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Extraterritorial Impacts of the Supply Chain Due Diligence Act of Germany (Lieferkettensorgfaltspflichtengesetz – LkSG)

Dissertation
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List of Abbreviations

AJCL	The American Journal of Comparative Law
AJIL	The American Journal of International Law
AktG	Aktiengesetz [Stock Corporation Act of Germany]
Art.	Article
AVR	Archiv des Völkerrechts [International Law Archive]
BB	Betriebs-Berater [Business Consultant]
cf.	confer
cit.	cited
CJIL	Chinese Journal of International Law
CSR	Corporate Social Responsibility
DÖV	Die Öffentliche Verwaltung Zeitschrift für Öffentliches Recht und Verwaltungswissenschaften [Journal of Public Law and Administrative Sciences]
ECJ	European Court of Justice
ECOSOC	Economic and Social Council of the United Nations
ed(s).	Editor(s)
e.g.	exempli gratia [for example]
et al.	et alii [and others] (used from ten authors/editors on)
EU	European Union
FCPA	Foreign Corrupt Practices Act
FW	Die Friedens-Warte [The Peace Observation Point]
GWB	Gesetz gegen Wettbewerbsbeschränkungen [Act against Restraints of Competition of Germany]
HGB	Handelsgesetzbuch [German Commercial Code]
ibid.	ibidem [in the same place/source] (used in footnotes if the same work was referenced in the footnote immediately before on the same page)
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICJ/I.C.J.	International Court of Justice
i.e.	id est [that is/means]

ILO	International Labour Organization
JICJ	Journal of International Criminal Justice
LkSG	Lieferkettensorgfaltspflichtengesetz [Act on Corporate Due Diligence Obligations for the Prevention of Human Rights Violations in Supply Chains]
n.a.	no author
NAP	National Action Plan
n.d.	no date
NGO	Non-Governmental Organization(s)
No.	Number/Numbers
n.p.	no place
OECD	Organization for Economic Co-operation and Development
op. cit.	opere citato [in the cited work] (used in footnotes if the same work was previously referenced in a footnote on the same page and if helpful; for better transparency on each new page was first started again with the long citation of the respective work)
p(p).	page(s)
para(s).	paragraph(s)
PCIJ	Permanent Court of International Justice
RdTW	Recht der Transportwirtschaft [Law of the Transport Industry]
TILJ	Texas International Law Journal
UKBA	Bribery Act of the United Kingdom
UN	United Nations
US	United States
USA	United States of America
USSC	Supreme Court of the United States
v./vs.	versus
Vol.	Volume
YJIL	Yale Journal of International Law
ZLR	Zeitschrift für das gesamte Lebensmittelrecht [Journal for the Entire Food Law]
ZUR	Zeitschrift für Umweltrecht [Journal for Environmental Law]

I. Introduction

On the 16th July 2021 the "Act on Corporate Due Diligence Obligations for the Prevention of Human Rights Violations in Supply Chains (Lieferkettensorgfaltspflichtengesetz – LkSG)" was passed by the German Bundestag (Parliament) as part of the "Act on Corporate Due Diligence Obligations in Supply Chains"¹, and the act entered into force on 1st January 2023.² The act fits into a recent legal development at the EU level and in individual states that pursues the goal of responsible and sustainable global business, examples include the UK's Modern Slavery Act of 2015, the French Due Diligence Act of 2017 and the Dutch Child Labor Act adopted in 2019.³ But in the literature it is stated that the LkSG would even be the most ambitious of all due diligence laws worldwide.⁴ With the LkSG, companies would be de facto forced to ensure protection under international law everywhere in the world – along their supply chain.⁵ And this would also apply where local law has not provided for this so far.⁶

These statements raise the research question of whether the Federal Republic of Germany has the authority and jurisdiction to constitute such a seemingly broad scope of application beyond its borders by means of a domestic law. In the context of the exercise of jurisdiction, the term "extraterritoriality" is of particular importance.⁷ First, extraterritorial means outside a state's own territory, or negatively, it means on the territory of another state or on state-free territory such as the high seas and not on the territory of the regulating state.⁸ This leads to the first conclusion and hypothesis that the LkSG is an extraterritorial law. The research question that follows from this is what consequences and impacts are associated with this circumstance of its possible extraterritoriality – that is, what extraterritorial impacts arise from the LkSG and on whom? At this stage, the question cannot be answered, but in any case, it is a hypothesis that

¹ Cf. Act on Corporate Due Diligence Obligations in Supply Chains, p. 1.

² Cf. *ibid.*, p. 22, Art. 5 para 1.

³ Cf. BT-Drucks. 19/28649, p. 24.

⁴ Cf. Grabosch, in: Grabosch/LkSG, § 1 para. 5.

⁵ Cf. Ruttloff/Wilske/Schulga, in: Wagner/Ruttloff/Wagner LkSG, § 2 para. 107.

⁶ Cf. *ibid.*

⁷ Cf. Volz, in: Extraterritoriale Terrorismusbekämpfung [Extraterritorial Combating of Terrorism], p. 44 and there with further references.

⁸ Cf. Meng, in: Extraterritoriale Jurisdiktion im öffentlichen Wirtschaftsrecht [Extraterritorial Jurisdiction in Public Economic Law], p. 73.

the LkSG has extraterritorial impacts, since the first hypothesis is that the LkSG is an extraterritorial law.

The legal discipline that provides guidance on the question of whether the Federal Republic of Germany has the authority and jurisdiction to determine such a seemingly broad scope of application with the LkSG beyond its borders by means of a domestic law is the international law, because it deals with the rights and obligations of states.⁹ Thereby it orientates on the interstate dimension of jurisdiction and it is also called public international law.¹⁰ That is what is understood by international law in this work and the discipline from which viewpoint this work is written in order to be able to answer the underlying questions. In this regard, the hypothesis is that the Federal Republic of Germany has the authority and jurisdiction to enact such a seemingly broad scope beyond its borders with the LkSG as a domestic law because the law is already in force and at this point, without deeper research, it is assumed that it was then enacted within the permitted scope.

This leads to the overall hypothesis that the LkSG is an extraterritorial law, has extraterritorial impacts and that both is legitimate from a legal point of view of international law.

In the following, it will be explained how further research questions and hypotheses were developed on this basis and which goals and methods were pursued in the context of this work in order to finally answer the mentioned research questions and to test the hypotheses for their correctness. Furthermore, the work is placed in the context of the current state of science and the contribution to science of this work is explained.

Based on the previously provided description of extraterritoriality, it can be guessed that legislation in this way is not the rule, but rather an exception, which brings with it impacts and possibly also problems or challenges. In order to establish a theoretical basis for what makes extraterritoriality so special, it seems necessary first to find out what the standard is in the case of authority to legislate and who is authorized to do so usually. This leads in a first step to a reflection on the rights and obligations of states from the perspective of international law.¹¹ Thus, initially, the objective is to answer

⁹ Cf. van Arnould, in: *Völkerrecht [International Law]*, § 1 para. 1 with reference for more details to § 2 and there with further references.

¹⁰ Cf. *ibid.*

¹¹ Cf. *ibid.* with reference for more details to § 2 and there with further references.

the question of what a state is and what characteristics constitute it, in order to derive from this the consequences or even privileges of statehood. On this basis, extraterritoriality and extraterritorial impacts will be distinguished from the general standard case and defined once again in more detail. Furthermore, it will be examined under which circumstances extraterritorial laws and extraterritorial impacts are permissible from the perspective of international law. In the steps mentioned in this para., reference will be made predominantly to well-established and internationally recognized basic literature of international law. In this context, it should be noted that the cut-off date of the underlying literature for this whole work was the 23rd April 2023 and literature after this date could therefore not be considered.

After these theoretical foundations of international law have been laid, the aim is to apply them to the concrete practical case of the LkSG in order to be able to answer the mentioned research questions. In doing so, the background of the act from the point of view of international law and the reasons for it will first be introduced. Then, selected and essential contents of the act for this work will be named and illustrated. Afterwards, the LkSG will be examined for extraterritoriality and extraterritorial impacts, in particular on whom, by applying the knowledge from the theoretical foundations laid before. These are also applied and transferred to the LkSG in order to evaluate any extraterritoriality and/or extraterritorial impacts of the LkSG in terms of their admissibility. In addition to the (among others) wording of the act, the explanation of the act and the own transfer knowledge, corresponding opinions of the literature will be consulted for the steps mentioned in this para., so that finally, within the framework of this work, an own evaluation and answer to the research questions and hypotheses can be provided.

This also leads over to the classification of this work in the current state of science and the contribution of this work to it. The literature research has shown that meanwhile a lot of recent literature on supply chain laws and the LkSG has been published, which often also addresses the question whether supply chain laws or the LkSG are designed extraterritorially and whether this is legal. However, the answer to whether a possible extraterritoriality or extraterritorial impacts of it are legal under international law is controversial. In this respect, a scientific contribution of this work is to collect the arguments, to bundle them, to prepare them in a structured way and then to evaluate

them and, against the background of such a broad range of opinions in this respect, to come to an own conclusive opinion.

Another contribution to science is that while the aforementioned literature on supply chain laws and the LkSG often concludes that it may have extraterritorial impacts, these impacts have not been crystallized in concrete terms, and in particular not by means of specific practical examples, so that the potentially affected addressees could know exactly what extraterritorial impacts they may face, which is an objective in the context of this work. Another contribution to science of this work is that the literature to date does not answer the question of whether an extraterritorial design of the LkSG, if legal, is also legitimate.

All in all, the overarching objective of this work is to be able to answer all these research questions and to test the hypotheses for their correctness so that the desired contribution to science can be provided.

II. States and the General Rules of Jurisdiction

As a starting point, in order to be able to answer the questions raised and to understand what extraterritoriality is and why it is an exception and not the normal case, it seems necessary initially to find out what this normal case is in jurisdiction and legislation. This standard, who or what has legislative and juridical competence, is derived from the nature of states and the consequences of their statehood. Therefore, this will be examined in the following.

1. Legal Nature of States

For this purpose, first of all, the legal nature of states in terms of their legal identity shall be discussed. The focus is on the characteristics of the nature of a state that distinguish it from other legal subjects or persons and thus establish its legal identity attributes. Within the context of this work and in order to explain the phenomenon of extraterritoriality, it seems necessary as a basis to understand what legal nature and identity states hold, especially within the framework of international law. Therefore, in the course of this chapter, reference will be made primarily to the legal nature of states in terms of their legal identity from the perspective of and in the theory of international law.

The state is the object of research of the General State Doctrine, whereby, among other things, there is interest in understanding the nature of the state.¹² For state practice, the legal nature of the state under international law is of the highest importance, which is therefore of particular interest in the context of General State Doctrine.¹³ "[...T]he state is a type of legal person recognized by international law."¹⁴ International law's claim to prove its formative power in the reality of interstate relations shapes the concept of the state under international law.¹⁵ Due to the existence of other types of legal persons that are recognized in this way, the presence of the attribute of a legal personality is not alone a sufficient identity characteristic to clearly distinguish statehood,

¹² Cf. Schöbener/Knauff, in: Allgemeine Staatslehre [General state doctrine], § 1 para. 1.

¹³ Cf. *ibid.*, § 3 para. 42.

¹⁴ Crawford, in: Brownlie's Principles of Public International Law, p. 117.

¹⁵ Cf. Herdegen, in: Völkerrecht [International Law], § 8 para. 2.

i.e., the nature of states, from the others.¹⁶ In addition to the state as the classical subject of international law, however, other subjects of international law also exist in the doctrine of international law.¹⁷ Nevertheless, the identity characteristics for the nature of states are established by the law.¹⁸

Even in the current literature on this topic, the Three-Elements-Doctrine of *Jellinek* is widely referred to and built upon for the definition of the state.¹⁹ According to *Jellinek*, in order to avoid juridical fictions and to recognize the natural being of the state existing before all jurisprudence, it appears obvious to search for the objective essence of the state in one of its constituting, seemingly real existing elements, which would be the territory, the people and the governor.²⁰ *Jellinek* elaborates on these three elements, naming them 1. state territory, 2. state people, and 3. state power.²¹ In conclusion, *Jellinek* summarizes his considerations on the nature of the state in such a way that it results that the state is, in its legal character, the corporation of a sedentary people endowed with original ruling power.²² This basis of *Jellinek* will now be considered and further elaborated from a contemporary perspective with more recent literature.

The state territory is a delimited part of the earth's surface as an exclusive domain, and thus a necessary component of a state is always a territory.²³ From other states the national territory is separated by the state borders.²⁴ Under international law, the concept of a state does not require a certain minimum size of state territory and therefore also includes so-called microstates such as Grenada, San Marino or the Vatican City State.²⁵

A state people as the personal substrate of the state presupposes a permanently established association of people (the nationals) under the umbrella of a common system of

¹⁶ Cf. Crawford, in: Brownlie's Principles of Public International Law, p. 117 with further references.

¹⁷ Cf. van Arnould, in: Völkerrecht [International Law], § 2 and see there for examples, details and further references.

¹⁸ Cf. Crawford, op. cit., p. 117.

¹⁹ See, e.g., Herdegen, in: Völkerrecht [International Law], § 8 para. 3 with reference to Jellinek, in: Allgemeine Staatslehre [General State Doctrine], pp. 396 et seq. (whereby the relevant chapter starts on p. 394 and lasts until p. 434); van Arnould, op. cit., § 2 para. 73; Schöbener/Knauff, in: Allgemeine Staatslehre [General state doctrine], § 3 para. 42.

²⁰ Cf. Jellinek, op. cit., p. 144.

²¹ Cf. *ibid.*, pp. 394-434 and see there for further details and elaborations.

²² Cf. *ibid.*, p. 433.

²³ Cf. Schöbener/Knauff, op. cit., § 3 para. 44.

²⁴ Cf. *ibid.*

²⁵ Cf. Herdegen, op. cit., § 8 para. 5.

rule and law.²⁶ This sedentary, permanent association of persons is legally consolidated by the membership bond of citizenship, whereby the size of this association of persons, i.e., the number of citizens or nationals, is irrelevant.²⁷

As an organizational bracket, the state power connects the personal and territorial substrate of the state, because state power is more closely defined in terms of content by its assignment to a state territory (territorial authority) and a state people (personal authority).²⁸ Internally, the state power secures the state's regulatory tasks and externally, it secures the state's ability to act as a subject of international law.²⁹ State power is an organized governance with the prospect of permanence, exercised by an effective government capable of action and independent of third parties.³⁰

The question examined at hand about the nature that characterizes the identity of a state goes in tandem with the question of the purpose(s) for which states exist. However, here the focus is on the question "What are states?" and less on the question "Why do states exist?". Reason for this is that the answer to the latter question is not expected to have a decisive impact on the explanation of the exceptional case of extraterritoriality and the superordinated study of the dissertation's topic. Moreover, that "Why-question" alone appears to be suitable as a topic for other works or certainly for further studies, since it is the subject of a separate field of research. Thus, the following gives only a short overview for the understanding of the general context. The field of the General State Doctrine not only describes the existence of states, but also examines the question of why states exist, which requires a philosophical consideration of the justification of state governance and thereby examines the reasons that justify the existence of the state, i.e., the purposes of the state.³¹

Using this and the simple form of the definition of a state as a basis, the legal nature of states in terms of their legal identity is now examined from the point of view from and in the theory of international law, as already introduced, because this is the discipline and the viewpoint from which this dissertation is written and on which further considerations are built up.

²⁶ Cf. Herdegen, in: *Völkerrecht* [International Law], § 8 para. 6.

²⁷ Cf. Schöbener/Knauff, in: *Allgemeine Staatslehre* [General state doctrine], § 3 para. 45.

²⁸ Cf. Herdegen, *op. cit.*, § 8 para. 7 with further references.

²⁹ Cf. *ibid.* with further references.

³⁰ Cf. Schöbener/Knauff, *op. cit.*, § 3 para. 46.

³¹ Cf. *ibid.*, § 4 para. 1.

The legal nature of states in terms of their legal identity in the view and theory of international law can firstly be derived from the Montevideo Convention.³² This convention is often referred to in these contexts.³³ It contains the famous definition of the state as a subject of international law, which ties in with the elements of *Jellinek* regarding his concept of the state.³⁴ It can serve as a first indication, nevertheless it needs broader and deeper explorations.³⁵ The Montevideo Convention from the 26th December 1933 had the purpose to regulate the rights and duties of states.³⁶ In its Art. 1 it defines that "[t]he state as a person of international law should possess the following qualifications: (a) a permanent population; (b) a defined territory; (c) government; and (d) capacity to enter into relations with other states."³⁷ Compared to the three characteristics state territory, state power and state people mentioned before,³⁸ it is noticeable that criteria (a), (b) and (c) of the Montevideo Convention are very familiar to them. In the sense of the Montevideo Convention, only criterion (d), which seems comprehensible in an international context, is added. These criteria will be examined and further developed in the following broader and deeper exploration from the perspective of the current state of scholarship in the discipline of international law in order to ultimately characterize the legal nature of states in terms of their legal identity.

Determining the presence of a state requires, first and foremost, a "physical basis for an organized community"³⁹, which is why the criteria "(a) a permanent population"⁴⁰ and "(b) a defined territory"⁴¹ mentioned by the Montevideo Convention are to be understood and applied in conjunction with each other.⁴² "There must be a reasonably stable political community and this must be in control of a certain area."⁴³ In this context, the actual creation of such a community is in the foreground, which is why the complete definition of exact borders is not necessary.⁴⁴ Thus, the line of these borders

³² Cf. Crawford, in: Brownlie's Principles of Public International Law, p. 118.

³³ Cf. *ibid.* with further references.

³⁴ Cf. Herdegen, in: Völkerrecht [International Law], § 8 para. 4 with reference to Montevideo Convention, Art. 1, p. 3 (found in another source).

³⁵ Cf. Crawford, *op. cit.*, p. 118.

³⁶ Cf. Montevideo Convention, p. 1 et seq.

³⁷ *Ibid.*, Art. 1, p. 3.

³⁸ See therefore once again pp. 6-7 and there the respective referenced literature.

³⁹ Crawford, *op. cit.*, p. 118

⁴⁰ Montevideo Convention, Art. 1, p. 3.

⁴¹ *Ibid.*

⁴² Cf. Crawford, *op. cit.*, p. 118.

⁴³ *Ibid.*

⁴⁴ Cf. *ibid.* with further references.

need not be undisputed on every point.⁴⁵ Moreover, as said before, no minimum value is set for either of the two criteria.⁴⁶ Given that, "[a] state is a stable political community supporting a legal order to the exclusion of others in a given area."⁴⁷ Criterion "(c) government"⁴⁸ of the Montevideo Convention is neither considered mandatory nor satisfactory in the current state of science.⁴⁹ However, the functional presence of this criterion serves as the strongest proof of such a community.⁵⁰ The reason why this criteria of the Montevideo Convention seem not to be sufficient in the present state of this science is that all of its aforementioned and explained criteria might be fulfilled by a state in question, but nevertheless it is not able to actually work as a state in praxis. In the following, it will be shown why this can be.

With the current state of the discipline, the last criterion of the Montevideo Convention "(d) capacity to enter into relations with other states"⁵¹ is assessed to the fact that this characteristic depends on the bottom line of whether the state in question has the enforcement strength in the internal relationship of the territory at all to execute entered international commitments and furthermore on whether the state in question can enter and fulfill these international ties without the influence of others and be responsible for them.⁵² It is not to be understood as an additional criterion, but coincides to a large extent with immediacy under international law as an element of state power, according to which a state, in order to be a subject of international law, must have the external capacity to act legally independently of other states and in accordance with international law.⁵³ In summary, this criterion "(d) capacity to enter into relations with other states"⁵⁴ in this context, where this could prove to be a valuable criterion, is a result of the this capability presupposing necessities of criterion "(c) government"⁵⁵ and an independence.⁵⁶ This supports the previously mentioned finding that the criteria of the Montevideo Convention do not seem sufficient. It is noticeable that there appears to

⁴⁵ Cf. van Arnould, in: *Völkerrecht [International Law]*, § 2 para. 74.

⁴⁶ Cf. Crawford, in: *Brownlie's Principles of Public International Law*, p. 118.

⁴⁷ *Ibid.*, p. 119.

⁴⁸ Montevideo Convention, Art. 1, p. 3.

⁴⁹ Cf. Crawford, *op. cit.*, p. 119.

⁵⁰ Cf. Crawford, *ibid.* with further references.

⁵¹ Montevideo Convention, Art. 1, p. 3.

⁵² Cf. Crawford, in: *The Creation of States in International Law*, p. 62.

⁵³ Cf. van Arnould, *op. cit.*, § 2 paras. 73 and 90 with reference to Montevideo Convention, Art. 1, p. 3 (found in another source).

⁵⁴ Montevideo Convention, Art. 1, p. 3.

⁵⁵ *Ibid.*

⁵⁶ Cf. Crawford, in: *The Creation of States in International Law*, p. 62 with further references for a deeper discussion.

be at least one further and fundamental criterion which has not emerged so far, for which reason it requires the aforementioned deeper and broader explorations.

"Independence is the central criterion for statehood."⁵⁷ In principle, there is no effective state power of its own if it cannot be exercised independently, but only in dependence on another state power.⁵⁸ "[T]he state must be independent of other state legal orders, and any interference by such legal orders, or by an international agency, must be based on a title of international law."⁵⁹ In general, the assessment of the characteristic of independence is unproblematic, although under certain circumstances there are also problematic issues to be discussed.⁶⁰ On the one hand, due to the numerous interdependencies between the criteria of independence and that of a functioning government, the challenges of the one criterion can similarly be those of the other or influence it.⁶¹ On the other hand, independence is also in question if, despite its own and apparently independent executive, judiciary, legislature, administration, judicial order, citizenship rights and international connections as good indications of statehood, a dominant influence on the state in question by another party/state or other parties/states is conspicuous.⁶² And, as already stated, in order to be a subject of international law, a state must have the external capacity to act legally independently of other states and in accordance with international law, which in a sense refers to the external legal capacity of the state.⁶³ "But the emphasis is on foreign control overbearing the decision-making of the entity concerned on a wide range of matters and doing so systematically and on a continuing basis."⁶⁴

For the fulfilment of the characteristic of independence, it is harmless if such control is exercised in the form of an actual and legally established representation of another state by means of a title under international law, e.g., on the basis of a protective agreement or a legitimate joint defensive or sanction war, which results in an occupation and installation of actions to eliminate the causes of the aggressiveness.⁶⁵

⁵⁷ Crawford, in: *The Creation of States in International Law*, p. 62 with further references.

⁵⁸ Cf. Stein/von Buttlar/Kotzur, in: *Völkerrecht [International Law]*, § 17 para. 286.

⁵⁹ Crawford, in: *Brownlie's Principles of Public International Law*, p. 119.

⁶⁰ Cf. *ibid.*

⁶¹ Cf. *ibid.*

⁶² Cf. *ibid.*, p. 120.

⁶³ Cf. van Arnauld, in: *Völkerrecht [International Law]*, § 2 para. 90.

⁶⁴ Crawford, in: *Brownlie's Principles of Public International Law*, p. 120.

