S. assessments on the need to set the threshold at 16/14 nm or smaller for logic chips.”).

69 Rasser & Wolf, supra note 26.

70 Id. (noting that “[t]he Biden administration needed to apply this part of the rule extraterritorially because these GPUs are not made in the United States and no other country subjects them to any form of export control given their widespread commercial applications.”).

71 See Bown, supra note 27, at 300–02 (discussing how governments can limit exports for political and economic reasons and how distrust about the veracity of national security claims can undermine coordination).

72 China’s Chip Industry Set for Deep Pain from US Export Controls, FIN. TIMES, Oct. 8, 2022, Factiva, Doc. No. FTCOM000200221009eia90008d.

73 Bown, supra note 55, at 17–18.
2. The limits of FDP rules

While FDP Rules can enhance the effectiveness of U.S. export controls and protect domestic industries from foreign rivals, they are not costless policies. FDP Rules are often not well received by allies and may undermine diplomatic efforts to build a multilateral consensus over security policy. In addition, it can lead foreign firms to avoid using American materials in their supply chains in order to escape the FDP Rule's grasp.

Foreign allies frequently view FDP rules as coercive. The home governments of companies affected by extraterritorial restrictions often do not appreciate foreign regulation. There are several sources of concern. First, governments care about their independence. States can have different views of security threats or varying ideas of what is in their national interests. Export controls with foreign direct product rules override foreign governments' ability to make independent decisions on these issues, which can be critical to important national industries. For instance, the loss of sales to China can deprive national

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74 The needs for American policy to deliver “fairness” to American industry has been emphasized by BIS head, Under Secretary Alan Estevez. See Martijn Rasser, A Conversation with Under Secretary of Commerce Alan F. Estevez, CTR. FOR NEW AM. SEC. (Oct. 27, 2022), https://www.cnas.org/publications/transcript/a-conversation-with-under-secretary-of-commerce-alan-f-estevez [https://perma.cc/XUF4-AD2H].

75 Bown, supra note 55, at 13 (quoting former Assistant Commerce Secretary Kevin Wolf as saying “in response to export controls, allies generally bristle at the extra-territorial jurisdiction of US law over their companies. They wouldn’t say it, but it is something that frustrates and upsets otherwise very polite, good allies”); Alan Beattie, Opinion, Trade Bans for You, Exports for Us, FIN. TIMES, Dec. 19, 2022, Factiva, Doc. No. FTCOM00020221219eicj002jp (describing the extraterritorial effects of the export bans as the U.S. being a “bully” and “alienating” to allies.).


77 See Sam Fleming & Andy Bounds, Dutch Minister Defends Trade Links with China, FIN. TIMES, Dec. 1, 2022, Factiva, Doc. No. FTCOM00020221201eic1002jp (discussing the Dutch government’s insistence that it needs its “own strategy” in dealing with China as it disagrees with the U.S. on the benefits of trade with China and whether the export controls would be effective in slowing down China’s semiconductor industry); Rasser & Wolf, supra note 26 (highlighting that the Dutch government had a different “threat perception” with regards to China); Anna Gross & Demetri Sevastopulo, Dutch Chip Toolmaker ASMI Warns of Escalating Trade Tensions, FIN. TIMES, Nov. 28, 2022, Factiva, Doc. No. FTCOM00020221128eibt0000j (quoting the Dutch foreign trade minister, Liesje Schreinemacher, stating that the Dutch had to defend their own national interests and would not simply copy American measures).

78 See Fleming & Bounds, supra note 77 (discussing the Dutch government’s insistence that it be allowed to strike its own balance with regards to export controls to China); Sevastopulo & Inagaki, supra note 66 (also discussing Japan and the Netherlands’ desire to have an independent
semiconductor producers of the revenue necessary to reinvest in the research and development necessary to stay at the top of their industry. Thus, it is not surprising that foreign governments want to retain control over export policies and are angered when they are deprived of it.

Second, foreign governments and foreign companies are often concerned that extraterritorial export controls can be protectionist, favoring the regulating state’s companies over foreign companies. The concern is that the export controls will reflect a mix of national security and commercial concerns, and be shaped to promote the exports of national firms. For instance, the CEO of ASML, the Dutch semiconductor tools manufacturer, explicitly accused the U.S. of favoring American semiconductor producers over Dutch producers. He argued that by banning sales of more advanced technology to China, the U.S. policy hurt Dutch producers but allowed American companies, who produced less technologically advanced goods, to sell more goods to China. Foreign companies are also concerned that the U.S. Commerce Department, which licenses sales to China, will act in a biased manner, approving applications from American firms while rejecting applications from foreign firms. The confidentiality of the process makes it impossible to determine whether the Commerce Department is favoring domestic interests, which makes foreign governments and companies skeptical about the fairness of the process. These concerns about possible protectionist motives make U.S. export controls controversial abroad.
As a result, the extraterritoriality of FDP Rules carry notable costs. Most importantly, they may decrease the willingness of allies, who object to the U.S.’s use of broad FDP Rules, to cooperate on a range of national security issues. \textsuperscript{87} Even with FDP Rules, the U.S. needs the cooperation of other states to make its export controls effective. \textsuperscript{88} Unilateral measures have their limits in a world where multiple states can produce sensitive products. \textsuperscript{89}

Semiconductor manufacturing equipment, which allows semiconductor plants to produce the most advanced node chips, presents one example. The U.S. is home to three of the major semiconductor equipment manufacturers: LAM, Applied Materials, and KLA. \textsuperscript{90} But there are several foreign competitors, including the Netherlands’ ASML and Japan’s Tokyo Electron. \textsuperscript{91} Each company specializes in different equipment, but each is a source for advanced semiconductor production tools. \textsuperscript{92} Both ASML and Tokyo Electron may have eliminated American-made goods from their production process, presumably to limit their exposure to U.S. export controls. \textsuperscript{93} As a result, the U.S. needs the Dutch and Japanese governments to impose restrictions on these firms, similar to the ones that it has imposed on LAM, Applied Materials, and KLA, in order to deprive China and Chinese companies on the Entities List of these firms’ exports.

\begin{itemize}
  \item \textsuperscript{87} Matthew Reynolds, \textit{Assessing the New Semiconductor Export Controls}, CTR. FOR STRATEGIC & INT’L STUD. (Nov. 3, 2022) available at https://www.csis.org/analysis/assessing-new-semiconductor-export-controls [https://perma.cc/Q4HX-KNN7] (discussing how “the unilateral nature of [the export] controls” can upset diplomatic relations with U.S. allies, including Japan, South Korea, and Taiwan).
  \item \textsuperscript{89} See Bown, supra note 27, at 300.
  \item Bown, supra note 55, at 21. In addition, the U.S. needs support from other nations in weakening the impact of Chinese retaliation for these export restrictions. China announced that it has begun a national security review of Micron, an American-headquartered semiconductors, whose mature semiconductors are not covered by the American export restrictions. American officials believe that this is Chinese retaliation aimed at harming a U.S. corporation and weakening the political support for the export control. The U.S. has reached out to South Korea to urge their companies, Samsung and SK Hynix, not to sell China any additional chips to undermine the effect of Chinese retaliation. Sevastopulo, supra note 79.
  \item Bown, supra note 55, at 21.
  \item \textit{Id.} at 21–22. They could also make tools that would replace the others’ exports if some firms were prohibited from selling to China but others were not. \textit{Id.} at 21.
  \item \textit{Id.} at 21.
\end{itemize}
In January 2023, the Netherlands, Japan, and the U.S. formed a trilateral agreement to restrict chip exports to China. The details of the agreement are not public, however, so it is difficult to know whether the Netherlands and Japan fully adopted the American position. European Union Commission president, Ursula von der Leyen, also argued that the European Union needs to adopt more defense tools in its relationship with China, including restricting trade in sensitive technologies. While both of these developments represent support for a stronger US-EU-Japanese position to counterbalance China, there remain important differences regarding the scope of economic and security policy. For instance, Commissioner von der Leyen stressed that the European Union strategy is one of “de-risking,” in contrast to the American effort under President Trump to “decouple” from China. Similarly, French President Emmanuel Macron recently insisted that Europe should build their strategic autonomy from US-China disputes. As a consequence, the U.S. will need to continue to maintain the support of allies, which is not always aided by unilateral action that has commercial consequences abroad.