⁶⁵ Cf. *ibid.*

In this respect, it is not possible to specifically assess the characteristic of independence in general, but only with consideration of the legal intention underlying the investigation and with the inclusion of the factual circumstances of the respective case.⁶⁶ A fine line to dependency can be seen with regard to numerous countries, especially developing countries, which require external help and funds from different organizations, as they are susceptible to impact and intervention, e.g., from the industrialized countries.⁶⁷ This is because the underlying concepts are typically linked to such constraints as the utilization of the funds or the developing country's politics on several fundamental matters, which means that such a developing country can hardly do anything but to meet the requirements if it intends to acquire and hold on to these resources.⁶⁸ States which fulfill the criterion of independence are able to engage in ways of collaboration on a voluntary and peer basis, which may be grounded in the establishment of an international organization or in the development, by agreement or practice, of other forms for the preservation of collaboration.⁶⁹ At this point, the circle closes to the previous summary that the criterion "(d) capacity to enter into relations with other states"⁷⁰ of the Montevideo Convention is a result of the this capability presupposing necessities of criterion "(c) government"⁷¹ and the explained independence.⁷²

In modern international law doctrine, there is a tendency to equate sovereignty with independence.⁷³ Against this background and in the current state of the discipline of international law, the meaning of sovereignty can in principle be understood as synonymous with the meaning of independence as the fundamental characteristic of a state.⁷⁴ It has always been considered a necessary attribute of states, and a lack of it appears as a deficit of state power that calls into question the state quality of a ruling entity.⁷⁵ But, while a state that has agreed to allow some other to administer its external affairs, or has provided some other with broad extraterritorial rights, cannot be ad-

⁶⁶ Cf. Crawford, in: Brownlie's Principles of Public International Law, p. 121.

⁶⁷ Cf. *ibid.*, p. 122.

⁶⁸ Cf. *ibid.*

⁶⁹ Cf. *ibid.*, p. 123.

⁷⁰ Montevideo Convention, Art. 1, p. 3.

⁷¹ *Ibid.*

⁷² Cf. Crawford, in: The Creation of States in International Law, p. 62 with further references for a deeper discussion.

⁷³ Cf. Herdegen, in: Völkerrecht [International Law], § 28 para. 5.

⁷⁴ Cf. Crawford, in: Brownlie's Principles of Public International Law, p. 124 with further general references.

⁷⁵ Cf. Herdegen, *op. cit.*, § 28 para. 1.

mitted to fulfill a characteristic of sovereignty and a court might conclude a state in which a large part of its judicial authorities has been given away step by step has, as a result, also stopped having an existence of its own.⁷⁶ However, it can be challenging to differentiate between the cession of powers and the mere presence of a proxy, in addition to which there is a powerful supposition towards the forfeiture with respect to existence as a sovereign state.⁷⁷ A brief overall definition describes the concept of sovereignty under international law as the ability of the state to act externally and independently of other states within the framework of and in accordance with international law.⁷⁸ This is consistent with the finding that sovereignty in the sense of a defining characteristic for a state can be interpreted synonymously with independence and thus is not a necessary characteristic in itself.

To now briefly summarize and bring together the previous findings and understandings from the perspective of the discipline of international law, it can be said that a state has come into existence as soon as it has a sufficiently stable community by means of a population in a delimited territory under the sovereign leadership of an independent government.⁷⁹ Simultaneously these are the characteristics of the legal nature of a state that distinguish it from other legal subjects or persons and are its legal identity attributes.

But this, on the face of it, is only a situation where the above mentioned characteristics are present in a form in which they are not challenged by other actors, especially states, or even where such actors not make claims over individual parts of the above mentioned characteristics, such as parts of the territory. Thus, the problem comes up as to how the situation and especially the legal nature of states in terms of their legal identity should then be assessed. Because, "[w]henever a state acts in a way which may affect the rights or interests of other states, the question arises of the significance of their reaction to the event."⁸⁰ In the context of international law, in addition to an agreement between the states involved, unilateral reactions of the affected state can also be possible with regard to the continuation of such a situation, such as, in the positive case,

⁷⁶ Cf. Crawford, in: Brownlie's Principles of Public International Law, pp. 124-125.

⁷⁷ Cf. *ibid.*, p. 125.

⁷⁸ Cf. Schöbener/Knauff, in: Allgemeine Staatslehre [General state doctrine], § 3 para. 62.

⁷⁹ Own summary of the findings from the previous study with the partial incorporation of the outcomes and formulations of the literature referred to before since p. 6.

⁸⁰ Crawford, *op. cit.*, p. 134 with further references to the state practice and other materials as well as to the literature.

a recognition, but in the negative case, in particular, also a protest.⁸¹ This in turn brings up the question of the effect that lack of recognition has. It is conceivable, e.g., that the territory designated by one state would not be accepted by another affected state. Furthermore, this could then jeopardize the corresponding characteristic and could call into question its existence and thus its identity as a state in its totality.

"In this context, legal writing has adopted the emphasis and terminology of political relations, notably in relation to the fundamental issue of recognition of states."⁸² As a response to this issue, the positivist theory first provided the explanation that the duties to comply with international law arise from the approval of the other states and when a new state is established, new juridical duties then emerge for the already present states, which is why, according to this theory, the approval of the establishment of a new state or its submission to international law, as far as other states would be affected, appeared to be necessary.⁸³ To the extent that binding legal norms and acts are available, there would be no need for relying on pre-state rights, since for legal positivism only (positive) law set by the authorities responsible for it exists anyway and any other form of substantiation of law by it is rejected.⁸⁴

For the purpose of providing completeness as far as possible within the scope of this dissertation, the legal-theoretical counterpart to legal positivism should be briefly mentioned here. Unlike legal positivism, the doctrine of natural law assumes, notwithstanding various patterns of argumentation, that human beings can be entitled to rights on the basis of their existence as human beings even independently of a state guarantee, and such rights must also be respected by the state, which is why they are described as pre-state and as inevitable and untouchable.⁸⁵

Building on the explanation of legal positivism, among other things, a controversy of opinions arose. Thus, due to the complex nature of the juridical question of recognition in relations between states, a dogmatic debate developed with representatives of the declaratory and the constitutive perspective on the effect of recognition.⁸⁶

⁸¹ Cf. Crawford, in: Brownlie's Principles of Public International Law, p. 134.

⁸² Ibid., p. 135.

⁸³ Cf. Crawford, in: The Creation of States in International Law, p. 13.

⁸⁴ Cf. Schöbener/Knauff, in: Allgemeine Staatslehre [General state doctrine], § 5 para. 113.

⁸⁵ Cf. *ibid.*

⁸⁶ Cf. Crawford, in: Brownlie's Principles of Public International Law, p. 135 with a further reference to an explanation of the terms with different wordings, but with the same meaning.

The constitutive perspective of this debate is built on this explanation of positivist theory, "[...] according to which the political act of recognition is a precondition of the existence of legal rights: in its extreme form this implies that the very personality of a state depends on the political decision of other states."⁸⁷

Contrary to this and pursuant to the representatives of the declaratory perspective, the juridical effect of the recognition is reduced to the fact that it is merely a declaration or an admission of an actual legal and factual status, whereby the legal personality that establishes the state as such in its identity has already been granted on the basis of these facts.⁸⁸

Already the Montevideo Convention of 1933 determined in its Art. 3 that "[t]he political existence of the state is independent of recognition by other states"⁸⁹, what also reflects the common practice of states, which thus follow the declaratory perspective on recognition.⁹⁰ This also reflects the prevailing view that, with regard to the existence of a state, recognition is in principle only declaratory and that, as a result, not the quality of the state as such, but only the maintenance of diplomatic relations, depends on recognition by the other states.⁹¹ The opinion, which was held especially earlier in international law doctrine, that the (majoritarian) recognition of an entity as a state has constitutive effect and is thus a necessary requirement for the existence of a state as a subject of international law, could not prevail against the counter-opinion of the declaratory effect of recognition, according to which the existence of a state as a subject of international law does not depend on recognition by other states.⁹²

To discuss the reasoning for this only briefly, it should be explained that the constitutive perspective on recognition is unconvincing in its corollary, as it is undisputed that states cannot eliminate or revoke competence of other states based on international law through their individual decision, which furthermore causes considerable inconvenience for this perspective in its practice.⁹³ The minimum number of states, e.g., that have to recognize the existence of a state is unclear, as is the question of the validity

⁸⁷ Crawford, in: Brownlie's Principles of Public International Law, p. 136 with further references especially to adherents of this perspective, but also to further discussion.

⁸⁸ Cf. Crawford, op. cit., p. 135 with further references to adherents of this perspective.

⁸⁹ Montevideo Convention, Art. 3, pp. 3-4.

⁹⁰ Cf. Crawford, op. cit., p. 136 by referring to the Art. 3 of the Montevideo Convention and with other further references.

⁹¹ Cf. Stein/von Buttlar/Kotzur, in: Völkerrecht [International Law], § 20 para. 323.

⁹² Cf. Herdegen, in: Völkerrecht [International Law], § 8 para. 11.

⁹³ Cf. Crawford, op. cit., p. 137.

of the recognition that is fundamental to the existence of a state if it is not based on (all) facts known or applied, or whether non-recognition at the hands of a state authorizes it to consider the state in question as a non-state in the sense of international law, perhaps through interference in the domestic matters or annexation of the territory of the state in question.⁹⁴ What speaks decisively in favor of the prevailing view is that there is no obligation under international law to recognize states or, conversely, no entitlement of a newly emerged state to recognition; rather, recognition can be omitted without further ado for political reasons, i.e., even if the characteristics of a state are undoubtedly present.⁹⁵ Nevertheless, it should be noted that the quality of a state cannot be completely separated from political conflicts in this way, because although objective criteria may be used to determine whether a state is in existence, states may have different views on whether the necessary characteristics of a state are present.⁹⁶ Here, the recognition practice acquires indirect legal significance as an indication of the international community's view of the quality of the state as such, and hence collective recognition speaks for, and collective non-recognition against, the quality of the state.⁹⁷

In addition, for the sake of completeness, it is worth mentioning that with regard to the term recognition, a distinction must be made between the recognition of states and the recognition of governments,⁹⁸ even if this has no influence on the result just reached. Because the recognition of governments does not refer directly to the quality as a subject of international law, but to the entitlement to representation in international relations.⁹⁹ That also means that the recognition of governments is more or less irrelevant to the existence and identity of a state. Generally, however, the recognition of a government goes hand in hand with the recognition of a state.¹⁰⁰

Regardless of the prevailing view in favor of the declaratory theory¹⁰¹ against the constitutive theory and considering recognition as an expression of common processes of acceptance and toleration between states, formally diplomatic recognition continues to be an instrument employed and treated as in some way ultimate in conflict cases with

⁹⁴ Cf. Crawford, in: Brownlie's Principles of Public International Law, p. 137.

⁹⁵ Cf. Stein/von Buttlar/Kotzur, in: Völkerrecht [International Law], § 20 para. 323.

⁹⁶ Cf. van Arnould, in: Völkerrecht [International Law], § 2 para. 98.

⁹⁷ Cf. *ibid.*

⁹⁸ Cf. Stein/von Buttlar/Kotzur, *op. cit.*, § 20 para. 330; van Arnould, *op. cit.*, § 2 para. 100.

⁹⁹ Cf. Stein/von Buttlar/Kotzur, *op. cit.*, § 20 para. 330.

¹⁰⁰ Cf. van Arnould, *op. cit.*, § 2 para. 100; Stein/von Buttlar/Kotzur, *op. cit.*, § 20 para. 330.

¹⁰¹ Cf. Crawford, in: The Creation of States in International Law, p. 25.

new states and sometimes new regimes, even though recognition granted by a sole state or even a majority of states is unable to establish or regulate the status of the recognized state in question for those states that do not recognize it, at least according to the usual standards.¹⁰² Thus, from the perspective of legal theory, it can be observed that while positivist scholarship in international law initially led to a focus on the issue of recognition in questions of statehood, modern scholarship and praxis has shifted the focus back to aspects of statehood and status regardless from recognition.¹⁰³

Therefore, it can be concluded that the intermediate result reached earlier, that it can be said that a state has come into existence as soon as it has a sufficiently stable community by means of a population in a delimited territory under the sovereign leadership of an independent government,¹⁰⁴ and that simultaneously these are the characteristics of the legal nature of a state that distinguish it from other legal subjects or persons and are its legal identity attributes, is also the final result. Supplementary to this, it should be pointed out that "[i]t is a characteristic of these criteria [...] that they are based on the principle of effectiveness among territorial units."¹⁰⁵ From the principle of effectiveness and the interest in peace and stability also follows the principle of continuity, according to which even if one of the characteristics of statehood is eliminated for a certain period of time, it must be assumed that the state continues to exist.¹⁰⁶ And, because "[...] the independence of an existing State is protected by international law rules against unlawful invasion and annexation, [...] the State may, even for a considerable time, continue to exist as a legal entity despite lack of effectiveness."¹⁰⁷

2. Sovereignty and Jurisdiction as a Consequence of Statehood

Up to now, it has been established what constitutes a state and what components such a state typically has. "State territory and its appurtenances (airspace and territorial sea), together with the government and population within its boundaries, constitute the physical and social base for the state."¹⁰⁸ This is in line with the previously gained

¹⁰² Cf. Crawford, in: Brownlie's Principles of Public International Law, p. 155.

¹⁰³ Cf. Crawford, in: The Creation of States in International Law, p. 37.

¹⁰⁴ Own summary of the findings from the previous study with the partial incorporation of the outcomes and formulations of the literature referred to before between pp. 6-12.

¹⁰⁵ Crawford, in: The Creation of States in International Law, p. 46 with further references regarding effectiveness and the traditional criteria of statehood.

¹⁰⁶ Cf. van Arnould, in: Völkerrecht [International Law], § 2 para. 73.

¹⁰⁷ Crawford, in: The Creation of States in International Law, p. 63.

¹⁰⁸ Crawford, in: Brownlie's Principles of Public International Law, p. 192.

knowledge on the characteristics of the legal nature of a state that distinguish it from other legal subjects or persons and are its legal identity attributes. The question now arises what consequences, rights and obligations then correspond to the status of a state, especially against the background of the study of "Extraterritorial Impacts of the Supply Chain Due Diligence Act of Germany (Lieferkettensorgfaltspflichtengesetz – LkSG)", within which the phenomenon of extraterritoriality is to be explained as a basis. Therefore, only those will be discussed in more detail in the context of this dissertation that offer direct added value for this study – knowing full well that there are also other and further consequences, rights and obligations of states, for which the "Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations"¹⁰⁹ in particular is fundamental.¹¹⁰ In order to be able to recognize or evaluate the supposed phenomenon of extraterritoriality as such, it seems necessary to crystallize a "normal case" as standard alongside this supposed phenomenon.

As a foundation for this normal case, the previously elaborated characteristics of a state were analyzed. Because "[t]he legal competence of states and the rules for their protection depend on and assume the existence of this stable, physically identified (and normally legally delimited) base"¹¹¹. The territorial supremacy and personal supremacy of states are direct manifestations of their sovereignty, the prohibition of intervention serves to protect sovereignty by prohibiting other states from interfering in internal affairs, and immunity excludes in principle the subjection of a state, its organs, and those who act on its behalf to foreign sovereignty or jurisdiction.¹¹² In relation to their respective territories, states' competence is regularly explained with the expressions sovereignty and jurisdiction, whereby the standard set of rights of the state, typically the instance of legal competence, is generally known as sovereignty, whereas special rights as well as aggregations of rights that are relatively below the norm are described as jurisdiction.¹¹³ "In brief, 'sovereignty' is shorthand for legal personality of a certain kind, that of statehood; 'jurisdiction' refers to particular aspects,

¹⁰⁹ A/RES/2625(XXV).

¹¹⁰ Cf. van Arnould, in: *Völkerrecht [International Law]*, § 4 para. 306 and there with further references and see for details on rights and obligations of states, e.g., van Arnould, in: *Völkerrecht [International Law]*, § 4 para. 304 et seq.; Stein/von Buttlar/Kotzur, in: *Völkerrecht [International Law]*, Section 4 para. 505 et seq.

¹¹¹ Crawford, in: *Brownlie's Principles of Public International Law*, p. 192.

¹¹² Cf. Stein/von Buttlar/Kotzur, op. cit., § 30 para. 510.

¹¹³ Cf. Crawford, op. cit., p. 192.

especially rights (or claims), liberties, and powers."¹¹⁴ Sovereignty includes the right to bind itself under international law, whereby the state waives the exercise of certain sovereign rights, but not sovereignty as such.¹¹⁵

Through international law, processes relating to the sovereignty of states are cast in the form of law, expressed and regulated in terms of which (exclusively) they are understood to be sovereign, are equal to each other in this point and within the framework of which this status is determined by law in dealings with other states.¹¹⁶ These characteristics lead to the following conclusions in this context:¹¹⁷

- "[...] (1) a jurisdiction, *prima facie* exclusive, over a territory and the permanent population living there;
- (2) a duty of non-intervention in the area of exclusive jurisdiction of other states; and
- (3) the ultimate dependence on consent of obligations arising whether from customary law or from treaties."¹¹⁸

To the extent that state independence is subject to limitations, the principle of the sovereign equality of states moves to the center of international relations, which combines the sovereignty of the state with the requirement of the equality of states and thus forms one of the fundamental principles of the international legal order.¹¹⁹ The sovereign state exercises its sovereignty independently of the other states, but in doing so it must bear in mind that the other states rule in the same way over their sphere of jurisdiction, and in this respect the requirement of sovereign equality automatically leads to the limitation of the sovereignty of the individual state without calling it into question.¹²⁰

Simply summarized, this means that the "normal case" is that a sovereign state generally has exclusively, and without interference from another state, jurisdiction over issues that occur within the scope of its territory and the persons therein.

A considerable part of the provisions of the international law has the function of regulating the parallel presence of sovereign states and situations of dispute between them.¹²¹ It reflects the need of states to regulate their international relations in a binding

¹¹⁴ Crawford, in: Brownlie's Principles of Public International Law, p. 192.

¹¹⁵ Cf. van Arnould, in: Völkerrecht [International Law], § 4 para. 320.

¹¹⁶ Cf. Crawford, *op. cit.*, p. 431.

¹¹⁷ Cf. *ibid.*

¹¹⁸ *Ibid.*

¹¹⁹ Cf. Stein/von Buttlar/Kotzur, in: Völkerrecht [International Law], § 30 para. 522.

¹²⁰ Cf. *ibid.*

¹²¹ Cf. Crawford, *op. cit.*, p. 432.

manner.¹²² Sovereignty as a legal expression is employed diversely to characterize the legal competence of states generically, by designating a specific role to, or by justifying a specified practice of it.¹²³ Both jurisdiction and legislative competence above the domestic territory can be defined in terms of this expression or the concomitant rights which derive from the claim to a territory itself or from the specific rights in the execution of that claim to a territory.¹²⁴ Abstractly and globally, the term refers to authorities and benefits under customary law independently of the specific acceptance of any other state.¹²⁵ However, the contemporary understanding of sovereignty in international law is relative in the sense that it means that a state is not dependent on the will of other states (also) in its external relations, both legally and in fact, as already mentioned before, but that it must in any case respect international law, to which it is directly bound.¹²⁶ Crawford states that "[j]urisdiction is an aspect of sovereignty: it refers to a state's competence under international law to regulate the conduct of natural and juridical persons."¹²⁷

But it is not always clear which state has this competence in a given case. This is because, particularly in the economic environment, the impacts of specific acts can in the present time have a worldwide influence and thus, under certain circumstances, create bases that could give rise to the legal jurisdiction of several states and make them compete for this jurisdiction, which is the outcome of the traditional concepts of international law.¹²⁸ In the following, these traditional concepts concerning jurisdiction in international law are explained as a basis for further considerations.

With regard to the topic of this dissertation, the following intermediate conclusion can be drawn at this point: The Federal Republic of Germany is indisputably a state and thus has the competence to enact a law like the LkSG, which applies on its state territory and to its state people. However, the LkSG is also intended to regulate situations outside Germany. The question now arises as to whether this is at all possible, permissible and, in conjunction with this, whether it does not interfere with the sovereignty of other states. Answers to these questions will be given in the following chapter.

¹²² Cf. van Arnould, in: *Völkerrecht [International Law]*, § 1 para. 2.

¹²³ Cf. Crawford, in: *Brownlie's Principles of Public International Law*, p. 432.

¹²⁴ Cf. *ibid.*

¹²⁵ Cf. *ibid.*, p. 433.

¹²⁶ Cf. Schöbener/Knauff, in: *Allgemeine Staatslehre [General state doctrine]*, § 3 para. 62.

¹²⁷ Crawford, *op. cit.*, p. 440.

¹²⁸ Cf. Ryngaert, in: *Jurisdiction in International Law*, p. 27.

III. Extraterritoriality and the Rules of Jurisdiction in the Case of Several Potentially Eligible States

At first glance, there is surprisingly little change in the discourse on international law in this regard, and the conceptual framework and terminology that are mostly used today are on very familiar ground.¹²⁹ Every relevant text cites the traditional jurisdictional categories that see the territoriality principle as the starting point, with the well-known exceptions in the active and passive personality principle, the protection principle, and the (narrowly defined) universality principle.¹³⁰ The effects doctrine alone, based on competition law, between the territoriality and protection principles, emerged relatively recently after the second World War.¹³¹ In the meantime, *Ryngaert's* work "Jurisdiction in International Law" has gained a reputation as the standard reference work for this topic and in this context, which also reflects this continuity.¹³² For this reason, the following will refer primarily to *Ryngaert's* work "Jurisdiction in International Law"¹³³.

1. Basic Concepts of International Law

It follows from Chapter II that the legislative power of a sovereign state covers, in principle, persons, moveable and immovable property, as well as all facts that are located on its territory or take place there.¹³⁴ The enactment of sovereign acts by states with effect vis-à-vis foreign countries is impermissible, which does not exclude indirect effects, the limit being drawn by the prohibition of intervention.¹³⁵ According to general opinion and in accordance with the practice of states, the territorial scope of national law is limited to the territory in which a state exercises sovereign jurisdiction,

¹²⁹ Cf. Krisch, in: *Entgrenzte Jurisdiktion: Die extraterritoriale Durchsetzung von Unternehmensverantwortung* [Debordered Jurisdiction: The Extraterritorial Enforcement of Corporate Responsibility], p. 15.

¹³⁰ Cf. *ibid.*

¹³¹ Cf. *ibid.* with further references in regards of the effects doctrine.

¹³² Cf. *ibid.* with reference to Ryngaert, in: *Jurisdiction in International Law* and with further references where this continuity is also reflected; cf. Henn/Jahn, in: *Rechtsgutachten LieferkettenG* [Legal Opinion Supply Chain Act], p. 30, footnote 132, referring to Krisch, *op. cit.*, p. 15 and the references there.

¹³³ Ryngaert, *op. cit.*

¹³⁴ Cf. Stein/von Buttlar/Kotzur, in: *Völkerrecht* [International Law], § 35 para. 601.

¹³⁵ Cf. van Arnauld, in: *Völkerrecht* [International Law], § 4 para. 349.

but international law does not prohibit the establishment of national rules also for foreign matters and the extension of the material scope of application, which means that the scope of the state's own legislative power is not exclusive from the outset, but potentially competes with the legislative power of other states.¹³⁶ International law coordinates the national legal systems and allocates regulatory competences.¹³⁷ While the territorial scope of national legislation is identical with the sovereignty over one's own territory, it is a question of the possibility of a material scope of application that goes beyond this, in other words, the extraterritorial effect of a national legal norm.¹³⁸

One concept grants states the right to assume jurisdiction in their sole discretion, with the exception of a specific provision that forbids this and the other forbids states from assuming jurisdiction in their sole discretion, with the exception of a specific provision that entitles to do so.¹³⁹

In 1927, the first concept has been applied by the PCIJ, while the second concept is an expression of customary international law and thus represents the prevailing opinion of the doctrine and a major part of the states.¹⁴⁰ Since it has not been conclusively clarified what concept will prevail, it can be observed that those states that consider themselves jurisdictional competent will often refer to the first concept and those states that want to defend themselves against such claims of competence by other states will usually refer to the second concept, thus transferring the evidentiary responsibility to the respective other side in each case.¹⁴¹ Practically, a mixed form predominantly characterized by the second concept of limitation has gained prevalence, which obliges the state claiming its legal jurisdictional competence to substantiate its claim with a rule of authorization under international law.¹⁴² In the absence of such an authorization, the extension of the state's regulatory power may constitute an interference in the sovereign territory of another state in violation of international law.¹⁴³ Commonly, a state is presumed to be competent to assert jurisdiction provided that it is able to claim a legitimate interest grounded in personal or territorial links to the issue to be settled.¹⁴⁴

¹³⁶ Cf. Stein/von Buttler/Kotzur, in: *Völkerrecht [International Law]*, § 35 para. 602.

¹³⁷ Cf. van Arnould, in: *Völkerrecht [International Law]*, § 4 para. 353.

¹³⁸ Cf. Stein/von Buttler/Kotzur, *op. cit.*, § 35 para. 601.

¹³⁹ Cf. Ryngaert, in: *Jurisdiction in International Law*, p. 29.

¹⁴⁰ Cf. *ibid.*

¹⁴¹ Cf. *ibid.*

¹⁴² Cf. *ibid.*

¹⁴³ Cf. Stein/von Buttler/Kotzur, *op. cit.*, § 35 para. 608.

¹⁴⁴ Cf. Ryngaert, *op. cit.*, p. 30.

However, this solution is also faced with challenges and does not solve every question of legal jurisdiction between states. "The indeterminacy of 'connections' and 'interests' has made States' room for action actually very broad, and has led to an internationally sanctioned system of possibly harmful concurring jurisdiction."¹⁴⁵ In order to understand this, together with the solutions and challenges, the individual concepts and their expressions are presented hereafter.

The starting point for such considerations was "THE CASE OF THE S.S. 'LOTUS'" (hereafter only "Lotus Case"¹⁴⁶) decided by the PCIJ in 1927, which was already mentioned before.¹⁴⁷ In the Lotus Case, the PCIJ was engaged specifically on a jurisdictional issue, and in that case the PCIJ presented an exposition that remains a standard source for clarifying jurisdiction between states in the context of international law.¹⁴⁸

Although, as briefly indicated earlier, the first concept to clarify such issues arising from the Lotus Case does not correspond to the current prevailing opinion, the remarks are still not only much respected but also topical, as neither the PCIJ nor the ICJ has ever touched particularly on the question of extraterritorial jurisdiction in the meantime again.¹⁴⁹ Albeit it hardly had the potential to be deemed prestigious for jurisdictional conflicts, the Lotus Case nevertheless emerged as the most important benchmark for these situations in all fields of law, which is why it seems beneficial to examine the PCIJ's jurisprudence in more depth.¹⁵⁰

This particular incident relates to a crash at open ocean involving a ship from France and another one from Turkey, the latter subsequently sinking, with its personnel being killed.¹⁵¹ After the ship from France entered a harbor on Turkish territory to be fixed, its guard members were brought on trial there with the result of a sentence.¹⁵²

A first milestone was that "[...] the PCIJ made the important distinction between enforcement and prescriptive jurisdiction."¹⁵³ Thus, in the court's view, states may not

¹⁴⁵ Ryngaert, in: *Jurisdiction in International Law*, p. 30.

¹⁴⁶ In the same way also *ibid.*, e.g., p. 30.

¹⁴⁷ For the case see PCIJ, Series A.–No. 10, 3 et seq.

¹⁴⁸ Cf. Ryngaert, *op. cit.*, p. 30.

¹⁴⁹ Cf. *ibid.*

¹⁵⁰ Cf. *ibid.*, p. 31.

¹⁵¹ Cf. Crawford, in: *Brownlie's Principles of Public International Law*, p. 441.

¹⁵² Cf. *ibid.*

¹⁵³ Ryngaert, *op. cit.*, p. 31.

execute the content of its statutes on the territory of another state without permission.¹⁵⁴ Literally, the PCIJ stated in this regard that "[...] the first and foremost restriction imposed by international law upon a State is that—failing the existence of a permissive rule to the contrary—it may not exercise its power in any form in the territory of another State."¹⁵⁵ Furthermore, that "[i]n this sense jurisdiction is certainly territorial ; [sic!] it cannot be exercised by a State outside its territory except by virtue of a permissive rule derived from international custom or from a convention."¹⁵⁶

On the contrary, international law does not restrict the legal competence and jurisdiction of a state to impose its regulations on individuals and incidents beyond that state's territory in the lack of a specific prohibition to do so.¹⁵⁷ The PCIJ elaborated on that verbatim as follows:

"It does not, however, follow that international law prohibits a State from exercising jurisdiction in its own territory, in respect of any case which relates to acts which have taken place abroad, and in which it cannot rely on some permissive rule of international law."¹⁵⁸ "Such a view would only be tenable if international law contained a general prohibition to States to extend the application of their laws and the jurisdiction of their courts to persons, property and acts outside their territory, and if, as an exception to this general prohibition, it allowed States to do so in certain specific cases."¹⁵⁹ "But this is certainly not the case under international law as it stands at present."¹⁶⁰ "Far from laying down a general prohibition to the effect that States may not extend the application of their laws and the jurisdiction of their courts to persons, property and acts outside their territory, it leaves them in this respect a wide measure of discretion which is only limited in certain cases by prohibitive rules; as regards other cases, every State remains free to adopt the principles which it regards as best and most suitable."¹⁶¹

In summary, this means that a state may not utilize compulsory force to ensure its regulations are enforced beyond its borders, as the opposite would violate the untouchable rule of the equal sovereignty of states.¹⁶² However, the Lotus Case leads to the

¹⁵⁴ Cf. Ryngaert, in: *Jurisdiction in International Law*, p. 31.

¹⁵⁵ PCIJ, Series A.—No. 10, 3, 18.

¹⁵⁶ *Ibid.*, 18-19.

¹⁵⁷ Cf. Ryngaert, *op. cit.*, p. 31.

¹⁵⁸ PCIJ, *op. cit.*, 19.

¹⁵⁹ *Ibid.*

¹⁶⁰ *Ibid.*

¹⁶¹ *Ibid.*

¹⁶² Cf. Ryngaert, in: *op. cit.*, p. 31.

conclusion that, according to those prohibitions of extraterritorial enforcing competence, states may, without a prohibition otherwise, impose regulations on individuals, objects and activities beyond the borders of the state's area, insofar as it is enforcing these regulations only within its territory.¹⁶³ "Territorial sovereignty would relate to enforcement jurisdiction, but not to prescriptive jurisdiction."¹⁶⁴

At first sight, this distinction might seem illogical in consequence, since countries issuing regulations for behaviour beyond their borders usually seek to ensure that these regulations are complied with, if necessary, on pain by penalties.¹⁶⁵ But both approaches come to the same result in most cases.¹⁶⁶ Such countries could employ circumstantial territory-based methods for achieving the intended behaviour, because in case somebody beyond the borders of the state fails to meet with the extraterritorial regulation imposed, that person can face legal action within the imposing state's borders.¹⁶⁷ In the event of non-payment of the penalty, properties within the country may be frozen or also the access into the country or registration at a public authority could be prohibited, thereby the territorial executory competence can force someone into meeting the extraterritorial imposed regulations.¹⁶⁸ However, if one has no property on issuing country's land and has no relations to it, then this methods and the regulations designed in this way usually turns out to be useless as well.¹⁶⁹

"In claiming jurisdictional freedom for States, Lotus reaffirmed the voluntary nature of international law."¹⁷⁰ For in its elaboration on the essence with regard to this, the PCIJ pointed out the following:¹⁷¹

"The rules of law binding upon States therefore emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law and established in order to regulate the relations between these co-existing independent communities or with a view to the achievement of common aims."¹⁷² "Restrictions upon the independence of States cannot therefore be presumed."¹⁷³

¹⁶³ Cf. Ryngaert, in: *Jurisdiction in International Law*, p. 32.

¹⁶⁴ *Ibid.*

¹⁶⁵ Cf. *ibid.*, p. 32.

¹⁶⁶ Cf. van Arnould, in: *Völkerrecht [International Law]*, § 4 para. 351.

¹⁶⁷ Cf. Ryngaert, *op. cit.*, p. 32.

¹⁶⁸ Cf. *ibid.*

¹⁶⁹ Cf. *ibid.*

¹⁷⁰ *Ibid.*, p. 32.

¹⁷¹ Cf. *ibid.*, p. 32.

¹⁷² PCIJ, Series A.—No. 10, 3, 18.

¹⁷³ *Ibid.*

Thus, the judges took no notice, albeit minimal, of the sovereignty as well as the independence from a foreign country, which could be infringed due to the extraterritorial jurisdiction self-imposed by the issuing country.¹⁷⁴

This first concept from the Lotus Case is countered by a meanwhile evolving set of rules of jurisdiction from common inter-state praxis and judgments, the fundamental basis of which attacks its concept of unconstrained juridical competence with a virtually free hand and wide latitude of countries in these matters by generally disallowing the expansion of such a country's competence outside the territorial boundaries of it.¹⁷⁵ Thus, the second concept is based on this mutually shared practice between the states. "They arguably constitute customary international law."¹⁷⁶ Customary international law is predominantly universal, which means that its rules apply to all subjects of international law worldwide.¹⁷⁷ In this lies the so-called "territoriality principle"¹⁷⁸ at the center, which has to be applied in general.¹⁷⁹ "It is a reflection of the essential territoriality of sovereignty."¹⁸⁰ Hence, the decision out of the Lotus Case got heavily deprecated by the representatives of this second concept.¹⁸¹ "Nevertheless, States continue to rely on it, as it is the only judgment of an international court directly relating to the problem of jurisdiction."¹⁸²

Moreover, it can be observed in some claims of juridical competence made under the principles of the second concept that they are in fact based on the first concept of the general freedom of extraterritorial competence that emerges from the Lotus Case.¹⁸³ Declarations of juridical competence by countries on economic grounds frequently base solely titularly from the above mentioned territoriality principle, but in praxis those countries that do not accept this declaration have the obligation to prove that the domestic impact of a behaviour that limited commercial transactions is not enough to

¹⁷⁴ Cf. Ryngaert, in: Jurisdiction in International Law, p. 33.

¹⁷⁵ Cf. *ibid.*, p. 34.

¹⁷⁶ *Ibid.*

¹⁷⁷ Cf. van Arnould, in: Völkerrecht [International Law], § 3 para. 256.

¹⁷⁸ Ryngaert, *op. cit.*, p. 34 and more detailed about this term and concept on pp. 49-100; cf. Crawford, in: Brownlie's Principles of Public International Law, p. 442 where it is called "territorial principle".

¹⁷⁹ Cf. Ryngaert, *op. cit.*, p. 34.

¹⁸⁰ Crawford, *op. cit.*, p. 442.

¹⁸¹ Cf. Ryngaert, *op. cit.*, p. 34.

¹⁸² *Ibid.*

¹⁸³ Cf. *ibid.*

legitimize the juridical competence of the declaring country.¹⁸⁴ Consequently, the concept on which a state's declaration is based and used to argue that it should have juridical competence is not always obvious, which is also why the "defense argumentation" to be used by the disagreeing states is not necessarily a simple and quickly developed one. In this context, "[i]t is interesting to point out here that both the expansive view [...] (based on prohibitive rules) and the restrictive view of the permissive rules approach are both underpinned by the principle of sovereignty."¹⁸⁵ The reason for this is evident from the explanation and understanding of the first concept. To understand why this is also the case with the second concept, an explanation of how this works follows.

Each of the allowing policies of the latter concept has in common a presupposition of a connection within the issue to be decided and the claiming country.¹⁸⁶ Conversely, this means that insofar as a country has neither connection nor interest regarding the issue to be decided, it cannot practice juridical competence, also without another country disputing this alleged claim.¹⁸⁷ This also means that whether a law of a state may apply to foreign situations is determined by whether there is a connecting factor recognized under international law.¹⁸⁸ "However, even if a link or interest could be discerned, and a State could rely on an accepted permissive principle, the legality of the exercise of jurisdiction under international law might depend on the harm that such exercise causes to other sovereigns."¹⁸⁹

But the challenge here at this point is that this is subjective, because one state might perceive itself to be violated by a different state's claim of juridical competence, whereas a third state could consider itself to be unviolated through this.¹⁹⁰ "In practice, the harm caused by an assertion of extraterritorial jurisdiction is a measure of the foreign protest leveled at the assertion."¹⁹¹ This could lead the country claiming juridical competence considering the detrimental impact for others as well as perhaps

¹⁸⁴ Cf. Ryngaert, in: *Jurisdiction in International Law*, pp. 34-35.

¹⁸⁵ Cf. *ibid.*, p. 37.

¹⁸⁶ Cf. *ibid.*, p. 38.

¹⁸⁷ Cf. *ibid.*, p. 39.

¹⁸⁸ Cf. van Arnould, in: *Völkerrecht [International Law]*, § 3 para. 352.

¹⁸⁹ Ryngaert, *op. cit.*, p. 39 with further references.

¹⁹⁰ Cf. *ibid.*, p. 41.

¹⁹¹ *Ibid.*, p. 41.

refraining from claiming juridical competence presently or moreover regarding coming scenarios.¹⁹² Normally, such complaints arise at such an early stage, when a country enacts its extraterritorial juridical competence into law, and not when it is carried out in individual cases.¹⁹³ Nevertheless, complaints sometimes fail to be successful because the country claiming juridical competence would only refrain from exercising it if the complaining country can build up resistance to the extent that it can inflict at least equivalent damage upon the "offensive" country.¹⁹⁴ The result of the previously mentioned fact is that "[d]eference will obviously depend on the foreign State's political and economic power."¹⁹⁵ With a change of perspective, the reverse conclusion can be drawn from what has been said so far, that "[t]he efficiency of assertions of extraterritorial jurisdiction is a function of relative power."¹⁹⁶ Currently, there is a trend that powerful states in particular use peripheral links to their territory in order to enforce their own ideas of order extraterritorially.¹⁹⁷ Strong countries are capable of inflicting its laws over those countries with a smaller standing, whereas the latter hardly ever are capable of inflicting its laws over stronger countries with more standing.¹⁹⁸ "While this may be construed as a general norm of international realist thought, the question arises whether it is [...] a rule of customary international law."¹⁹⁹

Countries asserting their juridical competence do not yield to the complaints of other countries as a result of being forced to do so through an extrinsic juridical rule.²⁰⁰ This problem is intensified by the fact that there is no compulsory jurisdiction in international law, which means that no state is forced to face an international court without its will.²⁰¹ Rather, such countries yield to protests specifically in fear of immediate diplomatic or financial damage due to vengeance, and therefore lack a practical option.²⁰² Moreover, "[i]f deference to foreign governmental protests were considered to be a norm of international law, one may conflate an external legal norm with an internal realist norm."²⁰³ Limitation to practicing juridical competence extraterritorially is

¹⁹² Cf. Ryngaert, in: *Jurisdiction in International Law*, p. 41.

¹⁹³ Cf. *ibid.*

¹⁹⁴ Cf. *ibid.*

¹⁹⁵ *ibid.*

¹⁹⁶ *ibid.*

¹⁹⁷ Cf. van Arnould, in: *Völkerrecht [International Law]*, § 3 para. 354 with further references.

¹⁹⁸ Cf. Ryngaert, *op. cit.*, p. 41.

¹⁹⁹ *Ibid.*, pp. 41-42.

²⁰⁰ Cf. *ibid.*, p. 42.

²⁰¹ Cf. van Arnould, in: *op. cit.*, § 6 para. 443 with reference to para. 325.

²⁰² Cf. Ryngaert, *op. cit.*, p. 42.

²⁰³ *Ibid.*

thus not inevitably regulated through legislation, instead it arises quite naturally from the complex functioning within equilibrium of forces and authorities.²⁰⁴ Of course, as a result, creating one statutory scope for the limitation of juridical competence becomes more difficult.²⁰⁵

All in all, this renders the existence or non-existence of complaints from abroad inappropriate to be that decisive indicator for determining the legitimacy of juridical competence claims, since the intensity of this evidence is related to and dependent on the respective authority conditions of the contending states.²⁰⁶ In order to avoid undesirable jurisdictional conflicts with their political and economic risks, duties of consideration for extraterritorial regulations have been developed in case law and literature.²⁰⁷ "Attempts have therefore been made at rendering the factors to be used in restraining jurisdiction more objective, with foreign protest being just one factor to be taken into account."²⁰⁸ Indeed, these kinds of trials might struggle to gain acceptance within this actual sphere of intrastate affairs, in which different background menaces as well as pledges made by countries tend to govern an individual country's intended extent for its legislation.²⁰⁹

Thus, the design and applicability of these connecting factors is inconsistent and, in the absence of clear delimitation criteria, several principles have emerged, some of which are universally accepted, but some of which are problematic, either because they are not universally accepted or inconsistently applied, or because they overlap with another delimitation principle and thereby may lead to competing jurisdictional claims by different states.²¹⁰ In fact, despite countries and its judiciary shall apply their juridical competence appropriate, considering various such impartial, albeit formable, indicators, there is a risk of force-grounded juridical competence camouflaging itself as appropriate juridical competence.²¹¹

Nevertheless, these criteria have crystallized and therefore, in the following, these further criteria will be illustrated which should help in assessing the legality of juridical

²⁰⁴ Cf. Ryngaert, in: *Jurisdiction in International Law*, p. 42.

²⁰⁵ Cf. *ibid.*

²⁰⁶ Cf. *ibid.*

²⁰⁷ Cf. Herdegen, in: *Völkerrecht [International Law]*, § 26 para. 19.

²⁰⁸ Ryngaert, *op. cit.*, p. 42.

²⁰⁹ Cf. *ibid.*

²¹⁰ Cf. Stein/von Buttlar/Kotzur, in: *Völkerrecht [International Law]*, § 35 para. 609.

²¹¹ Cf. Ryngaert, *op. cit.*, p. 42.

claims of competence and their appropriateness – such as the LkSG. The following chapter will thus help to find an answer to the research question if the LkSG is designed in a legal manner from the viewpoint of international law.

2. International Law Principles for Accepted Extraterritoriality

In order to be able to answer the question of the admissibility of extraterritorial jurisdiction, it is necessary to differentiate between the above-mentioned types of exercise of sovereignty, since international law provides different limits with regard to their admissibility.²¹² In the following, a distinction is made between "jurisdiction to prescribe"²¹³ regulations and "jurisdiction to enforce"²¹⁴ regulations as forms of sovereign action within the framework of extraterritorial jurisdiction,²¹⁵ whereby the "jurisdiction to adjudicate"²¹⁶, the sovereign power for the legal review of regulations, is excluded here, since this, linked to the aforementioned authorities, can only take place lawfully if the state is at least entitled to the authority to stipulate regulations.²¹⁷

The enforcement sovereignty of a state usually comprises physical acts of sovereignty, such as the actual enforcement of laws.²¹⁸ Exclusive territoriality guarantees that only the state that has territorial sovereignty over the territory concerned is entitled to exercise sovereignty in that territory.²¹⁹ If, therefore, a State performs an act of enforcement in a territory subject to the territorial sovereignty of another State, it violates the territorial sovereignty of the latter, since exclusive territoriality excludes the power to perform acts of sovereignty by a foreign sovereign on its own territory.²²⁰ Accordingly,

²¹² Cf. Schalber, in: *Der UK Bribery Act und seine Bedeutung im Rahmen von Criminal Compliance* [The UK Bribery Act and its Significance in the Context of Criminal Compliance], p. 126 with further references.

²¹³ Stein/von Buttlar/Kotzur, in: *Völkerrecht* [International Law], § 33 para. 536 and see, e.g., there for a distinction of these concepts.

²¹⁴ Ibid. and see, e.g., there for a distinction of these concepts.

²¹⁵ Cf. Schalber, op. cit., p. 126

²¹⁶ Stein/von Buttlar/Kotzur, op. cit., § 33 para. 536 and see, e.g., there for a distinction of these concepts.

²¹⁷ Cf. Schalber, in: op. cit., p. 126, footnote 21.

²¹⁸ Cf. ibid., p. 126 with reference to Volz, in: *Extraterritoriale Terrorismusbekämpfung* [Extraterritorial Combating of Terrorism], p. 43 and there with further references.

²¹⁹ Cf. Schalber, op. cit., p. 126 with further references.

²²⁰ Cf. ibid., pp. 126-127 with further references.

the performance of an act of enforcement ("jurisdiction to enforce"²²¹) on foreign territory constitutes a violation of the territorial integrity of the foreign state and is illegal under international law without the consent of the state concerned.²²²

The enactment of legal acts with foreign effect or foreign connection is to be distinguished from the performance of acts of sovereignty on foreign territory.²²³ Just as in the case of physical acts of sovereignty, the territorial scope of laws is also limited to the territory of the state that issued the legal norm.²²⁴ However, the material scope of application of a norm can go beyond the territorial scope.²²⁵ In this case, the legal norm may stipulate conduct outside the territory or be linked to facts outside the territory, or both.²²⁶ And if a law may apply to foreign facts is determined by the existence of a connecting factor recognized under international law.²²⁷

"The law of jurisdiction may be guided by a number of international law principles."²²⁸ As already discovered, the foundational rules of juridical competence require that the claiming country has an authentic conjunction to the matter it intends to regulate.²²⁹ Thus, only under certain conditions may a state subject to its law individual conduct that takes place entirely outside its national territory.²³⁰ However, when every rival juridical competence statement can rely to an authentic conjunction, there follows a problem as to the necessity of the most authentic conjunction.²³¹ "A dominant line of argument in the doctrine has it that States should balance their contacts with a relevant situation and their interests in regulating it with other States' contacts and interests."²³² Nevertheless, the aforementioned observation remains that, in case of doubt and discussion, the state with the greater powers will probably prevail, irrespective of the objective weight of its arguments and points of connection, when the interests are

²²¹ Stein/von Buttlar/Kotzur, in: *Völkerrecht [International Law]*, § 33 para. 536 and see, e.g., there for a distinction of these concepts.

²²² Cf. Schalber, in: *Der UK Bribery Act und seine Bedeutung im Rahmen von Criminal Compliance [The UK Bribery Act and its Significance in the Context of Criminal Compliance]*, p. 127 with further references.

²²³ Cf. *ibid.* with further references.

²²⁴ Cf. *ibid.* with further references.

²²⁵ Cf. *ibid.* with further references.

²²⁶ Cf. *ibid.* with further references.

²²⁷ Cf. van Arnauld, in: *Völkerrecht [International Law]*, § 4 para. 352.

²²⁸ Ryngaert, in: *Jurisdiction in International Law*, p. 43.

²²⁹ Cf. *ibid.*

²³⁰ Cf. Herdegen, in: *Völkerrecht [International Law]*, § 26 para. 1.

²³¹ Cf. Ryngaert, *op. cit.*, p. 43.

²³² *Ibid.*

weighed up.²³³ This drawn in front of the bracket, "the basic international law principles of jurisdiction"²³⁴ are now presented.