Apart from concerns about allies’ support, there are also domestic economic implications. FDP rules can drive firms out of the American market. Some firms may simply try to avoid purchasing American goods, as ASML and Tokyo Electric may have. Such aversion to U.S.

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94 Demetri Sevastopulo & Sam Fleming, Netherlands and Japan Join US in Restricting Chip Exports to China, FIN. TIMES, Jan. 27, 2023, Factiva, Doc. No. FTCOM00020230128ej1s0005l. Japan has avoided any public announcement about the agreement to avoid raising tensions with China. See Leo Lewis & Kana Inagaki, Japan to Restrict Semiconductor Equipment Exports as China Chip War Intensifies, FIN. TIMES, March 31, 2023, Factiva, Doc. No. FTCOM00020230331ej3v00009.

95 Sevastopulo & Fleming, supra note 94.

96 Sam Fleming & Henry Foy, EU Strikes Back Against China’s ‘Divide and Conquer’ Tactics, FIN. TIMES, March 30, 2023, Factiva, Doc. No. FTCOM00020230330ej3u0018h.

97 Henry Foy & Demetri Sevastopulo, US Steps Up Pressure on European Allies to Harden China Stance, FIN. TIMES, Nov. 28, 2022, Factiva, Doc. No. FTCOM00020221129eb000mb (discussing how many NATO allies “are reluctant to fully align their China postures with that of Washington”).

98 Fleming & Foy, supra note 96.

99 Leila Abboud & Sarah White, Emmanuel Macron’s Taiwan Remarks Spark International Backlash, FIN. TIMES, April 10, 2023, Factiva, Doc. No. FTCOM00020230410ej4a001up.

100 See, e.g., Alan Beattie, Opinion, South Korea Ponders the High Cost of Being America’s Friend, FIN. TIMES, April 27, 2023, Factiva, Doc. No. FTCOM00020230427ej4r002gx (observing that the “US hasn’t managed to assemble a gang of diehard supporters on whose political alliance it can depend. It faces a spectrum of more or less friendly nations doing case-by-case trade-offs about which of Washington’s initiative they want to support, decisions in which commercial considerations will inevitably play a part”).

101 See SHIVAKUMAR ET AL., supra note 88, at 4 (highlighting that the concern “foreign firms will ‘design out’ U.S. technologies if it becomes too hard to comply with the export control restrictions”); Bown, supra note 41, at 383 (also noting concerns about firms’ ability to “design-out” U.S. materials to avoid export controls); Bown, supra note 55, at 21 (noting that these firms have
technology can seriously harm the competitiveness of American high-tech leaders. American firms need foreign sales to fund the billions of dollars that they annually invest in research and development. Losing foreign customers seeking to avoid U.S. FDP restrictions can accordingly cripple American firms’ abilities to innovate. FDP rules have long-term implications for the U.S.’s capacity to maintain its technological lead relative to China. At the extreme, this dynamic can also lead domestic firms to relocate outside of the U.S. If U.S. export controls make it too difficult to sell globally, then firms may seek to remove themselves from its jurisdiction. This would be particularly tempting to American firms if allies, such as the European Union or Japan, have not imposed similar restrictions. Some of these innovation and competitiveness concerns may be lessened by the passage of the CHIPS Act of 2022, which provides $52 billion in subsidies for the development and onshoring of the semiconductor industry. However, the longer-term impacts of these restrictions on American firms are still unclear and highly dependent on the U.S.’s ability to gain its allies’ assent to strategic goals and export control enforcement.

The American export controls on semiconductor sales to China represent a significant new step in global corporate regulation. Unlike previous export regulations with FDP Rules, these export restrictions apply to American-made products that are not covered by national security restrictions, as well as to all sales of listed goods to China. While the U.S. government believes that both the export restrictions and the unilateral approach are necessary to ensure American national security, global corporate regulation also has important effects on foreign governments and firms. If the U.S. continues with its unilateral approach to addressing increasing tensions with China, the limits of its ability to maintain control over foreign corporations’ engagement with China are likely to be tested.

eliminated U.S. materials to avoid sanctions).

102 SHIVAKUMAR ET AL., supra note 88, at 4 (noting that foreign firms’ attempt to “design out” American goods can lead to American firms losing their customer base in a few years).