One of it is the following:²³⁵ "The territoriality principle is the most basic principle of jurisdiction in international law."²³⁶ According to this, the juridical competence of a state applies to incidents occurring inside its sovereign borders.²³⁷ In its basic form, it is unproblematic because it is in accordance with the exclusive, territorial character of state sovereignty, and in this context the state's connection of the legal norm is established by the location of a thing or the residence of a person within the country.²³⁸

In order to gain an understanding of the development, it is first of all examined where the origins of this highlighted principle lie and how and by whom it emerged.

a. Historical Classification and Origins

"Historically, however, personality rather than territoriality was the basic principle of jurisdictional order."²³⁹ This raises the question of what was the reason for this that time. "In the ancient world, composed of communities rather than territories, allegiances based on religion, race, or nationality prevailed over those based on territoriality."²⁴⁰ The independence from certain areas, in contrast to the independence from certain groups or tribes, and the corresponding norms of juridical competence, showed largely non-existent back then.²⁴¹ Sovereignty was not understood as the authority over a certain area, but as the authority over a certain group.²⁴² This in turn opens up the question of what the consequences of this way of thinking in those days had been. It was not possible for non-tribal people to be treated under the same legislation as tribal people, so they were treated either under their own law or under a specific legislation.²⁴³ Simultaneously, "[i]t is in these relations and under these conditions that we

²³³ Cf. van Arnould, in: *Völkerrecht [International Law]*, § 3 para. 354 with further references; Ryngaert, in: *Jurisdiction in International Law*, p. 41.

²³⁴ Ryngaert, op. cit., p. 42.

²³⁵ Cf. *ibid.*, p. 43.

²³⁶ *Ibid.*, p. 49.

²³⁷ Cf. *ibid.*

²³⁸ Cf. Stein/von Buttlar/Kotzur, in: *Völkerrecht [International Law]*, § 35 para. 611.

²³⁹ Ryngaert, op. cit., p. 49.

²⁴⁰ *Ibid.*, p. 51 with reference to Kassan, in: *AJIL*, Vol. 29 (1935), 237, 240.

²⁴¹ Cf. Ryngaert, op. cit., p. 51.

²⁴² Cf. Kassan, op. cit., 240.

²⁴³ Cf. *ibid.*

find the earliest traces of extraterritoriality."²⁴⁴ That leaves the question of the turning point and when and why it emerged. In this regard *Ryngaert* explored the following:

"[...] [F]rom the seventeenth century on, a century that witnessed the rise of the modern and fully sovereign nation-state in the aftermath of the Westphalian Peace (1648), [...] the pre-eminence of the principle of territoriality in public international law became gradually entrenched in Europe."²⁴⁵

Once again, therefore, the question arises as to what the consequences of this more recent way of thinking were and what characterized this turning point. "The importance of origin, nationality, or religion declined, and the theory that a person who moved to another territory did not carry his personal laws with him, but became subject to the laws of that territory, gained ascendancy."²⁴⁶

It remains to be clarified whether this constituted a complete turning point in this way of thinking. Because, "[a]s could be gleaned from German and French practice, the rise of territoriality in modern Europe did not prevent European States from continuing to exercise personality-based jurisdiction."²⁴⁷ Thus, it can be stated that characteristics of the earlier way of thinking still seem to have been recognizable later. Following on from this is the question of how this was then carried out in practice. "They not only did so by hauling their own nationals before their territorial courts, but also by setting up *extraterritorial* [emphasis in original] courts in foreign nations, notably in non-European States."²⁴⁸ But why was this done and how was it technically realized? *Ryngaert* summarizes the answer as follows: "European States often concluded treaties with non-Christian States to subject their own nationals exclusively to special consular jurisdiction, because they feared the barbarous character of territorial jurisdiction by non-Christian, often Muslim, States."²⁴⁹ Nevertheless, one wonders why the latter mentioned group of countries accepted to do so – or the other way around, how the former mentioned group of countries persuaded the latter mentioned group of countries to follow suit. "[...] Western States employed unequal treaties to cajole non-Christian States into granting jurisdictional favors to the former States' nationals."²⁵⁰ At the end

²⁴⁴ Kassan, in: AJIL, Vol. 29 (1935), 237, 240.

²⁴⁵ Ryngaert, in: Jurisdiction in International Law, p. 54.

²⁴⁶ Ibid., p. 51 with reference to Kassan, op. cit., 237-238 and there with further references.

²⁴⁷ Ryngaert, op. cit., p. 61.

²⁴⁸ Ibid.

²⁴⁹ Ibid.

²⁵⁰ Ibid.

the question remains, however, whether this practice does not represent a shift away from the path of thinking taken after the turning point described above or even a relapse into the old pattern of thinking. In this regard, *Ryngaert* states the following:

"Bearing in mind that the principles of international law only applied between Christian States and did not govern their relations with other States at the time, the perceived exception to the territoriality principle that consular jurisdiction embodied should be put in perspective."²⁵¹

It can thus be stated that the younger way of thinking seems to have prevailed on balance and that there seems to have been no relapse into the old pattern of thinking. "Territoriality is an important principle of jurisdictional order in continental Europe."²⁵² According to the traditional view of juridical competence there, a country's enforcement capacity under supranational rules was limited to its borders, so that statutes affected not more than its own statutes and country's area.²⁵³ "Yet a number of criminal and political goals carved out numerous exceptions to the territoriality principle."²⁵⁴ The question arises as to the reasons why the traditional view was partly deviated from. As *Ryngaert* states, "[f]or one thing, substantive justice and the desire to prevent impunity, a desire which reaches centuries back but was later fed by idealist German and Dutch thought, are goals of European criminal law which sit uneasily with procedural constraints."²⁵⁵ Furthermore, those countries adulated themselves by claiming that their own legislation was better than all others to be had.²⁵⁶ *Ryngaert* summarizes, "[i]n continental Europe, bringing the truth to light, bringing perpetrators to account, and defending national interests were considered to be more important than upholding the due process rights of the defendant."²⁵⁷

Now, however, the question still arises as to whether this was and is the thought of everywhere and globally, or whether there were and are also other views in this con-

²⁵¹ *Ryngaert*, in: *Jurisdiction in International Law*, p. 61.

²⁵² *Ibid.*

²⁵³ Cf. *ibid.*

²⁵⁴ *Ibid.*

²⁵⁵ *Ibid.*

²⁵⁶ Cf. *ibid.*

²⁵⁷ *Ibid.*, p. 62.

text. "[...] [F]or instance [...] today's common law lawyers have difficulties in understanding the [...] continental-European countries."²⁵⁸ These put a lot of faith in the traditional view and the following describes the reasons for that shortly.²⁵⁹

"In England, territoriality occupies a very central position in the law of jurisdiction."²⁶⁰ The rationale here lies in history and not where it lies in the European mainland, as shown earlier.²⁶¹ *Ryngaert* explains it as follows:

"Modern English adherence to the territorial principle, enunciated by a number of late nineteenth century court decisions,^[262] harks back to medieval times, when criminal juries were summoned from the *locus delicti* [emphasis in original] (the jurymen originally being the eye and ear witnesses, with no formal witnesses being allowed at trial) and evidence was easiest to gather at the place where the crime occurred ('all crime is local')."²⁶³

In contrast to European mainland countries, it was thus very difficult to establish extraterritorial offences, as those were in danger that they would not be brought to court.²⁶⁴ "Only in the courts of the Admiral (which dealt with maritime law) did extraterritorial jurisdiction gain a foothold, notably in cases of piracy (the archetypical offense giving rise to universal jurisdiction), because these courts' procedure was civil law-based."²⁶⁵ At the bottom-line, this seems as allowance for a contrast to the previously mentioned approach. "As they could rely on testimony, they were not restrained by common law evidentiary rules."²⁶⁶

The aforementioned provides an explanation for the differences in handling in this context, which at the same time raises the question of further explanatory approaches. "While the strict jurisdictional view may [...] be explained by the doctrine of venue, which requires an offense to be tried by jury in the county where the offense occurred, it may also be explained by reference to the concept of crime in common law."²⁶⁷ But in the required brevity, what is the difference between these two approaches in this context? "Whilst civil law may emphasize a crime as an offense against the victim or

²⁵⁸ Ryngaert, in: *Jurisdiction in International Law*, p. 62.

²⁵⁹ Cf. *ibid.*

²⁶⁰ *Ibid.*

²⁶¹ Cf. *ibid.*

²⁶² *Ibid.* with further references (the original footnote in Ryngaert, *op. cit.*, p. 62 is 72)

²⁶³ *Ibid.* with further references.

²⁶⁴ *Ibid.*, pp. 62-63 with further references.

²⁶⁵ *Ibid.*, p. 63.

²⁶⁶ *Ibid.*

²⁶⁷ *Ibid.*

against a natural order of justice [...], common law considers a crime to be an offense against the society in which it occurs or an affront to 'the King's (or Queen's) peace.'²⁶⁸²⁶⁹ Therefore, when a crime has no affect to country's system, the crime has no admission to be decided from the courts of England.²⁷⁰

Nevertheless, "[t]he primacy of the territorial principle in England does not imply that Parliament cannot extend the territorial ambit of the law."²⁷¹ This brings up two questions, one of which is under what circumstances extension is possible. "[...] [T]he territoriality of the law being a concept of common law [...] may be overridden by statute in specific instances."²⁷² Subsequently, the second question is what is the margin of discretion in this context. "However, in the absence of an unambiguous and clearly stated intent of Parliament to extend the ambit of the law, statutes are presumed not to apply extraterritorially,^[273] a presumption which is also employed by US courts."²⁷⁴ From these and in their past history, attention has also been repeatedly drawn to the original and traditional – also prevailing in England – concept.²⁷⁵ Meanwhile, the application of this prevailing concept there has moved away out of the roots and taken on an unique US character.²⁷⁶ As pointed out before, there is indeed "[...] the presumption against extraterritoriality, pursuant to which US courts may only apply a statute extraterritorially if such was the unambiguous intent of the US Congress."²⁷⁷ Especially when thinking about the FCPA provisions, e.g., it is clear that this exemption provision is actually being used. "[...] [E]xceptions to this presumption have recently been carved out, notably in the field of economic regulation and criminal law, and [...] international law may now often be the decisive factor and outer limit of jurisdictional reasonableness in the US."²⁷⁸

In the following some constellations will be shown and furthermore the from most countries generally accepted guard rails for an extraterritorial extension of national law will be presented.

²⁶⁸ Ryngaert, in: *Jurisdiction in International Law*, p. 63 with further references.

²⁶⁹ *Ibid.* with further references.

²⁷⁰ *Cf. ibid.*, p. 63.

²⁷¹ *Ibid.*, p. 64.

²⁷² *Ibid.*

²⁷³ *Ibid.*, with further references (the original footnote in Ryngaert, *op. cit.*, p. 64 is 87).

²⁷⁴ *Ibid.* with further references.

²⁷⁵ *Cf. ibid.*, p. 65.

²⁷⁶ *Cf. ibid.*

²⁷⁷ *Ibid.*

²⁷⁸ *Ibid.*

b. Territoriality Principle in Transnational Cases

The regulatory substance of territorial jurisdiction is less explicit than it initially seems, because incidents can take place in more than a single country.²⁷⁹ For such situations, certain criteria have emerged in practice, depending on the respective circumstances, as to the conditions with which jurisdiction can be established under this rule. Furthermore, within the framework recognized by international law, states may enact laws that relate to foreign situations in which the principle of territoriality based on the principle of territorial sovereignty can be used as a suitable connecting factor recognized by international law and with which the validity of state law for foreigners is justified.²⁸⁰

As an example, "[i]n international criminal law, it is commonly accepted that it is necessary and sufficient that one constituent element of the act or situation has been consummated in the territory of the State that claims jurisdiction."²⁸¹ It is sufficient for international law that the crime or impact of it occurred within the borders of a country in order for it to carry out territorial jurisdiction lawfully, regardless if the crime or impact is classified as such an element under national law.²⁸² The extent to which those criminal law approaches will entirely hold true for ambiguous, not criminal, acts, like overseas discriminatory commercial activities that have in-country implications, awaits further development.²⁸³ This so-called effect principle, as part of the territoriality principle, is based on impacts on the own territory of the state that considers itself juridically competent.²⁸⁴ In the area of non-competitive agreements, e.g., some countries still refuse to apply the above mentioned impact test.²⁸⁵ The European Commission, for instance, deemed such impact within its Union satisfactory to subject the restrictive agreement abroad that caused the impact to European juridical competence, whereas the ECJ gave no definitive consent to the establishment of juridical competence in antitrust situations on the grounds of the impact test.²⁸⁶ "On the basis of this doctrine, jurisdiction obtains on the basis of the territorial implementation of a

²⁷⁹ Cf. Ryngaert, in: *Jurisdiction in International Law*, p. 77.

²⁸⁰ Cf. van Arnould, in: *Völkerrecht [International Law]*, § 4 paras. 351-352.

²⁸¹ Ryngaert, *op. cit.*, p. 78.

²⁸² Cf. *ibid.*

²⁸³ Cf. *ibid.*, p. 82.

²⁸⁴ Cf. van Arnould, *op. cit.*, § 4 para. 352.

²⁸⁵ Cf. Ryngaert, *op. cit.*, p. 83.

²⁸⁶ Cf. *ibid.*

conspiracy, rather than its territorial effects."²⁸⁷ All in all, it can be summarized today that for the effect principle to be a suitable connecting factor accepted under international law, an increased domestic connection in the form of a "*direct, foreseeable and substantial effect* [emphasis in original]"²⁸⁸ is necessary in order to avoid useless jurisdictional conflicts in an interdependent world.²⁸⁹

Furthermore, in the following, some practical examples will be briefly shown how (far) legislation based on the territoriality principle can function. American counter bribery provisions especially have quite an extensive reach, that, in contrast to many alternative laws, directly derives from the respective act, specifically in §§ 78dd-1(g), 78dd-2(i) of the FCPA.²⁹⁰ But first of all for the sake of order, to highlight in the course of this how far this law reaches, §§ 78dd-1(a), 78dd-2(a) FCPA determine as a basis what is prohibited. In this context, § 78dd-1(a) FCPA mentions:

"It shall be unlawful for any issuer [...] or for any officer, director, employee, or agent of such issuer or any stockholder thereof acting on behalf of such issuer, to make use of the mails or any means or instrumentality of interstate commerce corruptly in furtherance of an offer, payment, promise to pay, or authorization of the payment of any money, or offer, gift, promise to give, or authorization of the giving of anything of value [...]."

The aforementioned is according to § 78dd-1(a) FCPA prohibited if it is intended in the direction of one of the in the catalogue of § 78dd-1(a) (1)-(3) FCPA mentioned persons/parties and "[...] in order to assist such issuer in obtaining or retaining business for or with, or directing business to, any person."

Both paras. regulate in a basically comparable way, but § 78dd-2(a) FCPA goes further in the sense of the outreach of this law and states in this regard:

"It shall be unlawful for any domestic concern, other than an issuer which is subject to section 78dd-1 of this title, or for any officer, director, employee, or agent of such domestic concern or any stockholder thereof acting on behalf of such domestic concern, to make use of the mails or any means or instrumentality of interstate commerce corruptly in furtherance of an offer, payment, promise to pay, or authorization of the

²⁸⁷ Ryngaert, in: Jurisdiction in International Law, p. 83.

²⁸⁸ van Arnould, in: Völkerrecht [International Law], § 4 para. 352; also Herdegen, in: Völkerrecht [International Law], § 26 para. 8.

²⁸⁹ Cf. van Arnould, op. cit., § 4 para. 352.

²⁹⁰ Cf. Ryngaert, op. cit., p. 86 with reference to §§ 78dd-1(g), 78dd-2(i) FCPA.

payment of any money, or offer, gift, promise to give, or authorization of the giving of anything of value [...]."

The aforementioned is according to § 78dd-2(a) FCPA prohibited if it is intended in the direction of one of the in the catalogue of § 78dd-2(a) (1)-(3) FCPA mentioned persons/parties and "[...] in order to assist such domestic concern in obtaining or retaining business for or with, or directing business to, any person."

What is understood in this context as such a domestic concern, that is defined by § 78dd-2(h)(1) FCPA:

"The term 'domestic concern' means—

(A) any individual who is a citizen, national, or resident of the United States; and

(B) any corporation, partnership, association, joint-stock company, business trust, unincorporated organization, or sole proprietorship which has its principal place of business in the United States, or which is organized under the laws of a State of the United States or a territory, possession, or commonwealth of the United States."

But that is not all. The FCPA reaches further. Because, according to §§ 78dd-1(g), 78dd-2(i) FCPA, "[t]he FCPA subjects all 'United States person[s]' to the FCPA, even if their acts of bribing (foreign) officials have no nexus with the territory of the US."²⁹¹ That in mind, § 78dd-1(g)(1) FCPA, and the same opening approach is taken for its corresponding regulation in § 78dd-2(i)(1) FCPA, states:

"It shall also be unlawful for any issuer organized under the laws of the United States [...] or for any United States person that is an officer, director, employee, or agent of such issuer or a stockholder thereof acting on behalf of such issuer, to corruptly do any act outside the United States in furtherance of an offer, payment, promise to pay, or authorization of the payment of any money, or offer, gift, promise to give, or authorization of the giving of anything of value to any of the persons or entities set forth in paragraphs (1), (2), and (3) of subsection (a) of this section for the purposes set forth therein, irrespective of whether such issuer or such officer, director, employee, agent, or stockholder makes use of the mails or any means or instrumentality of interstate commerce in furtherance of such offer, gift, payment, promise, or authorization."

²⁹¹ Ryngaert, in: Jurisdiction in International Law, p. 86 with reference to the mentioned §§ 78dd-1(g), 78dd-2(i) FCPA.

This alone shows a wide sphere of application of the FCPA's regulations. "The reach of the territoriality rather than the nationality principle under the FCPA is most striking, however."²⁹² Because the prohibition of the above mentioned § 78dd-1(a) FCPA includes literally all "[...] issuer which has a class of securities registered pursuant to section 78l of this title or which is required to file reports under section 78o(d) of this title [...]", the outreach of this regulations has been extended further.²⁹³ With a look on these, this reference means, at the bottom line, that "[t]he FCPA applies to all 'issuers,' which are companies that register securities and file reports with the US Securities and Exchange Commission (SEC)."²⁹⁴ This kind of bourse-based juridical competence approach relies solely in the presence of shares-listing on a public bourse within the borders of a given country what might can receive encouragement through some wide interpretation of the territoriality principle.²⁹⁵

Beyond what has been established, the already vast applicability of this law is further extended. Because, "[i]n addition, the FCPA applies to 'any person' acting within US territory, notably if it causes, directly or through agents, an act in furtherance of the corrupt payment to take place within the territory of the US."²⁹⁶ This follows not only from the already mentioned §§ 78dd-1(a), 78dd-2(a) FCPA, but especially also from § 78dd-3(a) FCPA.²⁹⁷

"It shall be unlawful for any person other than an issuer that is subject to section 78dd-1 of this title or a domestic concern (as defined in section 78dd-2 of this title), or for any officer, director, employee, or agent of such person or any stockholder thereof acting on behalf of such person, while in the territory of the United States, corruptly to make use of the mails or any means or instrumentality of interstate commerce or to do any other act in furtherance of an offer, payment, promise to pay, or authorization of the payment of any money, or offer, gift, promise to give, or authorization of the giving of anything of value [...]."

The aforementioned is according to § 78dd-3(a) FCPA prohibited if it is intended in the direction of one of the in the catalogue of § 78dd-3(a) (1)-(3) FCPA mentioned

²⁹² Ryngaert, in: Jurisdiction in International Law, p. 87.

²⁹³ Cf. *ibid.*, pp. 86-87 with reference to the mentioned § 78dd-1(a) FCPA and to §§ 78l and 78o(d) FCPA.

²⁹⁴ *Ibid.*, p. 87 with reference to § 78dd-1(a) FCPA combined to §§ 78l and 78o(d) FCPA.

²⁹⁵ Cf. *ibid.*, p. 87.

²⁹⁶ *Ibid.* with reference to §§ 78dd-1, 78dd-2, 78dd-3 FCPA.

²⁹⁷ Cf. *ibid.*, pp. 86-87 with reference to §§ 78dd-1, 78dd-2, 78dd-3 FCPA.

persons/parties and "[...] in order to assist such person in obtaining or retaining business for or with, or directing business to, any person."

What is understood in this context as a person, that is defined by § 78dd-3(f)(1) FCPA:

"The term 'person', when referring to an offender, means any natural person other than a national of the United States [...] or any corporation, partnership, association, joint-stock company, business trust, unincorporated organization, or sole proprietorship organized under the law of a foreign nation or a political subdivision thereof."

All in all, it can be summarized that the provisions of the FCPA have a very far-reaching applicability, which also extends outside the territory of the USA and therefore has an extraterritorial effect. As a result, "[t]his provision has allowed [...] to bring corruption proceedings against foreign persons whose bribery acts [...] had only a tenuous connection with the US, for example routing payment through US bank accounts or sending an email to a US company."²⁹⁸

Although in terms of reach, respective American provisions might go beyond those of other states and paved the road for the use of extraterritorial jurisdiction in relation to bribery with the FCPA, it nevertheless in no way implies that those are unable to practice like and with this in such issues, to the extent that some pursued this role model.²⁹⁹ One example for this is the UKBA,³⁰⁰ "[...] which provides for rather broad extraterritorial jurisdiction."³⁰¹ This follows in this regards especially from Section 12 (2)-(5) UKBA:

"(2) Subsection (3) applies if—

- (a) no act or omission which forms part of an offence under section 1, 2 or 6 takes place in the United Kingdom,
- (b) a person's acts or omissions done or made outside the United Kingdom would form part of such an offence if done or made in the United Kingdom, and
- (c) that person has a close connection with the United Kingdom.

(3) In such a case—

²⁹⁸ Ryngaert, in: Jurisdiction in International Law, p. 87 with further references.

²⁹⁹ Cf. *ibid.*, pp. 87-88.

³⁰⁰ Cf. *ibid.*, p. 88 with reference to the Bribery Act 2010 Chapter 23 from the United Kingdom.

³⁰¹ *Ibid.*, p. 88.

(a) the acts or omissions form part of the offence referred to in subsection (2)(a),
and

(b) proceedings for the offence may be taken at any place in the United Kingdom.

(4) For the purposes of subsection (2)(c) a person has a close connection with the United Kingdom if, and only if, the person was one of the following at the time the acts or omissions concerned were done or made—

(a) a British citizen,

(b) a British overseas territories citizen,

(c) a British National (Overseas),

(d) a British Overseas citizen,

(e) a person who under the British Nationality Act 1981 was a British subject,

(f) a British protected person within the meaning of that Act,

(g) an individual ordinarily resident in the United Kingdom,

(h) a body incorporated under the law of any part of the United Kingdom,

(i) a Scottish partnership.

(5) An offence is committed under section 7 irrespective of whether the acts or omissions which form part of the offence take place in the United Kingdom or elsewhere."

Also in this regulation, a departure from the general rule – the territoriality principle, according to which the juridical competence of a state applies to incidents occurring inside its sovereign borders³⁰² – can be observed.

"What is more, the Organization for Economic Co-operation and Development (OECD) and UN anti-corruption conventions explicitly focus on foreign corrupt practices, which [...] may be addressed through extraterritorial jurisdiction."³⁰³ Thus, this approach also receives tailwind and popularity from international organizations. Literally, the OECD states in Art. 4 of its Convention on Combating Bribery of Foreign Public Officials in International Business Transactions:

³⁰² Cf. Ryngaert, in: Jurisdiction in International Law, p. 49.

³⁰³ Ibid. with reference to OECD, Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, Art. 4 and Art. 42 of the United Nations Convention against Corruption, General Assembly Resolution 58/4 of 31 October 2003 (UNCAC).

- "1. Each Party shall take such measures as may be necessary to establish its jurisdiction over the bribery of a foreign public official when the offence is committed in whole or in part in its territory."³⁰⁴
- "2. Each Party which has jurisdiction to prosecute its nationals for offences committed abroad shall take such measures as may be necessary to establish its jurisdiction to do so in respect of the bribery of a foreign public official, according to the same principles."³⁰⁵
- "3. When more than one Party has jurisdiction over an alleged offence described in this Convention, the Parties involved shall, at the request of one of them, consult with a view to determining the most appropriate jurisdiction for prosecution."³⁰⁶
- "4. Each Party shall review whether its current basis for jurisdiction is effective in the fight against the bribery of foreign public officials and, if it is not, shall take remedial steps."³⁰⁷

Similarly, the UN declare in Art. 42 of their Convention against Corruption:

- "1. Each State Party shall adopt such measures as may be necessary to establish its jurisdiction over the offences established in accordance with this Convention when:"³⁰⁸
 - "(a) [emphasis in original, also the following from this Art. 42] The offence is committed in the territory of that State Party; or
 - (b) The offence is committed on board a vessel that is flying the flag of that State Party or an aircraft that is registered under the laws of that State Party at the time that the offence is committed."³⁰⁹
- "2. Subject to article 4 of this Convention, a State Party may also establish its jurisdiction over any such offence when:"³¹⁰
 - "(a) The offence is committed against a national of that State Party; or
 - (b) The offence is committed by a national of that State Party or a stateless person who has his or her habitual residence in its territory; or
 - (c) The offence is one of those established in accordance with article 23, paragraph 1 (b) (ii), of this Convention and is committed outside its territory with a view to the commission of an offence established in accordance with article 23,

³⁰⁴ OECD, Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, p. 5, Art. 4.

³⁰⁵ Ibid.

³⁰⁶ Ibid.

³⁰⁷ Ibid.

³⁰⁸ UN, Convention against Corruption, p. 28, Art. 42 para. 1.

³⁰⁹ Ibid., p. 29, Art. 42 para. 1.

³¹⁰ Ibid.

paragraph 1 (a) (i) or (ii) or (b) (i), of this Convention within its territory; or
(d) The offence is committed against the State Party."³¹¹

"3. For the purposes of article 44 of this Convention, each State Party shall take such measures as may be necessary to establish its jurisdiction over the offences established in accordance with this Convention when the alleged offender is present in its territory and it does not extradite such person solely on the ground that he or she is one of its nationals."³¹²

"4. Each State Party may also take such measures as may be necessary to establish its jurisdiction over the offences established in accordance with this Convention when the alleged offender is present in its territory and it does not extradite him or her."³¹³

As a result, a large part of the national laws penalizing extraterritorial bribery derive from those international treaties, even if those laws are often less than stringently implemented.³¹⁴ Since numerous countries may apply multiple rules of responsibility to justify responsibility for bribery, it could be thought at times disputes occur.³¹⁵ In view of a global unanimity regarding unwelcome as well as punishable acts of overseas bribery, it is improbable that countries will challenge the assertion of juridical competence by other countries, and this hardly ever happens in real world situations.³¹⁶

So far, it has been treated the way in which laws can be extraterritorially valid to the extent of governing situations which occur, even to a certain degree, beyond the borders of the country that claims them.³¹⁷ "There are also territorially applicable statutes 'the relevant regulatory determination [of which is] shaped as a matter of law, by conduct or circumstances *abroad*.'^{318"}³¹⁹ In this regard, *Scott* provides definitions that help to differentiate.³²⁰ According to her, "Extraterritoriality"³²¹ is "[t]he application of a measure triggered by something other than a territorial connection with the regulating state."³²² Consequently, this cannot represent juridical competence claims justified by

³¹¹ UN, Convention against Corruption, p. 29, Art. 42 para. 2.

³¹² Ibid., p. 29, Art. 42 para. 3.

³¹³ Ibid., p. 29, Art. 42 para. 4.

³¹⁴ Cf. Ryngaert, in: Jurisdiction in International Law, p. 88.

³¹⁵ Cf. *ibid.*

³¹⁶ Cf. *ibid.*

³¹⁷ Cf. *ibid.*, p. 94.

³¹⁸ Scott, in: AJCL, Vol. 62 (2014), 87, 90; emphasis and "[of which is]" added by Ryngaert, *op. cit.*, p. 94 with reference to Scott, *op. cit.*, 90 (found in another source).

³¹⁹ Ryngaert, *op. cit.*, p. 94 with reference to Scott, *op. cit.*, 90 (found in another source).

³²⁰ Cf. Scott, *op. cit.*, 90.

³²¹ Ibid.

³²² Ibid.

the principle of territoriality. Whereas, pursuant to *Scott*, it is "Territorial Extension"³²³ when "[t]he application of a measure is triggered by a territorial connection but in applying the measure the regulator is required, as a matter of law, to take into account conduct or circumstances abroad."³²⁴ The enlargement of laws in this nature produces extraterritorial impacts, despite the fact that it refers to subjects of law that have a connection to the territory of the state claiming competence.³²⁵ After all, it should be noted that a state's jurisdiction, which is permissibly extended to foreign countries in accordance with the principle of territoriality, may not itself be enforced there.³²⁶

Juridical competence by way of territorial extension usually is practiced by predicated entry to the country's borders and commercial opportunities on an player's compliance with defined requirements, even if it acts beyond the country's borders.³²⁷ "In so doing, the regulating State or entity puts pressure to bear on other regulators, who might have a stronger nexus to the situation, to increase the quality and stringency of regulation to a level that is at least equivalent to that of the former regulator."³²⁸ This could also apply to the LkSG, which will be discussed later.

Furthermore, the example of antitrust law also shows that the extension of national regulations can almost be inevitable from the point of view of effectiveness, since in the light of international economic relations, control (of cartels) limited to national facts alone is insufficient and does not satisfy either the protection of the domestic economy or the domestic legal system.³²⁹ This can also be applied to other areas of (economic) law. On first glance, this extraterritorial outreach by national legislation seems quite indisputable, since its territorial connection cannot be denied.³³⁰

"It remains no less true, however, that the territorial regulator may consider this link as a *trigger* [emphasis in original] to exercise nearly universal jurisdiction in that it subjects the operator's worldwide activities, including those taking place *outside the territory* [emphasis in original], to territorial law, just because the activities, or the operator, happen to have some territorial link."³³¹

³²³ Scott, in: AJCL, Vol. 62 (2014), 87, 90.

³²⁴ Ibid.

³²⁵ Cf. Ryngaert, in: Jurisdiction in International Law, p. 94.

³²⁶ Cf. Stein/von Buttlar/Kotzur, in: Völkerrecht [International Law], § 35 para. 615.

³²⁷ Cf. Ryngaert, op. cit., p. 94.

³²⁸ Ibid.

³²⁹ Cf. Stein/von Buttlar/Kotzur, op. cit., § 35 para. 615.

³³⁰ Cf. Ryngaert, op. cit., p. 96.

³³¹ Ibid.

While this may not result in intense opposition, it could cause a territorial outreach of ambitious regulative norms by powerful states, which potentially create challenges for developing states to fulfil and impose those norms.³³² Thus, in some external actor's eyes, the argument could be made to avoid those norms through refraining from acting within the borders of the governing country or the governing authority.³³³ "Economically, however, where the regulating State or entity is a leading export or economic market, such as the EU or the US, he may not have this choice."³³⁴ Because the bottom line is that the actor then has to adhere to the highest degree of domestic as well as local requirements during its global activities, which increases its compliance expenses significantly.³³⁵

The outreach described above is said to be particularly prevalent in the USA with its claims of juridical competences, in that these are commonly considered to be more wide-ranging in comparison to other countries.³³⁶ "Sometimes they are denoted as assertions of 'extraterritorial' jurisdiction, in spite of their often being based, albeit loosely, on the territorial principle."³³⁷

However, the underlying facts might be connected to multiple countries, all of whom could seek to claim juridical competence by invoking the territoriality principle.³³⁸ And this permissive principle is only one, albeit as mentioned a very important one, among several.³³⁹ "In the customary international law scheme of jurisdiction, the territoriality principle serves as the basic principle of jurisdiction."³⁴⁰ Thus, the regulation of facts is mostly based on the principle of territoriality.³⁴¹ "Reasonableness requires not only that the exercise of jurisdiction be based on a permissive principle such as the territorial principle, but also that such an exercise takes into account the regulatory interests of other States."³⁴² In the case where an assessment shows clearly an alterna-

³³² Cf. Ryngaert, in: *Jurisdiction in International Law*, pp. 96-97.

³³³ Cf. *ibid.*, p. 97.

³³⁴ *Ibid.*

³³⁵ Cf. *ibid.*

³³⁶ Cf. *ibid.*, p. 99.

³³⁷ *Ibid.*

³³⁸ Cf. *ibid.*, p. 99.

³³⁹ Cf. *ibid.*, p. 100.

³⁴⁰ *Ibid.*, p. 101.

³⁴¹ Herdegen, in: *Völkerrecht [International Law]*, § 26 para. 4.

³⁴² Ryngaert, *op. cit.*, p. 100.

tive country could have a stronger justification for jurisdiction, given its links and concerns with the legal situation, the first country will or may need to decline.³⁴³ Nevertheless, it has also been learned so far that, usually, the more powerful state prevails if it does not withdraw of its own initiative.

c. Active Personality Principle

As already stated, the principle of territoriality is only one among several permissive principles of international law that provide a recognized connecting factor.³⁴⁴ "Exceptionally [...] national laws may be given extraterritorial application, provided that these laws could be justified by one of the recognized principles of extraterritorial jurisdiction under public international law [...]."³⁴⁵ These are illustrated in the following and the first one is the "Active Personality Principle"³⁴⁶: According to the active personality principle, a state exercises comprehensive sovereignty over the rights and obligations as well as the status of its nationals (natural and legal persons), even if they are abroad, and it is based on the personal sovereignty of the home state, which also extends abroad.³⁴⁷

There is little dispute whether it is possible for a country to justify its penal juridical competence by offender's nationality.³⁴⁸ The USSC was of the opinion, that this kind of conduct of competences is not a matter of international law, rather it is only a matter of the specifications of local regulations, that determine the obligations that a member of the community has towards its federal administration.³⁴⁹ It furthermore held that "[...] it is the duty of the courts of the United States to apply to offenses committed by its citizens on vessels flying its flag, its own statutes, interpreted in the light of recognized principles of international law."³⁵⁰ Thus, the latter has reasoned that courts must assert juridical competence grounded on citizenship under certain conditions,³⁵¹ despite the assumption that such a doctrine is likely to be valid only in the absence of

³⁴³ Cf. Ryngaert, in: *Jurisdiction in International Law*, p. 100.

³⁴⁴ Cf. van Arnauld, in: *Völkerrecht [International Law]*, § 4 para. 352; Stein/von Buttlar/Kotzur, in: *Völkerrecht [International Law]*, § 35 paras. 606-627; Herdegen, in: *Völkerrecht [International Law]*, § 26 paras. 1-16; Ryngaert, op. cit., especially p. 101.

³⁴⁵ Ryngaert, op. cit., p. 101.

³⁴⁶ Ibid., p. 104, see also the full chapter 4.2 regarding to it on pp. 104-110.

³⁴⁷ Cf. Stein/von Buttlar/Kotzur, op. cit., § 35 para. 617.

³⁴⁸ Cf. Ryngaert, op. cit., p. 104 with further references and with deeper explanation.

³⁴⁹ Cf. USSC, US Reports, 1932, 421, 437 with further references and deeper explanation.

³⁵⁰ USSC, US Reports, 1933, 137, 159.

³⁵¹ Cf. Ryngaert, op. cit., p. 105 with reference to USSC, US Reports, 1933, 137, 159.

concurrent national authorities.³⁵² "That being said, some international conventions *require* [emphasis in original] that States exercise active personality jurisdiction where they fail to extradite a person solely on the ground that he is a national of the State."³⁵³ Even in cases where the behaviour of the person being investigated has no criminal character in the territory of a country, active personal juridical competence may still have justification.³⁵⁴ Because by no means every country considers unacceptable the provision of support for the prosecution of offences that are not mentioned within its own penal law.³⁵⁵ But then it can indicate a lack of sufficient local laws within this country and thus generate doubts about its sovereignty.³⁵⁶

"It may be noted that active personality jurisdiction may cover all crimes committed abroad, subject to certain restraints such as double criminality, a technique typical to continental Europe."³⁵⁷ Furthermore, whereas some infractions have been deemed suitable for application of this kind of juridical competence, penalties can actually be more lenient compared to intra-country ones, as the damage to the national integrity of the respective country often appears to be less in the case of extraterritorial infractions.³⁵⁸

"As [...] justification [...] it has been argued that active personality jurisdiction is in fact a compensation for the diplomatic protection that the State offers to its nationals abroad (the so-called 'allegiance theory')."³⁵⁹ That doctrine fails to fully clarify the reasons for which a country ought to be keen to govern the activities from their citizens in other countries, particularly in cases where they have no immediate impact on domestic safety nor land.³⁶⁰ Two reasons serve to legitimate that.³⁶¹ One is that a country considers to prevent their citizens of committing acts which infringe on the reputation

³⁵² Cf. Ryngaert, in: *Jurisdiction in International Law*, p. 105 with reference to Knox, in: *AJIL*, Vol. 104 (2010), 351, 369.

³⁵³ Ryngaert, *op. cit.*, p. 105 with further references.

³⁵⁴ Cf. *ibid.*, p. 105.

³⁵⁵ Cf. Watson, in: *YJIL*, Vol. 17:41 (1992), 41, 79.

³⁵⁶ Cf. Ryngaert, *op. cit.*, p. 105 with reference to Watson, *op. cit.*, 77 and 79.

³⁵⁷ Ryngaert, *op. cit.*, p. 105.

³⁵⁸ Cf. *ibid.*, p. 106 with further references.

³⁵⁹ Cf. *ibid.* with further references.

³⁶⁰ Cf. Watson, *op. cit.*, 68.

³⁶¹ Cf. *ibid.*

of the country or its international connections.³⁶² "Second, the international community as a whole has an interest in deterring serious crimes that currently go unpunished because no state exercises jurisdiction."³⁶³

The country on whose land the crime took place may well appreciate it if the country of which the perpetrator is a citizen declares itself juridical competent, since it can then use its resources for purposes other than the prosecution of this crime.³⁶⁴ Seen through this lens, practicing juridical competence grounded on this principle and justification can actually reduce instead of enhance cross-border conflicts.³⁶⁵

In addition to its significant position as part of the application of penal codes, in certain countries the citizenship approach takes on a similar weight in tax legislation.³⁶⁶ Thus, several countries subject its citizens to taxation according to what they have earned globally, i.e., also the earnings generated beyond the borders of an individual's national territory.³⁶⁷

"In the rules of adjudicatory jurisdiction in civil and commercial matters under *private international law* [emphasis in original], the *domicile principle* [emphasis in original] may serve as a variation on the active personality principle."³⁶⁸ The respective Regulation (EU) No 1215/2012 of the European Parliament and of the Council on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters stipulates in its Art. 4, 1., that "Subject to this Regulation, persons domiciled in a Member State shall, whatever their nationality, be sued in the courts of that Member State."³⁶⁹ What is generally meant by this is governed by Art. 63, 1., of this regulation:

"For the purposes of this Regulation, a company or other legal person or association of natural or legal persons is domiciled at the place where it has its:

- (a) statutory seat;
- (b) central administration; or

³⁶² Cf. Watson, in: YJIL, Vol. 17:41 (1992), 41, 68.

³⁶³ Ibid.

³⁶⁴ Cf. Ryngaert, in: Jurisdiction in International Law, pp. 106-107 with reference to Watson, op. cit., 69-70.

³⁶⁵ Cf. Ryngaert, op. cit., p. 107 with reference to Knox, in: AJIL, Vol. 104 (2010), 351, 372 (in the result equally).

³⁶⁶ Cf. Ryngaert, op. cit., p. 107 with further general references to this topic.

³⁶⁷ Cf. ibid. with further references and examples.

³⁶⁸ Ibid., p. 108.

³⁶⁹ EU-Regulation 1215/2012, L 351/1, L 351/7.

(c) principal place of business."³⁷⁰

As a result, companies could face legal action within their domestic country in spite of having committed illegal practices in a different country, such as when a global active company from an industrialized country would be accused of being involved with human rights infringements in less industrialized countries.³⁷¹ Again, this could also apply to the LkSG, which will be discussed later.

Furthermore, some countries, base its juridical competence regarding operations by companies located in foreign countries on the active personality principle, merely in spite of the fact that those companies have been controlled through its nationals or companies.³⁷² But, "[t]he 'control theory' is *prima facie* [emphasis in original] not in line with international law, which considers nationality, and not control, as controlling."³⁷³ The active personality principle is overstretched if national prohibition regulations are also extended to subsidiaries of domestic companies, even though they have their registered seat abroad.³⁷⁴ Thus, the personal relationship between the state and the legal person would be no longer given when it is a matter of state rules of conduct towards a subsidiary of a domestic company established abroad according to foreign law.³⁷⁵ Where applied to non-resident mother companies with regard to unlawful practices of local affiliates controlled on behalf of the non-resident mother company, this could prove admissible.³⁷⁶ Moreover, "[t]he control theory does not pose significant problems provided that prescriptive jurisdiction can duly be established on the basis of another accepted principle of jurisdiction under international law, such as the territoriality [...] principle."³⁷⁷

Certain countries, especially USA, have particular provisions on personal jurisdiction that can establish application upon non-resident companies which have no control by

³⁷⁰ EU-Regulation 1215/2012, L 351/1, L 351/18.

³⁷¹ Cf. Ryngaert, in: Jurisdiction in International Law, p. 108 with further explanation and general reference to Enneking, in: Foreign direct liability and beyond. See for deeper discussion especially Enneking, op. cit., Chapter 3.2, pp. 91 et seq.

³⁷² Cf. Ryngaert, op. cit., p. 108 with a reference for a deeper exploration of such a legislation and practical examples to Ryngaert, in: CJIL, Vol. 7 (2008), 625 et seq., where he discusses "[s]econdary boycotts [which] are extraterritorial measures in that they intervene in the commercial relations between actors who are not active within the territory of the regulating State.", Ryngaert, in: CJIL, Vol. 7 (2008), 625, 626.

³⁷³ Cf. Ryngaert, in: Jurisdiction in International Law, p. 108 with further references.

³⁷⁴ Cf. Herdegen, in: Völkerrecht [International Law], § 26 para. 10.

³⁷⁵ Cf. Stein/von Buttlar/Kotzur, in: Völkerrecht [International Law], § 35 para. 619.

³⁷⁶ Cf. Ryngaert, in: Jurisdiction in International Law, p. 109.

³⁷⁷ Cf. *ibid.* with reference to "cmt a *in fine* [emphasis in original]" ECJ, Case 48/69, ECR 619. See therefore especially III, 1., A, (a) of the ECJ, Case 48/69, ECR 619, 624-625.

national persons, merely because of the reason of commercially operating within governing state's borders.³⁷⁸ Regarding information technology and data protection law, as an example, USA argue they are entitled to ask for information held on all cloud servers globally in case the system supplier falls under their juridical competence, not just if the company sits within USA or runs an affiliate or a bureau there, in fact even if the company merely engages in commercial operations in USA on a recurring and organized basis, regardless of any other link to USA.³⁷⁹

d. Passive Personality Principle

As already explained before, there exists a general recognition regarding the ability of a country to govern the activities of its nationals, including while they are abroad.³⁸⁰ Conversely, however, the question arises whether countries are allowed to safeguard their residents in that they could prosecute every criminal act carried out from a person of another citizenship outside their borders against one of their nationals?³⁸¹ "That is, can a state exercise 'passive personality jurisdiction'—criminal jurisdiction based solely on the nationality of the victim?"³⁸²

There exists no more contentious ground to claim extraterritorial jurisdiction than this one,³⁸³ nor one that is more "pushy".³⁸⁴ What seems doubtful is if citizenship of a harmed person, notwithstanding this provides a valid concern for a country,³⁸⁵ moreover serves as proper connection in the sense of international law.³⁸⁶ A lot of states, USA among them, historically rejected that doctrine on juridical competence claims.³⁸⁷ "Passive personality jurisdiction does not clearly serve any of the interests furthered by territorial or nationality jurisdiction."³⁸⁸ Otherwise than the first, this contributes in a minor way to the enhancement of public order inside the country, if at all in the sense that a consistent assertion of the domestic regulations in foreign countries

³⁷⁸ Cf. Ryngaert, in: *Jurisdiction in International Law*, p. 109.

³⁷⁹ Cf. *ibid.* with reference to Maxwell/Wolf, in: *A Global Reality: Governmental Access to Data in the Cloud*, pp. 5-6.

³⁸⁰ Cf. Watson, in: *TILJ*, Vol. 28:1 (1993), 1, 2 with further references.

³⁸¹ Cf. *ibid.*

³⁸² *Ibid.*

³⁸³ Cf. Ryngaert, *op. cit.*, p. 110 with further references.

³⁸⁴ Cf. Watson, *op. cit.*, 2 with further references and short explanation of the other accepted grounds, also with further references.

³⁸⁵ Cf. Ryngaert, *op. cit.*, p. 110 with reference to Watson, *op. cit.*, 18.

³⁸⁶ Cf. Ryngaert, *op. cit.*, p. 110 with further references.

³⁸⁷ Cf. Watson, *op. cit.*, 2.

³⁸⁸ *Ibid.*, 18.

could have a minimal discouraging influence inside the country.³⁸⁹ Contrary to the latter, there is also no use of it to foster external affairs through holding citizens of a state accountable with regard to their delinquency in other countries.³⁹⁰ However, it benefits another major national concern of a country, namely protecting its citizens outside the borders.³⁹¹ "By deterring crime against a state's nationals abroad, passive personality jurisdiction presumably protects them from physical and economic harm."³⁹²

However, the passive personality principle is not everywhere recognized as a general principle of customary international law, as it is rejected by many states.³⁹³ A counter-argument for accepting this basis of a juridical competence claim could include it hardly being justifiable for countries to have a legitimate stake because, overall, this has little discouraging influence.³⁹⁴ Someone planning to commit one delinquent action possibly lacks knowledge about the citizenship held by its target, thus lacking awareness of the penal consequences of this behaviour.³⁹⁵ Although the delinquent may have knowledge of it, there is a probability of not having a familiarity on legal rules from its target country of origin.³⁹⁶ Factually, that delinquent will be far rather acquainted on the legislation applicable in its country of origin, maybe also in legislation in that country where the delinquency was committed, instead of regulations applicable in target's country of origin.³⁹⁷

"Under the *active* [emphasis in original] personality principle [...] individuals might reasonably be expected to be informed about the law applicable to their behavior."³⁹⁸ But if the delinquents are unaware of which country's legislation governs them, the assertion of juridical competence according to this concept does, all in all, not have a particularly strong dissuasive impact.³⁹⁹ "In addition, the state in which the crime occurred is much more likely to prosecute than the victim's home state, even if passive

³⁸⁹ Cf. Watson, in: TILJ, Vol. 28:1 (1993), 1, 18.

³⁹⁰ Cf. *ibid.*

³⁹¹ Cf. *ibid.*

³⁹² *Ibid.*

³⁹³ Cf. Stein/von Buttler/Kotzur, in: Völkerrecht [International Law], § 35 para. 620.

³⁹⁴ Cf. Watson, *op. cit.*, 19.

³⁹⁵ Cf. *ibid.*

³⁹⁶ Cf. *ibid.*

³⁹⁷ Cf. *ibid.*

³⁹⁸ Ryngaert, in: Jurisdiction in International Law, p. 111.