103 Reynolds, supra note 87.

104 Id.

105 See Bown, supra note 27, at 286.

106 Jeanne Whalen, A New Era of Industrial Policy Kicks Off with Signing of the Chips Act, WASH. POST, Aug. 9, 2022, Factiva, Doc. No. WPCOM000220220809ei890018k. Indeed, the CHIPS Act might be increasing the number of semiconductors produced in the territory of the U.S., see Don Clark & Ana Swanson, U.S. Pours Money Into Chips, but Even Soaring Spending Has Limits, N.Y. TIMES, Jan. 2, 2023, at A1 (discussing foreign firms’ intentions to build more semiconductor plants in the U.S.). See also Bown, supra note 55 at 23–24 (discussing how the CHIPS Act is designed to improve the competitiveness of the US semiconductor industry).
IV. MANDATORY CORPORATE SOCIAL RESPONSIBILITY LEGISLATION

Turning from national security, this section discusses how states are asserting a similar type of jurisdiction in the human rights field. Although these are very different areas, states are adopting analogous claims of jurisdictional power over multinational firms’ global operations based on market entry. This section introduces these mandatory CSR laws, discusses why states are considering broad extraterritorial claims over non-national firms, and considers some limits on this exercise of jurisdiction.

A. European CSR Legislation and Proposals

An international framework governs multinational firms’ duties regarding human rights. The key international instrument creating an obligation on businesses to respect human rights is the United Nations’ Guiding Principles in Business and Human Rights (UNGP). 107 The UNGP reiterates that states have the primary duty to protect human rights,108 but also establishes an obligation for businesses to respect human rights.109 With regards to corporate responsibility, the UNGP embraces the idea that firms have a due diligence obligation to prevent human rights abuses, as well as remedy them.110 Although the United Nations Human Rights Council endorsed these principles in 2011,111 the UNGP remains soft law, meaning it is not legally binding on states or corporations.112 Firms could voluntarily adopt these principles into

111 Pitts, supra note 109, at 51.
112 See Daniel Augenstein, Negotiating the Hard/Soft Law Divide in Business and Human Rights: The Implementation of the UNGPs in the European Union, 9 GLOBAL POL’Y 254, 256 (2018) (discussing the non-binding, soft law nature of the UN Guiding Principles); see also Liesbeth Enneking, Putting the Dutch Child Labour Due Diligence Act into Perspective: An Assessment of the CLDD Act’s Legal and Policy Relevance in the Netherlands and Beyond, 12 ERASMUS L. REV. 20,
their global operating processes, but it was left to states to enact laws that would make these principles mandatory.\footnote{See McCorquodale & Nolan, supra note 107, at 461 (discussing the expectation that states would pass legislation implementing these principles); Pitts, supra note 109, at 54, 59 (describing the principles as creating “social expectations” and arguing that “voluntary” principles can be important advances).}

Some states have taken up the UNGP’s call for greater corporate responsibility by passing laws at the national level that create binding rules to govern firms’ actions and incorporate human rights as well as environmental requirements.\footnote{This hardening of the UN Guiding Principles soft law creates several questions for how the principles should be operationalized. For a discussion, see generally Bueno & Bright, supra note 110. The U.S. has currently not passed a general corporate social responsibility statute at the federal level. For a proposal modeled on the Foreign Corrupt Practices Act, see Verdier & Stephan, supra note 107, at 1393–1407. The UN Guiding Principles did not refer to environmental rights, but they are now commonly included in European corporate social responsibility legislation. See McCorquodale & Nolan, supra note 107, at 460 (noting that “environmental rights are now becoming generally included in due diligence in national legislation, at least across the European Union” (footnote omitted)).} There are generally three categories of mandatory CSR laws enacted by nations: (1) laws that require firms to disclose information regarding their human rights and environmental impacts or their policies on these issues, (2) laws that require firms to engage in due diligence regarding human rights and environmental impacts but allow only public enforcement, and (3) laws that include due diligence obligations and also provide for a civil liability regime.\footnote{Bueno & Bright, supra note 110, at 800–01; Enneking, supra note 112, at 29–30. For a discussion of the weaknesses of the disclosure-based legislation, see generally Adam S. Chilton & Galit Sarfaty, The Limitations of Supply Chain Disclosure Regimes, 53 STAN. J. INT’L L. 1 (2017).} European states are the most active in passing these laws, although some other countries and U.S. states have enacted some CSR disclosure laws.\footnote{See generally, Michael R. Littenberg & Nellie V. Binder, Corporate Social Responsibility Disclosure and Compliance: An Overview of Selected Legislation, Guidance and Voluntary Initiatives (2019), https://www.ropesgray.com/en/newsroom/alerts/2019/10/corporate-social-responsibility-disclosure-and-compliance [https://perma.cc/AT5G-KT2A] (providing an overview national and state CSR initiatives); see also McCorquodale & Nolan, supra note 107, at 461–62 (reviewing recent human rights due diligence laws); Bueno & Bright, supra note 110, at 801–07 (reviewing French and Swiss due diligence and civil liability laws and proposals).}