³⁹⁹ Cf. *ibid.*

personality jurisdiction becomes widely accepted."⁴⁰⁰ The result of this is that any potential dissuasive influence from criminal investigation and sanctioning through target's country of origin is weakened all the more.⁴⁰¹ However, precisely this dissuasive influence and the impact it creates are one of the fundamental goals from penal codes.⁴⁰²

Watson counters by making the following arguments. "Still, passive personality's uncertain deterrent effect protects nationals better than no deterrent at all."⁴⁰³ In this context, it is not harmful as an argument in its favor when it does not completely fulfil this legitimate objective.⁴⁰⁴ This is because the other approaches presented so far do neither completely fulfil the function of deterrence, which can easily be proven with a view to daily world happenings.⁴⁰⁵ Furthermore, this can also be seen in the argumentation for the approach of the legitimate claim of juridical competence based on the citizenship of the delinquent, since on the one hand this can contribute to the fostering of external affairs, but on the second hand it can also harm these if the country where the offence took place claims competence over the case.⁴⁰⁶

Building on this, *Watson* continues: "Moreover, the very uncertainty of the passive personality remedy may enhance its deterrent effect."⁴⁰⁷ When possible delinquents are uncertain about the citizenship of their targets but are informed about the possibility of severe punishments after offending people from a different country, they might be scared off by the threat of being mistaken regarding the citizenship of their targets and therefore being punished by another country.⁴⁰⁸ When possible delinquents are better prepared, nevertheless still minimal uncertain about the citizenship of their targets but are informed about the possibility of severe punishments in the country of their targets citizenship, they might be scared off by the threat of being mistaken regarding the citizenship of their targets and therefore being punished by another country which could be unfamiliar to them.⁴⁰⁹

⁴⁰⁰ *Watson*, in: *TILJ*, Vol. 28:1 (1993), 1, 19.

⁴⁰¹ Cf. *ibid.*

⁴⁰² Cf. *Ryngaert*, in: *Jurisdiction in International Law*, p. 111.

⁴⁰³ *Watson*, *op. cit.*, 19.

⁴⁰⁴ Cf. *ibid.*

⁴⁰⁵ Cf. *ibid.*

⁴⁰⁶ Cf. *ibid.*

⁴⁰⁷ *Ibid.*

⁴⁰⁸ Cf. *ibid.*

⁴⁰⁹ Cf. *ibid.*

Despite having full details of the citizenship of their targets, they could have limited understanding of the fact an offence is severely sanctioned in the countries of the targets, or in case they understand, they could be insufficiently familiar with the legal systems and its consequences in the countries of the targets, which would also contribute to their insecurity.⁴¹⁰ Any of these circumstances may prevent potential delinquents from selecting this victim, or any victim at all.⁴¹¹ Thus, the approach of being able to base judicial competence on the victim's citizenship contributes, to some extent, to a major governmental objective, the safeguarding from the respective country's citizens outside the borders.⁴¹² Hence, the applying states base the passive personality principle on the state's obligation to protect its own nationals.⁴¹³

For *Watson* "[i]t is difficult to see, then, why nationality jurisdiction is not considered 'intrusive' but passive personality jurisdiction is."⁴¹⁴ These are either scenarios in which countries foster their justifiable concerns with the use of their domestic legislation on the land of a foreign country.⁴¹⁵ The question remains not fully resolved why a country should be more in favor of using the former rather than the latter basis for claiming legal competence.⁴¹⁶ With the former basis for claiming legal competence, in which this is reasoned with the citizenship of the offender, the executing countries can eventually improve their images through preventing their citizens from remaining unpunished with generally recognized offences in other countries, while with the latter basis for claiming legal competence, in which this is reasoned with the citizenship of the victim, they can dissuade delinquents to harm citizens of their certain countries.⁴¹⁷ "But even if nationality jurisdiction serves more fundamental interests, passive personality clearly serves valid interests as well."⁴¹⁸ Such explained tendency towards this active personality principle based on citizenship, which has also grown out of history, could be an expression of the fact that countries are supposed to exercise with greater prudence in the prosecution of non-nationals.⁴¹⁹ However, that limitation fails to answer how alternative approaches to claiming juridical competence on foreigners,

⁴¹⁰ Cf. *Watson*, in: *TILJ*, Vol. 28:1 (1993), 1, 19.

⁴¹¹ Cf. *ibid.*

⁴¹² Cf. *ibid.*

⁴¹³ Cf. *Stein/von Buttlar/Kotzur*, in: *Völkerrecht [International Law]*, § 35 para. 621.

⁴¹⁴ *Watson*, *op. cit.*, 19.

⁴¹⁵ Cf. *ibid.*

⁴¹⁶ Cf. *ibid.*

⁴¹⁷ Cf. *ibid.*, 19-20.

⁴¹⁸ *Ibid.*, 20.

⁴¹⁹ Cf. *ibid.*

which will be discussed in more detail later, should be tolerable and the one based on the victim's nationality should remain invalid.⁴²⁰

In this same direction, *Watson* argues further: "One last question is whether passive personality jurisdiction 'intrudes' on the sovereignty of the *offender's* [emphasis in original] home state."⁴²¹ Indeed, delinquents do not necessarily possess citizenship from the country where they committed their violations.⁴²² Such a constellation raises the question if the country of origin of the respective delinquent wants to take over the legal responsibility for the case in the first place.⁴²³ "If not, it is again difficult to see how passive personality jurisdiction 'intrudes' on that state's sovereignty."⁴²⁴ For under these conditions, the assertion that the target's country of origin will take over the juridical processing of the case is unlikely to subvert the corresponding public agencies and the authority of the delinquent's country of origin.⁴²⁵ Conversely, in the event that the delinquent's country of origin seeks to do so, in fact, the target's country of origin has a comparatively worse position.⁴²⁶ In this context, these countries' individual concerns can largely show comparableness,⁴²⁷ as *Watson* points out:

"The offender's home state has a valid interest in deterring acts by its nationals that damage its reputation abroad, and perhaps in demonstrating to the state in which the crime occurred that it will take responsibility for the misconduct of its nationals abroad; the victim's home state, for its part, has a valid interest in protecting its nationals."⁴²⁸

Watson then puts this into perspective with the following train of thought:

"But it is probably more fair to the defendant to give preference to the defendant's home state, for the defendant can be presumed to be aware of his own country's law—or at least can be presumed to be more familiar with his own country's law than with the law of the victim's state."⁴²⁹

That kind of reasoning of the primacy of the delinquent's country of origin will obviously be attenuated in case a certain delinquent wishes to be treated according to the

⁴²⁰ Cf. *Watson*, in: *TILJ*, Vol. 28:1 (1993), 1, 20.

⁴²¹ *Ibid.*

⁴²² Cf. *ibid.*

⁴²³ Cf. *ibid.*

⁴²⁴ *Ibid.*

⁴²⁵ Cf. *ibid.*

⁴²⁶ Cf. *ibid.*

⁴²⁷ Cf. *ibid.*

⁴²⁸ *Ibid.* with further explanation.

⁴²⁹ *Ibid.* with a reference to another chapter in this article concerning this topic.

law of and by the target's country of origin.⁴³⁰ *Watson* himself counters this with the argument that "[e]ven then, however, the international community would likely still favor the offender's home state, presumably for the same reasons that extradition treaties permit states to deny extradition of their nationals regardless of the defendant's preferences."⁴³¹ This is because it is somewhat understood for countries to retain an overriding entitlement in determining the point at which they dispossess freedom from their citizens, an entitlement which goes actually beyond a country's authority in prosecuting legislation infringements on its domestic sovereign area.⁴³²

But *Ryngaert* states that [i]n indeed, it may be a territorial State's deliberate, sovereign, and legitimate choice *not* [emphasis in original] to prosecute a crime, especially in States with a system of prosecutorial discretion."⁴³³

Thus, *Watson* comes to the following justification: "[I]f neither the state in which the crime occurred nor the offender's home state prosecutes, they should not have reason to complain if the victim's home state then decides to prosecute."⁴³⁴ However, the functioning of such a hierarchy will of course require solid instruments to prevent the country of the target from proceeding as long as the country where the act was committed or country of origin of the delinquent announced what they intend to do.⁴³⁵ This could be achieved, e.g., by these latter both countries expressing what they plan to do to the respective politicians from the target's country of origin as well as, if this is disregarded, immediately addressing judicial authorities which are supposed to decide on the underlying case.⁴³⁶ Generally, a country which might not itself seek legal action against a delinquent should have little ground for opposing this type asserting juridical competence in the same case by a different country.⁴³⁷

"Such an exercise of jurisdiction does not 'intrude' on any state's sovereignty because it would not conflict with any state's exercise of sovereign powers."⁴³⁸ Rather, the assertion of juridical competence in this way secures the sanctioning of a delinquent who

⁴³⁰ Cf. *Watson*, in: *TILJ*, Vol. 28:1 (1993), 1, 21.

⁴³¹ *Ibid.*

⁴³² Cf. *ibid.* with further references.

⁴³³ *Ryngaert*, in: *Jurisdiction in International Law*, p. 113.

⁴³⁴ *Watson*, *op. cit.*, 21.

⁴³⁵ Cf. *ibid.*

⁴³⁶ Cf. *ibid.*

⁴³⁷ Cf. *ibid.*

⁴³⁸ *Ibid.*

might instead have possibly got away without any penalty.⁴³⁹ Moreover, there is little doubt that the global society in its entirety will have a vested concern not to let illegal acts go unsanctioned.⁴⁴⁰ Consequently, this way of asserting juridical competence on the basis of the victim's country of origin does not irregularly interfere in the autonomy of another possibly competent country, as long as such assertion is solely made in cases where these other possible countries classify the situation as a legal violation, without conducting any legal proceedings.⁴⁴¹ "If limited in this way, passive personality jurisdiction seems no more intrusive than nationality jurisdiction and other accepted forms of jurisdiction."⁴⁴²

Even if one were to follow *Watson's* arguments and recognize the passive personality principle as a suitable connecting factor and as a permissible principle of international law for extraterritorial juridical claims, the permissible scope of the passive personality principle remains controversial still today.⁴⁴³ In the *Lotus* case discussed earlier, such a constellation has already come into play, nevertheless various opposing views have thereupon denied this basis for asserting juridical competence.⁴⁴⁴ "The international community has not, by and large, accepted passive personality jurisdiction except as applied to terrorism [...]."⁴⁴⁵ Notwithstanding this, several countries created laws that allow them to have juridical competence outside their borders for general offences towards its citizens.⁴⁴⁶ However, only a small number of these countries made use of this option and rather the juridical competence is regularly left in hands of that country where an offence was committed.⁴⁴⁷ "In truth, as few States have actually applied their laws, it is difficult to discern a customary norm of international law unambiguously *authorizing* [emphasis in original] passive personality jurisdiction, or more accurately, its scope."⁴⁴⁸

⁴³⁹ Cf. Watson, in: TILJ, Vol. 28:1 (1993), 1, 21.

⁴⁴⁰ Cf. *ibid.*

⁴⁴¹ Cf. *ibid.*

⁴⁴² *Ibid.*

⁴⁴³ Cf. Herdegen, in: Völkerrecht [International Law], § 26 para. 11.

⁴⁴⁴ Cf. Ryngaert, in: Jurisdiction in International Law, p. 110 with an explanation to the background in the *Lotus* Case once again and the underlying regulations (see for this especially PCIJ, Series A.—No. 10, 3, 14-15) and with further references for opposing views.

⁴⁴⁵ Watson, *op. cit.*, 13.

⁴⁴⁶ Cf. *ibid.* with further references.

⁴⁴⁷ Cf. *ibid.*

⁴⁴⁸ Cf. Ryngaert, *op. cit.*, p. 112 with further references.

Moreover, and beyond these already outlined high hurdles for the generally accepted assertion of this extraterritorial juridical competence, this is further complicated by the practical problem in which the delinquent might be absent from the asserting country.⁴⁴⁹ Usually, the mutual assistance of the country in which the delinquent is currently located is needed to bring the delinquent to the claiming country.⁴⁵⁰ The country in which the delinquent is located frequently does not provide assistance unless the claiming country justifies juridical competence with a legitimate reason (and proves conformity with the limiting terms for the validity of that reason) that the country in which the delinquent is located would also accept under national law.⁴⁵¹ "If the custodial State does not recognize the passive personality principle, it will usually not honor an extradition request by another State based on this principle."⁴⁵² Similarly, when the country in which the delinquent is presently located sets itself strict limiting terms for the assertion of legal competence based on this concept, this country may require such strict limiting terms from the asserting country as well.⁴⁵³ As *Ryngaerts* states, "[a]n international streamlining and consolidation of the aforementioned restrictive conditions therefore appears desirable."⁴⁵⁴

All in all, it can be stated with regard to the passive personality principle that, as already mentioned, it is not recognized by all states as a permissive principle of international law for the assertion of extraterritorial juridical competence and is rejected by many states, but the extension of national regulatory power is predominantly accepted, at least for certain criminal acts, above all in connection with the fight against international terrorism, and in part also to combat organized crime.⁴⁵⁵

e. Protective Principle

However, these were not yet all of the possible principles that permit the extraterritorial exercise of jurisdiction under international law. In the following, another one, the so-called "Protective Principle"⁴⁵⁶, is presented. "The protective principle protects the

⁴⁴⁹ Cf. Ryngaert, in: *Jurisdiction in International Law*, p. 113.

⁴⁵⁰ Cf. *ibid.*

⁴⁵¹ Cf. *ibid.*

⁴⁵² *Ibid.*

⁴⁵³ Cf. *ibid.*

⁴⁵⁴ *Ibid.*

⁴⁵⁵ Cf. Stein/von Buttlar/Kotzur, in: *Völkerrecht [International Law]*, § 35 para. 620.

⁴⁵⁶ Ryngaert, *op. cit.*, see especially and in detail pp. 114-120.

State from acts perpetrated abroad which jeopardize its sovereignty or its right to political independence."⁴⁵⁷ This permissive principle for extraterritorial juridical claims, which is generally recognized under international law, is closely related to passive personal jurisdiction and grants states the power to punish offences committed abroad by nationals or foreigners that threaten the existence or other important legal interests of the state.⁴⁵⁸ A few applying countries interpret this quite extensively by justifying their jurisdiction with this concept from such obvious acts as spying or terrorism, to such offences as narcotics dealing, whereas at first glance, it appears hard to link this last point to safeguarding fundamental national concerns.⁴⁵⁹ This, in contrast, can be justified much better in the case of the first-mentioned examples. Since those offences might remain unpunishable within countries in which they are committed or initiated, this ground and concept for asserting extraterritorial juridical competence claimed by the country against this offence was intended seems to be legitimate.⁴⁶⁰

"For the operation of the protective principle, actual harm need not have resulted from these acts."⁴⁶¹ The legality thereof remains undisputed, especially in view of the vast prevalence of regulations providing for it in the meantime.⁴⁶² In addition, the principle of protection permits the enactment of laws to protect important state interests, whereby much is disputed here in detail, since an extensive interpretation could undermine the prohibition of intervention.⁴⁶³

Some authors see the source of this concept to justify extraterritorial jurisdiction in the immanent entitlement of states to defend themselves.⁴⁶⁴ But, "[f]rom a conceptual perspective, the self-defense justification has been criticized on the ground that protective jurisdiction is in fact exercised sometime *after* [emphasis in original] the (criminal) act

⁴⁵⁷ Ryngaert, in: Jurisdiction in International Law, p. 114 with further explanation and therefore reference to USCA, 523 F.3d 1 (First Circuit 2008), No. 06-1942, 1, 22.

⁴⁵⁸ Cf. Stein/von Buttlar/Kotzur, in: Völkerrecht [International Law], § 35 para. 621.

⁴⁵⁹ Cf. Ryngaert, op. cit., p. 114, footnote 93 with reference to USCA, op. cit., 22 and there with further references.

⁴⁶⁰ Cf. Ryngaert, op. cit., p. 114 with further references and deeper explanation.

⁴⁶¹ Ibid.

⁴⁶² Cf. ibid. with further references.

⁴⁶³ Cf. van Arnould, in: Völkerrecht [International Law], § 4 para. 352.

⁴⁶⁴ Cf. Ryngaert, op. cit., p. 114 with further references.

has taken place."⁴⁶⁵ Because the exercise of this immanent entitlement is normally just permitted at the precise moment when a country is exposed to weaponed assault.⁴⁶⁶

However, this is not the only criticism of this concept for the exercise of extraterritorial jurisdiction.

"More importantly, because the justification of the protective principle is rooted in the concept of State sovereignty and political independence, which every State defines for itself, there is unmistakably a danger that States might abuse the protective principle."⁴⁶⁷

Proceedings against delinquents alleged to have committed an offence with regard to the violation of national safety (that group of offences which are characteristically subject of this concept of justification for extraterritorial juridical competence) are likely to take place within an atmosphere that is hostile and vindictive, thus may resulting inevitably prejudicial towards a fair proceeding.⁴⁶⁸

Furthermore, asserting this type of juridical competence has the potential to harm cross-national connections and cooperation or even trigger countries into acts of reprisal.⁴⁶⁹ On the one hand, since for the same offence, different countries could claim juridical competence at the same time.⁴⁷⁰ On the other hand, since offences targeting the violation of national safety, contrary to general offences, may have the endorsement or acquiescence of another country.⁴⁷¹

For *Ryngaert*, "[i]t appears desirable to adopt an international convention on protective jurisdiction."⁴⁷² Nevertheless, he himself notes that, like elsewhere along the spectrum of juridical questions in that area, such an agreement could be difficult to achieve, given the intractable concerns and positions of the different countries.⁴⁷³ Further, "[...] the flaws inherent in unilateral jurisdiction could be remedied by providing for an independent international tribunal competent to prosecute perpetrators of crimes against the security of the State, along the lines of the International Criminal Court."⁴⁷⁴ But

⁴⁶⁵ Ryngaert, in: *Jurisdiction in International Law*, p. 115.

⁴⁶⁶ Cf. *ibid.* referring to UN, Charter, Art. 51 as an example.

⁴⁶⁷ Ryngaert, *op. cit.*, p. 114 with further references and deeper explanation.

⁴⁶⁸ Cf. *ibid.*, p. 115.

⁴⁶⁹ Cf. *ibid.*

⁴⁷⁰ Cf. *ibid.*

⁴⁷¹ Cf. *ibid.*

⁴⁷² *Ibid.*, p. 116.

⁴⁷³ Cf. *ibid.*

⁴⁷⁴ *Ibid.*

Ryngaert also assesses chances of setting up one like this to be low, because countries would hesitate to give an international body decision-making authority in the case of attacks against their own domestic safety.⁴⁷⁵ Questions would arise as to how decisions should be made, e.g., especially in times of war, where betrayal offences can bring significant informational advantages to combatant nations.⁴⁷⁶

"In spite of the bias potentially displayed by courts when exercising protective jurisdiction, one could, however, take comfort in the fact that protective jurisdiction is in practice hardly exercised."⁴⁷⁷ But if practiced, there is little dispute about doing so.⁴⁷⁸ All in all, "[i]n ordinary circumstances, it is exercised over offenses which the State in where they took place does not condone or support, e.g. plotting the overthrow of a State with which the territorial State is not at war."⁴⁷⁹

f. Universality Principle

In addition to this, there is another recognized concept to legitimately justify an extra-territorial assertion of jurisdiction, which is explained in the following. Generally, which has been explained so far, the legitimate assertion of juridical competence presupposes that there is a connection between the issue that needs governing and the governing country.⁴⁸⁰ However, there exists another concept of legitimate justification for the assertion of juridical competence which functions without being grounded upon some tying element attaching an event to the concerns of a country.⁴⁸¹ "Under the universality principle, the nature of the act may in itself confer jurisdiction on any State."⁴⁸² It declares that certain criminal acts which are considered to be a threat to the legal interests of the international community of states are subject to national criminal jurisdiction even if the criminal act was not committed on the national territory, neither the perpetrator nor the victim are nationals of the judging state and the criminal act is not directly directed against it.⁴⁸³ These are therefore criminal acts for the prosecution of which none of the previously described reasonable and permissible

⁴⁷⁵ Cf. *Ryngaert*, in: *Jurisdiction in International Law*, p. 116.

⁴⁷⁶ Cf. *ibid.*

⁴⁷⁷ *Ibid.*

⁴⁷⁸ Cf. *ibid.*

⁴⁷⁹ *Ibid.*

⁴⁸⁰ Cf. *ibid.*, p. 120.

⁴⁸¹ Cf. *ibid.*

⁴⁸² *Ibid.*

⁴⁸³ Cf. *Stein/von Buttlar/Kotzur*, in: *Völkerrecht [International Law]*, § 35 para. 623.

connecting factors for the assertion or exercise of extraterritorially effective jurisdictional competences on the domestic territory is necessary, because their combating is in the interest of all members of the community of states.⁴⁸⁴ This is because the entire community of states has such a high interest in certain legal goods that their defense by means of criminal law is permitted to every state under customary international law.⁴⁸⁵ It is true that a majority of countries expect a degree of territorial tie by way that a defendant is physically located within the country's borders, but nevertheless it remains uncertain if international law obliges countries in this way at all.⁴⁸⁶

"[...] [U]nder the universality principle, a State may exercise jurisdiction over any offense without regard to any connection to that State, or the interests of other States [...]." ⁴⁸⁷ This is also known as the principle of world law.⁴⁸⁸ It can apply regardless whether a country, which actually has bigger nexuses to a case, seeks to get handed over the delinquent.⁴⁸⁹

At first glance, this throws almost everything that has been illustrated and learned here till now into disorder. "It has been argued that the principles of jurisdiction are derivatives of the definition of statehood."⁴⁹⁰ In view of the different reasonings and grounds, rules and hurdles that objectively legitimate the exercise of a state's extraterritorial jurisdiction, the question is obvious as to why they are necessary at all. This question only does not arise if the seemingly broad approach discussed here also has corresponding, not too vague, guard rails and restrictions. Otherwise, simply thought, states could always refer to this one and the other approaches would hardly have a value any more. The bottom line is that disagreement in those questions could lead to a mess of competences between different states, which could also have a negative impact on international relations and legal certainty. In this respect, it is apparent that this approach needs to be restrained to some extent in its broad scope of application. Therefore, the following will address these necessary limitations and bases of legitimacy for this approach.

⁴⁸⁴ Cf. Stein/von Buttler/Kotzur, in: *Völkerrecht [International Law]*, § 35 para. 623.

⁴⁸⁵ Cf. Herdegen, in: *Völkerrecht [International Law]*, § 26 para. 13.

⁴⁸⁶ Cf. Ryngaert, in: *Jurisdiction in International Law*, p. 120.

⁴⁸⁷ *Ibid.*, p. 126 and see for a more detailed discussion of that term and the distinctions to other similar forms pp. 120-142.

⁴⁸⁸ Cf. Herdegen, *op. cit.*, § 26 para. 13; Stein/von Buttler/Kotzur, *op. cit.*, § 35 para. 623.

⁴⁸⁹ Cf. Ryngaert, *op. cit.*, p. 126.

⁴⁹⁰ Li, in: *Reconceiving Extraterritorial Jurisdiction*, p. 50.