States must make several decisions when passing legislation, including the measure’s jurisdictional scope, subject matter scope, primary obligations, enforcement, and remedies.\footnote{See Enneking, supra note 112, at 30–34 (categorizing these issues and using the framework to analyze the Dutch Child Labor Law); see also Bueno & Bright, supra note 110 at 801–07 (analyzing the various aspects of French and Swiss legislation and proposals). One important issue is}
how broadly to cast the measure’s jurisdictional net.\textsuperscript{118} It is uncontroversial for states to regulate their nationals,\textsuperscript{119} including firms: states can impose obligations on businesses that are incorporated or have a principal place in the state’s territory.\textsuperscript{120} In regulating its nationals, states can act extraterritorially, prescribing firms’ actions even outside of the state’s territory.\textsuperscript{121} As a result, states can regulate the global supply chains and distribution networks of national firms.\textsuperscript{122} For instance, both France and Germany recently passed general human rights due diligence laws that govern their national corporations.\textsuperscript{123}

However, some mandatory CSR laws claim broader jurisdictional mandates. Most notably, the Dutch Child Labor Act and the EU Draft Corporate Sustainability Due Diligence Directive (“EU Draft Directive”) adopt jurisdictional rules that aim to regulate firms that are not nationals and do not necessarily even have a physical presence in the country.\textsuperscript{124} These laws base their jurisdiction, in whole or in part, on foreign firms’ sale of goods in the Dutch or European market.\textsuperscript{125}

\textsuperscript{118} The UN Guiding Principles do not explicitly require states to regulate the extraterritorial actions of national corporations. See Bueno & Bright, supra note 110, at 793 (stating “the UN Guiding Principles do not go as far as defining or prescribing extraterritorial human rights obligations and the extent to which the States are required to regulate the extraterritorial activities of companies domiciled in their jurisdiction is still debated” (footnote omitted)).

\textsuperscript{119} Customary international law provides for states to have prescriptive jurisdiction over their nationals under the “active nationality” doctrine. Restatement (Fourth) of Foreign Relations Law § 407 (AM. L. INST. 2018); see also § 407 cmt. d (noting that “[t]erritoriality and active-personality are the oldest and least controversial bases of jurisdiction to prescribe”); § 407 cmt. c (noting that “[t]he most commonly recognized bases of jurisdiction are territorial and effects-based jurisdiction, active- and passive-personality jurisdiction, protective jurisdiction, and universal jurisdiction”).

\textsuperscript{120} Corporations are considered the nationals of the territory in which they are organized or have their principal place of business. See Restatement (Fourth) of Foreign Relations Law § 402, cmt. g & reps.’ note 7 (AM. L. INST. 2018).

\textsuperscript{121} See id. § 402, cmt. g (noting that “[t]he U.S. exercises jurisdiction to prescribe with respect to the conduct, interests, status, and relations of its nationals and residents outside its territory”).

\textsuperscript{122} Id. § 402; see also Bueno & Bright, supra note 110, at 793 (arguing that states should adopt legislation that governs national corporations’ extraterritorial actions).


\textsuperscript{124} Enneking, supra note 112, at 34.

The Dutch Child Labor Act applies to any firm that sells goods or services to Dutch consumers, regardless of size or legal form.\textsuperscript{126} The law requires covered firms to issue a declaration that it fulfilled its due diligence obligation, which ensures that the goods or services of a firm are not produced using child labor.\textsuperscript{127} To meet the due diligence obligation, the firm must investigate whether there is a reasonable suspicion that its goods or services supply chain uses child labor.\textsuperscript{128} The Dutch law passed the Dutch legislature in 2019 and was due to enter into force in 2022.\textsuperscript{129} However, the Dutch government issued a revised policy in October 2020 and appears to be waiting to evaluate the content of proposed EU-wide legislation before implementing the law.\textsuperscript{130}

The EU Draft Directive covers EU-based firms that employ over 500 persons and have more than €150 million of net revenue worldwide. It also covers EU-based firms that make half of their revenue in sensitive sectors (such as textiles, agriculture, forestry, or extractive industries), employ more than 250 persons, and report more than €40 million of net revenue worldwide.\textsuperscript{131} In addition, non-EU firms are covered if they meet employment thresholds and have €150 million/€40 million in net revenue from sales in the EU (for non-sensitive and sensitive sectors, respectively).\textsuperscript{132} This law imposes a broader range of due diligence requirements than the Dutch Law, requiring firms to identify and address human rights violations, as well as environmental impacts, from the parent company, any subsidiaries, and contractors with which the firm has an established business relationship.\textsuperscript{133} The EU Draft Directive will require EU member states to retain a public regulator in order to monitor compliance, impose “effective, proportionate, and dissuasive” sanctions, and establish a civil liability regime to allow victims to seek

\textsuperscript{126} Enneking, supra note 112, at 21–22 (discussing the broad scope of the provision and raising the possibility that some small firms in low risk sectors may be exempted through secondary legislation); Mandatory Human Rights Due Diligence Laws, supra note 125.

\textsuperscript{127} Enneking, supra note 112, at 21.

\textsuperscript{128} Id. at 22; Mandatory Human Rights Due Diligence Laws, supra note 125.

\textsuperscript{129} Enneking, supra note 112, at 20.

\textsuperscript{130} See id. at 23 (discussing the status of the law).

\textsuperscript{131} Weichbrodt et al., supra note 125; Just and Sustainable Economy, supra note 125.

\textsuperscript{132} Weichbrodt et al., supra note 125; Just and Sustainable Economy, supra note 125.

\textsuperscript{133} Weichbrodt et al., supra note 125; Just and Sustainable Economy, supra note 125.
compensation. In order for the EU Draft Directive to become binding on Members States, it must be approved by the European Parliament and the EU Council.

While neither the EU Draft Directive nor the Dutch Law are currently entered into force, they both represent a broad conception of jurisdiction over non-national firms based on the firms’ sales in the territory’s market. The basis for jurisdiction appears to be EU or Dutch citizens that are consuming goods and are concerned with negative human rights or environmental impacts. The Dutch government, in passing its Child Labor Law, stated in the preamble that:

Here, the consciences of Dutch consumers provide the connection necessary for the Netherlands to regulate firms’ global operations.

1. Why are the Netherlands and the EU claiming CSR jurisdiction based on market entry?

As in the export control context, states can have mixed motives in claiming jurisdiction over corporations that enter their market. One motive is undoubtedly concerns about the effectiveness of the policy, but there are also commercial motivations. Mandatory CSR policies are more effective if they cover more businesses. If a government is sincerely interested in limiting the human rights or environmental impacts of global supply chains, then the government will want to maximize its jurisdictional scope to pull in as many companies as it can. Extending the scope of the laws beyond a state’s nationals to all firms that enter its market is an efficacious means of imposing CSR obligations on more firms.

134 Weichbrodt et al., supra note 125; Just and Sustainable Economy, supra note 125.
135 Weichbrodt et al., supra note 125. Member states will then have two years to implement the law nationally. Id.
136 Enneking, supra note 112, at 21.
137 Cf. Restatement (Fourth) of Foreign Relations Law § 407 (A M. L. INST. 2018) (stating that customary international law permits a state to prescribe any conduct if there is a “genuine connection between the subject of the regulation and the state seeking to regulate.”).
138 RYNGAERT, supra note 8, at 190–91.
There are commercial considerations as well. Mandatory CSR policies can be costly to a state’s national firms, and this can lead to domestic resistance if national firms perceive that they are relatively disadvantaged vis-à-vis their global competitors. Concerns about creating an unlevel playing field can lead governments to broaden the scope for their regulations, spreading the costs of the policy to more businesses. For instance, the EU Draft Directive will be less controversial to European business if the costs of the policy, including national civil liability regimes, are borne by large non-European competitors as well. The mix of improved efficacy, as well as greater political acceptance, makes these broad assertions of market-based jurisdiction attractive to governments.