"In particular, universal jurisdiction over crimes such as piracy, drug offenses, hijacking, hostage-taking, and other terrorist acts lends itself to justification under the common interest rationale."⁴⁹¹ But this reasoning also reveals shortcomings. "The common interest rationale is not very helpful in justifying the exercise of universal jurisdiction over crimes against international humanitarian law (war crimes, genocide, crimes against humanity), however."⁴⁹² This is because the executors who commit those offences usually target a specific country or geographic area for a variety of possible reasons, which makes the probability that the executors will also commit these offences again in other countries seems low.⁴⁹³ Indeed, the predominant legitimation is that a number of offences can be deemed ethically so objectionable as to entitle, if not oblige, every country for prosecution.⁴⁹⁴

Practically, the enforcement of extraterritorial juridical competence on this ground tends to be fostered through widespread community disgust caused through delinquent's appearance, who commits such an offence, in the respective country.⁴⁹⁵ From a politics' point of view, tolerating such a delinquent's physical appearance, regardless of the fact it may not represents a common threat, shows disadvantageous for a country.⁴⁹⁶ "In recent times, media pressure has considerably fed this indignation, with journalists sometimes tracking down presumed perpetrators living quietly in the territory of a bystander State."⁴⁹⁷

Ultimately, the question remains under which conditions respectively for which offences this type of assertion of juridical competence is accepted. Especially war crimes, crimes against humanity and genocide are covered by the universality principle.⁴⁹⁸ These crimes under international law are codified in multilateral agreements and, moreover, are recognized under customary international law.⁴⁹⁹ Furthermore, another parameter for the acceptance is the one which was also explained earlier and finds here application as well:⁵⁰⁰ "If there is no protest, because no State feels harmed

⁴⁹¹ Ryngaert, in: *Jurisdiction in International Law*, p. 126.

⁴⁹² *Ibid.*

⁴⁹³ Cf. *ibid.*, pp. 126-127.

⁴⁹⁴ Cf. *ibid.*, p. 127 with reference to Yee, in: *CJIL*, Vol. 10 (2011), 503, 505 and there with further references.

⁴⁹⁵ Cf. Ryngaert, *op. cit.*, p. 127 with further references.

⁴⁹⁶ Cf. *ibid.*

⁴⁹⁷ *Ibid.*

⁴⁹⁸ Cf. Stein/von Buttlar/Kotzur, in: *Völkerrecht [International Law]*, § 35 para. 624.

⁴⁹⁹ Cf. *ibid.*, § 35 para. 625.

⁵⁰⁰ Cf. Ryngaert, *op. cit.*, p. 128.

in its interests, [it] [...] will be lawful."⁵⁰¹ Furthermore, it must also be noted in this context that regarding this type for justifying extraterritorial legal competence its dispute capacity is overestimated.⁵⁰² "[...] [T]he cases that actually went to trial, most defendants were low-level perpetrators who had sought refuge in bystander States and had lost the support of their territorial State [...]."⁵⁰³ In fact, countries seem to have used this justification for their legal competence mainly in situations where a risk of disputes with other countries was marginal.⁵⁰⁴ Ultimately, cases which actually ended up in court did neither result in diplomatic challenges nor disputes.⁵⁰⁵

"The question arises whether States could also exercise universal jurisdiction over offenders who are not (yet) present in their territory (i.e. *in absentia* [emphasis in original])."⁵⁰⁶ As this could probably be discussed in more detail, but is not intended to be in focus here, it will therefore only be briefly addressed in the following. *Ryngaert* "[...] supports the reasonable exercise of universal jurisdiction *in absentia* [emphasis in original], on the ground that the fight against impunity demands that as wide a prosecutorial net as possible be cast."⁵⁰⁷ Nevertheless, *Ryngaert* also sees the flipside of this approach: "Still, while the argument in favor of universal jurisdiction *in absentia* [emphasis in original] is cogent, reasonableness requires that due consideration is given to the legitimate concerns of foreign States and their agents."⁵⁰⁸

"The universality principle is typically invoked in a criminal law context, regarding the prosecution of heinous crimes."⁵⁰⁹ This has been considered so far. If an offence has been committed, there is usually also a quantifiable degree of compensation necessary. Thus, "[...] not only may a State's criminal courts be willing to establish universal jurisdiction, so may also a State's courts in civil matters."⁵¹⁰ Consequently, the question arises whether this approach to justifying extraterritorial juridical competence can also be permissible for such issues? "A State may allow its courts to hear complaints for damages by victims of serious infringements of international law, typically

⁵⁰¹ Ryngaert, in: Jurisdiction in International Law, p. 128.

⁵⁰² Cf. *ibid.*, p. 131.

⁵⁰³ *Ibid.* with further references.

⁵⁰⁴ Cf. *ibid.*, p. 132 with further references.

⁵⁰⁵ Cf. *ibid.* with further references.

⁵⁰⁶ *Ibid.*, p. 133.

⁵⁰⁷ *Ibid.*, p. 134.

⁵⁰⁸ *Ibid.*, p. 135.

⁵⁰⁹ *Ibid.*

⁵¹⁰ *Ibid.*

gross human rights violations, wherever these violations may have occurred."⁵¹¹ To differentiate between the two species, a nomenclature seems useful. *Ryngaert* suggests that "[t]his jurisdiction may be characterized as universal *tort* [emphasis in original] or *civil* [emphasis in original] jurisdiction."⁵¹² Another question in this context is whether the two species differ in terms of function or if they work similarly? "Like universal criminal jurisdiction, universal tort jurisdiction may be solely premised on the heinous nature of a particular violation, without a territorial or personal nexus to the forum being required."⁵¹³ This shows, the two species seem similar in terms of their function respectively their distinctive feature in comparison to the other permissible justifications for extraterritorial juridical competence presented. But, "[i]n practice, in tort cases under the universality principle, personal jurisdiction over the defendant will ordinarily not be established if the defendant has no minimal *territorial* [emphasis in original] contacts with the forum."⁵¹⁴ Which in turn raises the question of why this should then constitute a separate species of justification for extraterritorial juridical competence? Because, it "[...] does not require that the defendant reside in, or be a national of, the forum State."⁵¹⁵ Hence, a certain distinction can be observed, which makes the establishment of a separate species seem comprehensible. What also illustrates this is the fact that "[t]ransient or tag presence may suffice."⁵¹⁶

Apart from these classifications, the next question is whether this concept of claiming juridical competence extraterritorially enjoys comparable acceptance in common usage in the different countries and could be applied by many. According to *Ryngaert*, "[t]hanks to the peculiar features of the US procedural system, universal tort jurisdiction appears as a distinctly American phenomenon."⁵¹⁷ Thus, the question arises on what basis and for which offences this concept is typically used there. "Federal courts in the US [...] have received numerous human rights complaints, notably on the basis of the Alien Tort Statute (ATS), a statutory instrument which [...] confers universal tort jurisdiction on US federal courts for violations of 'the law of nations.'"⁵¹⁸

⁵¹¹ Ryngaert, in: *Jurisdiction in International Law*, p. 135.

⁵¹² *Ibid.*

⁵¹³ *Ibid.* with deeper explanation and there with further background references.

⁵¹⁴ *Ibid.*, footnote 216 with further background references.

⁵¹⁵ *Ibid.*, footnote 216 with further background references.

⁵¹⁶ *Ibid.*, footnote 216 with further background references.

⁵¹⁷ *Ibid.*, p. 136.

⁵¹⁸ *Ibid.* with reference to 28 U.S. Code § 1350.

Nevertheless, this would seem to suggest that this concept of claiming juridical competence extraterritorially is not widespread in other countries. Indeed, as *Ryngaert* points out, "[o]utside the US, even in Western States, universal tort jurisdiction is a less known quantity: States typically require a connection with the forum to ground their jurisdiction."⁵¹⁹

This in turn raises the question of whether this concept is then recognized as legitimate at all if it is not also applied by the majority of countries. From *Ryngaert's* point of view, a non-widespread application of this concept does not necessarily mean that it is unlawful or considered unlawful.⁵²⁰ Shortly summarized, "[...] tendencies demonstrate that in Europe and elsewhere,^[521] most transnational human rights claims are and will be reframed as regular tort claims governed by private international law, with its own rules of adjudicatory jurisdiction and choice of law."⁵²² This is followed by the question of how such constellations are handled in an economic context. "Often, such claims may be brought against a parent corporation in its home State, for an alleged violation of its duty of care under domestic tort law vis-à-vis the foreign activities of its foreign-based subsidiary."⁵²³

In summary, it can be stated that there is also the predominantly recognized possibility of establishing extraterritorial juridical competence in this area. "Still, the establishment of jurisdiction under rules of private international law without any, or with only a slight, connection may be reason for some concern."⁵²⁴ In any case, under the principle of international law, genocide, slave trade, war crimes, aircraft hijackings, and certain acts of terrorist violence can be prosecuted by every state today.⁵²⁵ All in all, "[m]ost doctrine argues that universal jurisdiction is lawful under customary international law."⁵²⁶

⁵¹⁹ Ryngaert, in: *Jurisdiction in International Law*, p. 136 with further selected examples and references.

⁵²⁰ Cf. *ibid.*, pp. 136-137.

⁵²¹ *Ibid.*, p. 141 with reference to Kaeb/Scheffer, in: *AJIL*, Vol. 107 (2013), 852, 857, there with further references, and with deeper explanation (the original footnote in *Ryngaert*, *op. cit.*, p. 141 is 252).

⁵²² *Ryngaert*, *op. cit.*, p. 141 with reference to McCorquodale, in: *AJIL*, Vol. 107 (2013), 846, 846 and there with further references and explanations.

⁵²³ *Ryngaert*, *op. cit.*, p. 141 with further references.

⁵²⁴ *Ibid.*

⁵²⁵ Cf. Herdegen, in: *Völkerrecht [International Law]*, § 26 para. 13.

⁵²⁶ *Ryngaert*, *op. cit.*, p. 129 with further references.

g. Interim Conclusion

In order to be able to evaluate and classify with regard to the topic of this dissertation, in the introductory paras. was announced that first necessary bases are to be created grounded in questions, which have now been researched and answered.

First of all, it can be stated that chapter III is closely related to chapter II. "It has been argued that the principles of jurisdiction are derivatives of the definition of statehood."⁵²⁷ The territorial sovereignty of a sovereign state means the authority over all persons and processes in its own territory, the personal sovereignty means the authority over the nationals, which often coincide.⁵²⁸ Territorial sovereignty means the exclusive power to perform sovereign acts on a certain territory.⁵²⁹ State sovereignty is expressed, among other things, in the comprehensive power to issue legal acts ("jurisdiction to prescribe"⁵³⁰).⁵³¹ Due to the prohibition of intervention, the enactment of sovereign acts with effect towards foreign countries is in principle inadmissible.⁵³² However, in the course of the research it could be found out that facts of a case are not always limited to one territory. If a state act may refer to foreign facts is determined by whether there is a connecting factor recognized under international law. These were presented and discussed in the course of this chapter. And here again we come full circle to chapter II.

"Territoriality, active and passive personality as well as the protective principle mirror the fact that a State under international law must necessarily possess a territory, a population and an independent government that may exercise its international law personality."⁵³³

Furthermore, these results of the research and this chapter prove that the exceptional case and the phenomenon of extraterritoriality exists, is one that is generally recognized under certain conditions and is applied in practice. This is because territorial sovereignty provides an essential connecting factor for the use of state regulatory

⁵²⁷ Li, in: *Reconceiving Extraterritorial Jurisdiction*, p. 50.

⁵²⁸ Cf. Stein/von Buttlar/Kotzur, in: *Völkerrecht [International Law]*, before § 33 para. 534.

⁵²⁹ Cf. Herdegen, in: *Völkerrecht [International Law]*, § 23 para. 2.

⁵³⁰ Stein/von Buttlar/Kotzur, *op. cit.*, before § 33 para. 536.

⁵³¹ Cf. *ibid.*

⁵³² Cf. van Arnould, in: *Völkerrecht [International Law]*, para. 349.

⁵³³ Li, *op. cit.*, pp. 50-51 with reference to de Mestral/Gruchalla-Wesierski, in: *Extraterritorial Application of Export Control Legislation: Canada and the U.S.A.*, p. 18.

power in accordance with the principle of territoriality.⁵³⁴ But, as illustrated, there are other recognized connecting factors.

"Extraterritoriality"⁵³⁵ is "[t]he application of a measure triggered by something other than a territorial connection with the regulating state."⁵³⁶ It was also found out that this has to be distinguished from "Territorial Extension"⁵³⁷ where "[t]he application of a measure is triggered by a territorial connection but in applying the measure the regulator is required, as a matter of law, to take into account conduct or circumstances abroad."⁵³⁸ The enlargement of laws in this nature produces extraterritorial impacts, despite the fact that it refers to subjects of law that have a connection to the territory of the state claiming competence.⁵³⁹ For those cases that lie between a genuine, comprehensive extraterritorial exercise of jurisdiction and a non-extraterritorial exercise of jurisdiction like the extension of the jurisdictional authority, international law scholarship applies the classic categories for which the legality of an extraterritorial jurisdictional authority is recognized as well.⁵⁴⁰ The questions under which circumstances extraterritorial laws and extraterritorial impacts are permissible from the perspective of international law and where this phenomenon find its legal limitations can be answered as follows.

Fundamentally, as shown above, there are two different ways of answering this question.⁵⁴¹ "Either one allows States to exercise jurisdiction as they see fit, unless there is a prohibitive rule to the contrary, or one prohibits States from exercising jurisdiction as they see fit, unless there is a permissive rule to the contrary."⁵⁴² Even though there are plausible arguments for both ways, this dissertation follows the latter. Reason for this is that "[t]he second approach, which purportedly reflects customary international law, has been taken by most States and the majority of the doctrine."⁵⁴³

Origins of extraterritoriality and the technical functionality were briefly explored and "[t]he previous sections discussed how statutes could apply extraterritorially, in the

⁵³⁴ Cf. Herdegen, in: *Völkerrecht [International Law]*, § 23 para. 5.

⁵³⁵ Scott, in: *AJCL*, Vol. 62 (2014), 87, 90.

⁵³⁶ *Ibid.*

⁵³⁷ *Ibid.*

⁵³⁸ *Ibid.*

⁵³⁹ Cf. Ryngaert, in: *Jurisdiction in International Law*, p. 94.

⁵⁴⁰ Cf. Henn/Jahn, in: *Rechtsgutachten LieferkettenG [Legal Opinion Supply Chain Act]*, p. 30 with further references.

⁵⁴¹ Cf. Ryngaert, *op. cit.*, p. 29.

⁵⁴² *Ibid.*

⁵⁴³ *Ibid.*

sense that they purport to regulate activity that takes place, at least in part, outside the asserting State's territory."⁵⁴⁴ By this means some realized practical examples of regulations were shown in the face of, e.g., the FCPA to demonstrate the technical functionality in practice.

Thus, the last section showed that countries are entitled to invoke multiple bases for their extraterritorial juridical competence over identical cases.⁵⁴⁵ This shows the following short example. "In the case of a citizen of State X committing a crime in State Y against a citizen of State Z, all three States may have jurisdiction, on the basis of the territoriality principle, the active personality principle, or the passive personality principle."⁵⁴⁶ Moreover, it has also been demonstrated in this chapter that in specific circumstances, more than "just" three countries, as in this example, could be considered for legitimate assertion of their juridical competence. "[...] [I]f the crime is an international crime that gives rise to universal jurisdiction, every single State may have jurisdiction, irrespective of a nexus with the crime."⁵⁴⁷ In addition, it was possible to identify that this is not the only circumstance and the only area in which a large number of countries might be eligible for juridical competence to decide on a case. "In the field of economic law, given the integration of the global economy, restrictive business practices and fraudulent securities transactions may produce worldwide effects, and cause several States to assert effects-based jurisdiction."⁵⁴⁸

Such legitimizing domestic connections allow a state to regulate the conduct of persons abroad or otherwise (completely or partly) to regulate matters located abroad, which is then referred to as extraterritorial or extraterritorially effective regulation.⁵⁴⁹

All in all, then, this chapter has shown that the field in which the exceptional case of jurisdiction and phenomenon of extraterritoriality operates and the determination of juridical competence in a given situation depends on various factors and can be highly complex. "The system of jurisdiction, in both criminal and economic matters, is, accordingly, one of *concurrent* [emphasis in original] jurisdiction."⁵⁵⁰ Thus, it seems important to understand and balance the different possible perspectives and interests of

⁵⁴⁴ Ryngaert, in: Jurisdiction in International Law, p. 94.

⁵⁴⁵ Cf. *ibid.*, p. 142.

⁵⁴⁶ *Ibid.*

⁵⁴⁷ *Ibid.*

⁵⁴⁸ *Ibid.*

⁵⁴⁹ Cf. Herdegen, in: Völkerrecht [International Law], § 26 para. 3.

⁵⁵⁰ Ryngaert, *op. cit.*, p. 142.

the notifying countries in order to find a solution to such a competitive situation. "This may be problematic, and spark normative competency conflicts between States."⁵⁵¹ It is obvious that every country claiming juridical competence probably has a good reason, at least from its point of view, why that country of all countries should decide on the underlying situation. "For instance, in the field of criminal law, only the State that could gain custody of the presumed offender, and put him or her on trial, will be able to effectively exercise its jurisdiction."⁵⁵² However, some countries that would be able to invoke a justifiable reason for their juridical competence as well could refuse to do so.⁵⁵³ Such countries could then argue a more powerful justification for its claims, in particular because on the basis it has a higher connection than other countries to those facts or persons involved.⁵⁵⁴ For such cases in an commercial and business context, *Ryngaert* summarizes his observations as follows:

"Somewhat similarly, in the field of economic law, it may happen that States clamp down on a restrictive business practice and impose fines pursuant to the territorial principle—while other States may contend that they, in fact, have a stronger territorial link with the practice, and, on that basis, they are entitled to allow the practice without regulatory intervention by other States."⁵⁵⁵

Where multiple countries may be juridical competent regarding an issue in question, there cannot be taken as granted any subordination from those countries towards a country which claims juridical competence foremost.⁵⁵⁶ "Because jurisdiction under international law is concurrent, conflicts over which State's jurisdictional assertions are most legitimate in a given case may surely arise."⁵⁵⁷ This observation has been seen before and examples of this can be found in each of the legitimate and recognized grounds for the use of extraterritorial juridical competence that have been demonstrated. "As to universal jurisdiction, for instance, the State on whose territory an international crime has been committed may argue that its right to establish jurisdiction (and to either prosecute or not prosecute) prevails over bystander States' right to do so."⁵⁵⁸ However, examples can be found not only in criminal law or similar, but also –

⁵⁵¹ Ryngaert, in: *Jurisdiction in International Law*, p. 142.

⁵⁵² *Ibid.*

⁵⁵³ Cf. *ibid.*

⁵⁵⁴ Cf. *ibid.*, pp. 142-143.

⁵⁵⁵ *Ibid.*, p. 143.

⁵⁵⁶ Cf. *ibid.*

⁵⁵⁷ *Ibid.*

⁵⁵⁸ *Ibid.*

and this is a crucial conclusion for the focus of this dissertation – especially in the economic context. "By the same token, as to antitrust jurisdiction, the State on whose territory a cartel was formed may argue that its right to establish jurisdiction [...] prevails over the regulatory claims of States where any adverse territorial effects may be felt."⁵⁵⁹

If several countries now feel and declare themselves juridically competent for a case to be decided and do not want to deviate from this even in view of the possibly good reasons of other countries, the question of how such differences can be settled is obvious. "In order to solve conflicts of jurisdiction, some writers and courts have asserted the primacy of territoriality, on the ground that territoriality is the basic rule of jurisdiction, and other grounds of jurisdiction, the exceptions."⁵⁶⁰ Assuming that this would be applied in practice, this approach cannot settle every dispute. For, as revealed in particular in an example just shown before, there may indeed be cases where several countries could rely on this approach – especially in the context of the business world. Furthermore, "[i]n fact, [...] the international law of jurisdiction does not seem to prioritize the bases of jurisdiction."⁵⁶¹

It is also questionable whether these problems, which are more technical in nature, are the only ones. Because "[m]oreover, even if territoriality were to be seen as being the paramount principle of jurisdiction, normative competency conflicts could not be excluded."⁵⁶² This can be illustrated by looking at and following the example from the business world, and this also enables to draw a connection to the topics in this context already touched upon.

"In the field of economic law in particular, different States may in fact all rely on the territorial principle in order to justify their jurisdictional assertions: either the conduct (or part of it), or the effects of one and the same economic transaction may have occurred within their territory."⁵⁶³

The extraterritorial effects of regulations that are domestically oriented and aim to protect domestic economic interests,⁵⁶⁴ can lead to a practicing country's reckless pursuit of its interests without taking into account the interests and reasons of other countries

⁵⁵⁹ Ryngaert, in: *Jurisdiction in International Law*, p. 143.

⁵⁶⁰ *Ibid.* with further references.

⁵⁶¹ *Ibid.* with further references.

⁵⁶² *Ibid.*, p. 144.

⁵⁶³ *Ibid.*, p. 144.

⁵⁶⁴ Cf. Herdegen, in: *Internationales Wirtschaftsrecht [International Business Law]*, § 3 para. 58.

that might be objectively more legitimate. Such dilemmas are more likely to increase in the future, because, as mentioned at the beginning, in view of the modern separation of tasks in the global economy, expressed, e.g., in very long and diverse supply chains, the regulatory purpose of these domestic regulations can often no longer be fulfilled without covering foreign factual components.⁵⁶⁵ It is therefore on the one hand understandable that states make processes abroad the subject of their national law if they have adverse effects on domestic protected interests.⁵⁶⁶ On the other hand, the previously concluded must be taken into account that "[j]urisdiction is an aspect of sovereignty: it refers to a state's competence under international law to regulate the conduct of natural and juridical persons."⁵⁶⁷ Very few affected countries will willingly hand over this right to a country that wants to enforce its personal financial concerns in a given matter, especially if it is itself affected in some way by that matter. This can lead to conflicts. Thus, one answer to the question which chances, impacts and possibly also problems or challenges extraterritoriality or extraterritorial effective regulations cause, especially in practice, is that a state can pursue its goals and interests with domestic regulations abroad, even if at first glance it is not competent to do so according to the basic theory of the state. Because, as simply summarized beforehand, the "normal case" is that a sovereign state generally has exclusively, and without interference from another state, jurisdiction over issues that occur within the scope of its territory and the persons therein. Looking at the flip side, extraterritoriality can lead to conflicts between states, which could both or all claim to be juridical competent. It is not easy to resolve these conflicts, since the connecting and permissive principles are not preceded by a superordinate system of values, according to which one would take precedence over the other.⁵⁶⁸

Based on the previous findings and the underlying literature, it can be stated that due to the fact that international law, however, does not determine a ranking among the permissible principles and cannot force a state by means of a court decision or similar, the more powerful state usually emerges as the winner from such jurisdictional conflicts or questionable constellations, regardless of the quality of its arguments under international law.

⁵⁶⁵ Cf. Herdegen, in: Internationales Wirtschaftsrecht [International Business Law], § 3 para. 58.

⁵⁶⁶ Cf. *ibid.*

⁵⁶⁷ Crawford, in: Brownlie's Principles of Public International Law, p. 440.

⁵⁶⁸ Cf. Stein/von Buttlar/Kotzur, in: Völkerrecht [International Law], § 35 para. 628.

IV. LkSG in the View of International Law

This chapter focuses on the "Act on Corporate Due Diligence Obligations for the Prevention of Human Rights Violations in Supply Chains (Lieferkettensorgfaltspflichtengesetz – LkSG)", which was passed by the German Bundestag on 16th July 2021 as part of the "Act on Corporate Due Diligence Obligations in Supply Chains".⁵⁶⁹ Having laid the theoretical foundations for the evaluation of the LkSG from the perspective of international law in the previous chapters, it is now possible to go deeper into this analysis. Without the theoretical foundations for this, it would not have been possible to evaluate whether the LkSG reveals extraterritoriality, impacts extraterritorially, and whether this, if present, is also legal from the perspective of international law by linking to one or more of the illustrated principles of international law that permit this. First, a general introduction to the LkSG is given, before the consequences arising from it are discussed. Finally, the extraterritorial impacts of this act are crystallized and reflected upon against the background of the previous results in the view of the international law.