2. What are the limits of extraterritorial CSR policies?

Governments’ claims of regulatory extraterritorial jurisdiction over non-national firms can lead to resistance by other states. States can push back against broad assertions of jurisdiction directly, through blocking statutes, or indirectly, through retaliatory provisions or more subtle resistance to the measure.

The most direct limit on controversial assertions of jurisdiction is for a state to pass a blocking statute, which limits the effect of the foreign law. A blocking statute can impede discovery or authorize claw-

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140 See, e.g., Rachel Brewster, Enforcing the FCPA: International Resonance and Domestic Strategy, 103 VA. L. REV. 1611, 1655–75 (2017) (discussing U.S. efforts to expand the scope of the Foreign Corrupt Practices Act to address the competitiveness concerns of American corporations); RYNGAERT, supra note 8, at 191–92 (discussing commercial competitiveness motivations for states to regulate extraterritorially).

141 See CMS LAW-NOW, EU CORPORATE SUSTAINABILITY DUE DILIGENCE DIRECTIVE CALLS FOR MORE STRINGENT MEASURES 4 (2022), https://www.cms-lawnow.com/ealerts/2022/04/eu-corporate-sustainability-due-diligence-directive-calls-for-more-stringent-measures [https://perma.cc/SJ6L-SX9J] (discussing how the draft law is controversial in Europe even though there is a trend towards more mandatory CSR in Western Europe).

142 RYNGAERT, supra note 8 at 190–92.

143 Id. at 192–93 (discussing how the exercise of extraterritorial jurisdiction can lead to protests from foreign states).

144 Id.

145 Restatement (Fourth) of Foreign Relations Law § 407 reps.’ note 5, § 409 reps.’ note 2 (AM. L. INST. 2018) (discussing the use of blocking statutes to object to foreign states’ assertion of jurisdiction); see also RYNGAERT, supra note 8, at 192.
back provisions that reimburse companies for foreign money judgments.\footnote{Restatement (Fourth) of Foreign Relations Law § 407 reps.' note 5 (AM. L. INST. 2018).} For instance, when the European Union objected to extraterritorial sanctions the U.S. imposed on Cuba, Libya, and Iran, it passed a blocking statute intended to nullify the effect of any foreign judgment based on the sanctions and allow European firms to recover damages from the effect of the American law.\footnote{See Extraterritoriality (Blocking Statute): Protecting EU Operators, Reinforcing European Strategic Autonomy, European Commission, https://finance.ec.europa.eu/eu-and-world/open-strategic-autonomy/extraterritoriality-blocking-statute_en [https://perma.cc/CQF8-PUB6] (last visited June 7, 2023); see also The EU Blocking Statute and Civil Law Liability, NORTON ROSE FULBRIGHT (Nov. 2022), https://www.nortonrosefulbright.com/en/knowledge/publications/0f133670/the-eu-blocking-statute-and-civil-law-liability [https://perma.cc/X7LZ-34K3] (last visited June 7, 2023) (discussing the history and current application of the blocking statute).} Alternatively, states can resist foreign extraterritorial jurisdiction by passing retaliatory measures, seeking to impose costs on the regulating jurisdiction.\footnote{See Ryngaert, supra note 8, at 192 (discussing states using economic pressure to resist extraterritorial jurisdiction).} For instance, when the U.S. objected to France’s jurisdiction to tax “digital services” corporations (such as Google, Facebook, Apple, and Amazon), it announced that it would impose trade sanctions on France.\footnote{Congressional Research Service, Section 301 Investigations: Foreign Digital Services Taxes (DSTS) 1–2 (2021), https://crsreports.congress.gov/product/pdf/IF/IF11564 (last updated Mar. 1, 2021); see also Lilian V. Faulhaber, Opinion, Beware. Other Nations Will Follow France With Their Own Digital Tax, N.Y. TIMES, July 15, 2019, at A23 (describing the French digital tax plan). These sanctions were subsequently suspended to allow for negotiations of a broader tax treaty through the OECD.}

While the Netherlands and the EU likely believe that the application of human rights to large firms is beneficial for the entire international community, the possibility for conflict exists on several levels. There may not be a global consensus on how best to operationalize firms’ human rights obligations. For instance, the United States or China might object to its firms being subject to civil liability regimes in European states for the human rights impacts of their supply chains. Indeed, this became an issue in American litigation brought under the Alien Tort Statute, an American law that allowed U.S. federal courts to adjudicate claims brought by alien plaintiffs for violations of international human rights law occurring inside or outside of American


See Bradley, supra note 150, at 2.


Id.

Id.
range of regulations that reflected each nation’s domestic priorities. Practically, only large-market states tend to regulate extraterritorially, but this trend would allow the United States, China, Japan, and other major or rising economic powers to also pass extraterritorial laws that condition market access on global corporate regulation.

This could lead to overlapping and possibly conflicting regulations of firms’ global operations. Firms that sell in multiple markets could face high levels of regulation from multiple regulators based on each nation’s concerns. While this patchwork of regulation could be a positive development if high levels of regulation are globally optimal, it could also be detrimental if states adopt parochial rules that favor national, not global, interests. At the extreme, this could push the global economy into separate spheres, with firms unable to enter multiple markets due to conflicting regulations.

Alternatively, it is possible that extraterritorial laws, such as mandatory CSR regulations, will be a catalyst for more states to similarly adopt rules themselves. To the extent that foreign firms become accustomed to extraterritorial regulations, they may not resist their home state from adopting similar law and may even prefer it, either because they want to bind domestic competitors to similar rules or because they want foreign regulators to defer to their home states’ regulators judgments.

IV. CONCLUSION

The possibility of broad claims of jurisdiction over foreign firms’ conduct outside of the regulating states’ territory has long been possible. This Article examines two recent regulations that turn the possibility of global corporate regulation into a reality, asserting (or proposing to assert) jurisdiction over foreign firms’ global operations based

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156 RYNGAERT, supra note 8, at 96.
157 Id. at 206 (arguing that, in practice, only states with large markets regulate extraterritorially).
158 Id. at 192–93.
159 Id. at 227.
160 For a discussion of how American human rights laws might prompt other states to adopt similar laws, see Verdier & Stephan, supra note 107, at 1412–18.
on these firms’ entry into the regulating state’s market, buying or selling goods or services. Governments’ efforts to create a global regulatory power undoubtedly reflect the regulating state’s legitimate interests: the United States’ expanding national security concerns with Chinese technological advancement and European concerns with the human rights and environmental impacts of global supply chains. In both cases, the states acted unilaterally, in part due to their concern that other jurisdictions were not regulating sufficiently. Although unilateral action has advantages in its ability to adopt substantive rules quickly and without compromise, it can lead to conflict with other jurisdictions that may believe these measures infringe on its rights to regulate its territory and nationals. Governments’ motives in establishing unilateral and extraterritorial policy are always multifaceted. States are attracted to extraterritorial measures to protect domestic firms as well as achieving policy goals. But these mixed motives can create distrust among other states and undermine the interstate cooperation necessary to achieve broader national security or human rights goals.

At present, it is hard to tell whether governments will be content to keep this new global corporate regulation confined to export controls or human rights standards. Given that the basis for this jurisdictional power is simply a firm’s entry into the state’s market, other states with large internal markets could follow suit. This is certainly more likely to occur if the U.S.’s and E.U.’s relationship with China worsens. We can imagine that all three states could seek to expand their set of unilateral economic tools and thereby impose increasingly greater demands on multinational corporations. Such efforts might lead to a divide in the global economy, effectively forcing corporations to choose a subset of countries in which they can do business. Although senior policymakers in the U.S. and E.U. have warned that this outcome would be economically undesirable,161 concerns about maintaining national security may drive states towards ever stronger claims of market-based regulatory authority.

161 Wolf, supra note 2 (discussing warning from U.S. Treasury Secretary, Janet Yellen, and EU Commission President von der Leyen).