1. Introductory Overview

In order to be able to crystallize and evaluate the extraterritorial impacts of the LkSG, it seems necessary to get to know this act and the reasons for the necessity for it in the first place. The background and considerations of the legislator for the LkSG will be presented as an introduction and then the contents and consequences of the law will be examined.

a. Background for the LkSG in the View of International Law

By way of introduction, it can be said that an extraterritorial duty to safeguard human rights results for the Federal Republic of Germany from international human rights.⁵⁷⁰ For by acceding to international human rights treaties, states assume obligations to "respect, protect and fulfil human rights"⁵⁷¹.⁵⁷² The "duty to respect"⁵⁷³ means that states must refrain from interfering with or curtailing the enjoyment of human rights.⁵⁷⁴

⁵⁶⁹ Cf. Act on Corporate Due Diligence Obligations in Supply Chains, p. 1.

⁵⁷⁰ Cf. Wehrmann, in: Depping/Walden LkSG, § 2 para. 19.

⁵⁷¹ Ibid.

⁵⁷² Cf. *ibid.*

⁵⁷³ Ibid.

⁵⁷⁴ Cf. *ibid.*

The "duty to protect"⁵⁷⁵ requires states to protect individuals and groups from human rights violations.⁵⁷⁶ This includes protection against infringements by third parties, such as companies.⁵⁷⁷ Such a "duty to protect"⁵⁷⁸ can be fulfilled as follows:⁵⁷⁹ "[...] [B]y establishing appropriate laws and regulations, together with monitoring, investigation and accountability procedures to set and enforce standards for the performance of corporations."⁵⁸⁰ In General Comment No. 24, the ECOSOC Committee on Economic, Social and Cultural Rights, in line with the UN Guiding Principles on Economic and Human Rights, specifies the "duty to protect"⁵⁸¹ by stating the following:⁵⁸²

"The obligation to protect entails a positive duty to adopt a legal framework requiring business entities to exercise human rights due diligence in order to identify, prevent and mitigate the risks of violations of Covenant rights, to avoid such rights being abused, and to account for the negative impacts caused or contributed to by their decisions and operations and those of entities they control on the enjoyment of Covenant rights."⁵⁸³

Furthermore, there is a suggestion as to how this could be implemented: "States should adopt measures such as imposing due diligence requirements to prevent abuses of Covenant rights in a business entity's supply chain and by subcontractors, suppliers, franchisees, or other business partners."⁵⁸⁴

The "duty to ensure/fulfil"⁵⁸⁵ means that states must take positive measures to facilitate the enjoyment of fundamental human rights.⁵⁸⁶ Added to these three obligations is the need for States Parties to ensure that individuals also have "access to effective remedy"⁵⁸⁷ in order to assert these rights,⁵⁸⁸ whereby that in the official German translation

⁵⁷⁵ Wehrmann, in: Depping/Walden LkSG, § 2 para. 19.

⁵⁷⁶ Cf. *ibid.*

⁵⁷⁷ Cf. *ibid.* with reference to E/C.12/GC/24, p. 5 para. 14.

⁵⁷⁸ Wehrmann, *op. cit.*, § 2 para. 19.

⁵⁷⁹ Cf. *ibid.*

⁵⁸⁰ E/C.12/2011/1, p. 2 para. 5.

⁵⁸¹ Wehrmann, *op. cit.*, § 2 para. 19.

⁵⁸² Cf. *ibid.*

⁵⁸³ E/C.12/GC/24, p. 5 para. 16 with reference to UN, Guiding Principles on Business and Human Rights, Principles 15 (pp. 15-16) and 17 (pp. 17-18).

⁵⁸⁴ E/C.12/GC/24, p. 5 para. 16.

⁵⁸⁵ Wehrmann, *op. cit.*, § 2 para. 19.

⁵⁸⁶ Cf. *ibid.*

⁵⁸⁷ *ibid.*

⁵⁸⁸ Cf. *ibid.* with reference to UN, International Covenant on Civil and Political Rights, Art. 2 para. 3 and CCPR/C/21/Rev.1/Add. 13, p. 6 para. 15.

of the Civil Covenant has been translated restrictively as the right to lodge an effective complaint^{589, 590}

The Federal Republic of Germany is thus obliged by international law to protect individuals and groups from human rights violations, including by corporations.⁵⁹¹ With Art. 1 para. 2 of the German Constitution, the Federal Republic of Germany or the German people profess inviolable and inalienable human rights as the basis of every human community, of peace and of justice in the world.⁵⁹² For a long time, the Federal Republic of Germany has been pursuing its duty to protect with various legal regulations through which it contributes to protecting the human rights of individuals and groups in Germany from violations by companies.⁵⁹³ With the LkSG, it supplements its "duty to protect"⁵⁹⁴, applies it explicitly to all human rights contained in the UN Civil Covenant and UN Social Covenant, and includes the human rights of individuals and groups outside its territory mentioned in the covenants in the protection against violations by companies based in Germany and their supply chains.⁵⁹⁵

The extraterritorial scope of this "duty to protect"⁵⁹⁶ has been repeatedly emphasized and increasingly elaborated since the beginning of the 21st century.⁵⁹⁷ Already in 2004, the UN Human Rights Committee declared the following in General Comment No. 31 in this regard:⁵⁹⁸ "[...] [A] State party must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that State Party, even if not situated within the territory of the State Party."⁵⁹⁹ In addition, the ECOSOC Committee on Economic, Social and Cultural Rights, in the above-mentioned Declaration on the Obligations of States Parties in 2011, stated as follows:⁶⁰⁰ "States parties should also take steps to prevent human rights contraventions abroad by corporations

⁵⁸⁹ Cf. Wehrmann, in: Depping/Walden LkSG, § 2 para. 19 with reference to the German Act from 15th November 1973 regarding the International Covenant on Civil and Political Rights from 19th December 1966, BGBl. 1973 II 1533, 1535.

⁵⁹⁰ Cf. Wehrmann, op. cit., § 2 para. 19.

⁵⁹¹ Cf. *ibid.*, § 2 para. 20.

⁵⁹² Cf. *ibid.*

⁵⁹³ Cf. *ibid.*

⁵⁹⁴ *Ibid.*, § 2 para. 19.

⁵⁹⁵ Cf. *ibid.*, § 2 para. 20.

⁵⁹⁶ *Ibid.*, § 2 para. 19.

⁵⁹⁷ Cf. *ibid.*, § 2 para. 21.

⁵⁹⁸ Cf. *ibid.*

⁵⁹⁹ CCPR/C/21/Rev.1/Add. 13, p. 4 para. 10.

⁶⁰⁰ Cf. Wehrmann, op. cit., § 2 para. 21.

which have their main offices under their jurisdiction, without infringing the sovereignty or diminishing the obligations of the host States under the Covenant."⁶⁰¹ In 2017, the ECOSOC Committee on Economic, Social and Cultural Rights added that the extraterritorial "duty to protect"⁶⁰² to regulate foreign-related activities of domestically-based companies derives from customary international law,⁶⁰³ in that "Customary international law also prohibits a State from allowing its territory to be used to cause damage on the territory of another State, a requirement that has gained particular relevance in international environmental law."⁶⁰⁴

With regard to the extraterritorial obligations of states in the area of economic, social and cultural rights, the Maastricht Principles⁶⁰⁵, although not formulated and adopted by the UN and thus not binding, but formulated in 2013 by internationally recognized experts, serve significantly as an interpretative aid, to which again the ECOSOC Committee on Economic, Social and Cultural Rights has already referred.⁶⁰⁶ In Section IV of the Maastricht Principles, Principle 23 first states on this matter that "[a]ll States must take action, separately, and jointly through international cooperation, to protect economic, social and cultural rights of persons within their territories and extraterritorially [...]"^{607, 608}

Furthermore, on this topic and in the same section of the Maastricht Principles, the following statement is made in its Principle 24:⁶⁰⁹

"All States must take necessary measures to ensure that non-State actors which they are in a position to regulate [...] such as private individuals and organisations, and transnational corporations and other business enterprises, do not nullify or impair the enjoyment of economic, social and cultural rights."⁶¹⁰

⁶⁰¹ E/C.12/2011/1, p. 2 para. 5.

⁶⁰² Wehrmann, in: Depping/Walden LkSG, § 2 para. 19.

⁶⁰³ Cf. *ibid.*, § 2 para. 21 with reference to E/C.12/GC/24, pp. 8-9 para. 27.

⁶⁰⁴ E/C.12/GC/24, p. 9 para. 27 with further references.

⁶⁰⁵ Cf. Maastricht Principles, pp. 6-13.

⁶⁰⁶ Cf. Wehrmann, *op. cit.*, § 2 para. 22.

⁶⁰⁷ Maastricht Principles, Principle 23, p. 9.

⁶⁰⁸ Cf. Wehrmann, *op. cit.*, § 2 para. 22 with reference to Maastricht Principles, Principles 23 and 24, p. 9.

⁶⁰⁹ Cf. Wehrmann, *op. cit.*, § 2 para. 22 with reference to Maastricht Principles, Principles 23 and 24, p. 9.

⁶¹⁰ Maastricht Principles, Principle 24, p. 9.

Moreover, Principle 25 letter c) describes the conditions under which companies can be regulated.⁶¹¹

"States must adopt and enforce measures to protect economic, social and cultural rights through legal and other means, including diplomatic means [...] as regards business enterprises, where the corporation, or its parent or controlling company, has its centre of activity, is registered or domiciled, or has its main place of business or substantial business activities, in the State concerned [...] [.]"⁶¹²

In addition, Principle 27 adds to these obligations by stating the following:⁶¹³ "All States must cooperate to ensure that non-State actors do not impair the enjoyment of the economic, social and cultural rights of any persons."⁶¹⁴ Beyond that, Principle 27 supplements the subsequent: "This obligation includes measures to prevent human rights abuses by non-State actors, to hold them to account for any such abuses, and to ensure an effective remedy for those affected."⁶¹⁵

Key elements of the Maastricht Principles were included by the ECOSOC Committee on Economic, Social and Cultural Rights in its General Comment No. 24 on the obligations of States under the International Covenant on Economic, Social and Cultural Rights in relation to business activities:⁶¹⁶

"The extraterritorial obligation to protect requires States parties to take steps to prevent and redress infringements of Covenant rights that occur outside their territories due to the activities of business entities over which they can exercise control, especially in cases where the remedies available to victims before the domestic courts of the State where the harm occurs are unavailable or ineffective."⁶¹⁷

General Comment No. 24 para. 31 adds which companies should be regulated by stating that "[t]his obligation extends to any business entities over which States parties may exercise control, in accordance with the Charter of the United Nations and applicable international law [...]"⁶¹⁸ and the following:⁶¹⁹

⁶¹¹ Cf. Wehrmann, in: Depping/Walden LkSG, § 2 para. 22 with reference to Maastricht Principles, Principle 25 c), p. 9.

⁶¹² Maastricht Principles, Principle 25 c), p. 9.

⁶¹³ Cf. Wehrmann, op. cit., § 2 para. 22 with reference to Maastricht Principles, Principle 27, p. 10.

⁶¹⁴ Maastricht Principles, Principle 27, p. 10.

⁶¹⁵ Ibid.

⁶¹⁶ Cf. Wehrmann, op. cit., § 2 para. 23 with reference to Maastricht Principles, pp. 6-13 and E/C.12/GC/24, especially p. 10 paras. 30 and 31.

⁶¹⁷ E/C.12/GC/24, p. 10 para. 30.

⁶¹⁸ Ibid., para. 31 and there with further references.

⁶¹⁹ Cf. Wehrmann, op. cit., § 2 para. 24 with reference to E/C.12/GC/24, p. 10 para. 31 and there with further references.

"Consistent with the admissible scope of jurisdiction under general international law, States may seek to regulate corporations that are domiciled in their territory and/or jurisdiction: this includes corporations incorporated under their laws, or which have their statutory seat, central administration or principal place of business on their national territory."⁶²⁰

Finally, in para. 33 of General Comment No. 24, the extraterritorial concept of the Maastricht Principles is linked to the UN Guiding Principles on Business and Human Rights (Principle 13) by stating the following:⁶²¹

"In discharging their duty to protect, States parties should also require corporations to deploy their best efforts to ensure that entities whose conduct those corporations may influence, such as subsidiaries (including all business entities in which they have invested, whether registered under the State party's laws or under the laws of another State) or business partners (including suppliers, franchisees and subcontractors), respect Covenant rights."⁶²²

Moreover, the subsequent is added there in this regard:⁶²³ "Corporations domiciled in the territory and/or jurisdiction of States parties should be required to act with due diligence to identify, prevent and address abuses to Covenant rights by such subsidiaries and business partners, wherever they may be located."⁶²⁴

Thus, international law imposes an extraterritorial obligation on states to regulate foreign-related activities of domestically based companies and provides a clear recommendation for the adoption of a supply chain law.⁶²⁵

In 2014, the Federal Republic of Germany, like all UN member states, was requested by the Human Rights Council to draw up a NAP for the implementation of the UN Guiding Principles on Business and Human Rights.⁶²⁶ Two years later, the Committee of Ministers of the Council of Europe reinforced the call for the implementation of the

⁶²⁰ E/C.12/GC/24, p. 10 para. 31 with reference to CM/Rec(2016)3, Appendix to Recommendation CM/Rec(2016)3, p. 11 para. 13.

⁶²¹ Cf. Wehrmann, in: Depping/Walden LkSG, § 2 para. 24 with reference to Maastricht Principles, pp. 6-13 and E/C.12/GC/24, pp. 10-11 para. 33 and UN, Guiding Principles on Business and Human Rights, Principle 13 (pp. 14-15).

⁶²² E/C.12/GC/24, p. 10 para. 33.

⁶²³ Cf. Wehrmann, op. cit., § 2 para. 24 with reference to Maastricht Principles, pp. 6-13 and E/C.12/GC/24, pp. 10-11 para. 33 and UN, op. cit., Principle 13 (pp. 14-15).

⁶²⁴ E/C.12/GC/24, pp. 10-11 para. 33 with reference to UN, op. cit., Principle 13 (pp. 14-15).

⁶²⁵ Cf. Wehrmann, op. cit., § 2 para. 25.

⁶²⁶ Cf. *ibid.*, § 2 para. 26 with reference to A/HRC/RES/26/22, especially p. 2.

UN Guiding Principles on Business and Human Rights in general and the establishment of a NAP with its already further mentioned Recommendation on Business and Human Rights.⁶²⁷ The German government presented the NAP in December 2016 after an almost two-year consultation and negotiation process.⁶²⁸ It contains a number of measures that were gradually implemented by the responsible ministries.⁶²⁹ Companies were only expected to introduce the core elements of human rights due diligence, but this was combined with the indication that a legal obligation may be created if the target of 50% of companies with more than 500 employees in Germany did not comply with this expectation.⁶³⁰ As the result of the NAP monitoring in 2020 then showed, the target was not achieved to the politically hoped-for extent through a corresponding perception of corporate self-responsibility, because the hoped-for broad impact of the voluntary incentives in the NAP fell short of expectations, and four years after the NAP was adopted it was clear that only 13-17% of German companies with over 500 employees integrated the measures laid down in the NAP into their corporate processes.⁶³¹ Consequently, on 16th July 2021, the respective act was passed, of which the LkSG is the integral part (as Art. 1).⁶³²

b. Reasons for the LkSG and Placement

Building on this background to the LkSG, the content-related reasons for this act are now to be explored and the act will be placed in the respective current legal world. Both was formulated in the explanatory memorandum to the LkSG and will be presented below as a basis for further consideration.

According to the explanatory memorandum this act serves to improve the international human rights situation by responsibly shaping the supply chains of companies based in the Federal Republic of Germany.⁶³³ Companies based in Germany above a certain size are obliged to better fulfil their responsibility in the supply chain with regard to respect for internationally recognized human rights by implementing the core elements of human rights due diligence.⁶³⁴

⁶²⁷ Cf. Wehrmann, in: Depping/Walden LkSG, § 2 para. 26 with reference to CM/Rec(2016)3, Appendix to Recommendation CM/Rec(2016)3, especially pp. 10-11 letter b.

⁶²⁸ Cf. Wehrmann, op. cit., § 2 para. 26 with reference to NAP, especially pp. 4-28.

⁶²⁹ Cf. Wehrmann, op. cit., § 2 para. 26 with reference to NAP, especially pp. 4-28.

⁶³⁰ Cf. Wehrmann, op. cit., § 2 para. 26 with reference to NAP, especially p. 10.

⁶³¹ Cf. Wagner/Ruttloff/Wagner, in: Wagner/Ruttloff/Wagner LkSG, Preface, p. X.

⁶³² Cf. Act on Corporate Due Diligence Obligations in Supply Chains, pp. 1-21.

⁶³³ Cf. BT-Drucks. 19/28649, p. 23.

⁶³⁴ Cf. *ibid.*

Due to the high level of international integration of its economy, the Federal Republic of Germany would, according to the explanatory memorandum, bear a special responsibility for sustainable and fair world trade.⁶³⁵ Its economic model of the social market economy would stand for protecting the freedom of the economy and functioning competition, for ensuring prosperity and social security, for living social partnership, free trade unions, far-reaching labor law and occupational health and safety, and for protecting the environment.⁶³⁶

Pursuant to the explanatory memorandum, in recent decades, the importance of corporate responsibility in transnational activities has steadily increased.⁶³⁷ In 2011, with the UN Guiding Principles on Business and Human Rights, the global community for the first time created a global standard of conduct for companies to respect human rights in supply chains.⁶³⁸ The legally non-binding human rights due diligence obligations enshrined in the Guiding Principles have been incorporated into the main ILO and OECD frameworks on responsible corporate governance.⁶³⁹ At the same time, they form the basis for the National Action Plan on Business and Human Rights (NAP), which the Federal Government adopted in 2016.⁶⁴⁰

Because of their strong integration into global sales and procurement markets, German companies are, according to the explanatory memorandum, particularly confronted with human rights challenges in their supply chains.⁶⁴¹ This would apply in particular to economically important sectors such as the automotive industry, mechanical engineering, the metal industry, chemicals, textiles, food and luxury goods, wholesale and retail, the electronics industry and energy suppliers.⁶⁴²

As per the explanatory memorandum, in the course of the implementation of the NAP, it has become clear that a voluntary commitment is not sufficient for companies to adequately fulfil their human rights due diligence.⁶⁴³ Therefore, a legal anchoring with official enforcement mechanisms would have been necessary.⁶⁴⁴

⁶³⁵ Cf. BT-Drucks. 19/28649, p. 23.

⁶³⁶ Cf. *ibid.*

⁶³⁷ Cf. *ibid.*

⁶³⁸ Cf. *ibid.*

⁶³⁹ Cf. *ibid.*

⁶⁴⁰ Cf. *ibid.*

⁶⁴¹ Cf. *ibid.*

⁶⁴² Cf. *ibid.*

⁶⁴³ Cf. *ibid.*

⁶⁴⁴ Cf. *ibid.*

At the same time, this would lay the foundation for a uniform understanding of the depth and breadth of corporate responsibility and its coherent implementation.⁶⁴⁵ It would set out what companies must do to comply with their human rights due diligence obligations and where the limits of their duty to act lie.⁶⁴⁶ Already now, violations of legal positions protected by human rights would represent an incalculable reputational risk for many companies.⁶⁴⁷ This would be especially true for companies with direct contact to consumers.⁶⁴⁸ According to the explanatory memorandum, a growing number of companies have therefore already taken action and concluded corresponding agreements with their suppliers.⁶⁴⁹ Due to the lack of government regulations, the requirements of the contracting companies, which they pass on to their suppliers, would vary greatly.⁶⁵⁰ Therefore, there would have been a need for political action to intervene in a regulatory way and to create a common framework.⁶⁵¹ Pursuant to the explanatory memorandum, the law wanted to avoid additional burdens for small and medium-sized enterprises and limit itself to requirements for large enterprises that are practicable, proportionate and can be implemented without excessive bureaucracy.⁶⁵²

The due diligence requirements enshrined in the law are, as per the explanatory memorandum, based on the generally recognized due diligence standard of the UN Guiding Principles on Business and Human Rights and the NAP, what would be already increasingly being applied in practice.⁶⁵³ It would also cover environmental protection and anti-corruption, insofar as human rights are directly affected by environmental damage or corruption or international environmental agreements are explicitly referred to.⁶⁵⁴

The act fits, according to the explanatory memorandum, into a recent legal development at the EU level and in individual states that pursues the goal of responsible and sustainable global business.⁶⁵⁵ Examples would include the UK's Modern Slavery Act of 2015, the French Due Diligence Act of 2017 and the Dutch Child Labor Act adopted

⁶⁴⁵ Cf. BT-Drucks. 19/28649, p. 23.

⁶⁴⁶ Cf. *ibid.*

⁶⁴⁷ Cf. *ibid.*

⁶⁴⁸ Cf. *ibid.*

⁶⁴⁹ Cf. *ibid.*

⁶⁵⁰ Cf. *ibid.*

⁶⁵¹ Cf. *ibid.*

⁶⁵² Cf. *ibid.*

⁶⁵³ Cf. *ibid.*

⁶⁵⁴ Cf. *ibid.*, p. 24.

⁶⁵⁵ Cf. *ibid.*

in 2019.⁶⁵⁶ The EU Timber Regulation of 2013 would enshrine due diligence requirements to prevent illegal logging worldwide, the EU Conflict Minerals Regulation, which entered into force in 2021, would describe due diligence standards in accordance with the relevant OECD Guidelines for the Prevention of Trade in Conflict Minerals.⁶⁵⁷

Moreover, "[o]n 23 February 2022, the European Commission presented a Proposal for a Directive Corporate Sustainability Due Diligence."⁶⁵⁸ The draft Corporate Sustainability Due Diligence Directive (CSDDD) includes both human rights and environmental due diligence as well as rules on corporate governance, with the objective of ensuring that EU enterprises apply specific due diligence rules to avoid adverse impacts of their company's operations on human rights and the environment in their value chains inside as well as outside of Europe.⁶⁵⁹ These objective is in line with those of the LkSG and the draft leans tightly to the LkSG regarding its key aspects.⁶⁶⁰ "The next step of the EU legislative process is the trilogue in which the Council, the European Parliament and the Commission will negotiate to finalize the directive."⁶⁶¹ Starting point for these proceedings has been initially scheduled for spring 2023 aiming to pass the corresponding act before the end of 2023.⁶⁶² At the cut-off date of the literature research of this dissertation, there was no newer information known yet. "After the entry into force, the member states have to translate the directive into national law after two years at the latest."⁶⁶³ As a result, the LkSG might need to be adapted along the lines of the Directive.⁶⁶⁴

c. Essential and Selected Contents of the LkSG

This chapter is dedicated to the essential contents of the LkSG, whereby, in order to remain within the given framework, no claim is made to completeness, but rather it was filtered in the light of the overarching research objective and from the perspective of international law.

⁶⁵⁶ Cf. BT-Drucks. 19/28649, p. 24.

⁶⁵⁷ Cf. *ibid.*

⁶⁵⁸ BMAS, EU supply chain law initiative.

⁶⁵⁹ Cf. *ibid.* and see for the CSDDD European Commission, COM(2022) 71 final, 2022/0051 (COD).

⁶⁶⁰ Cf. BMAS, *op. cit.*

⁶⁶¹ *Ibid.*

⁶⁶² Cf. *ibid.*

⁶⁶³ *Ibid.*

⁶⁶⁴ Cf. *ibid.*

(aa) Scope and Definitions

According to Art. 5 para. 1 of the overarching Act on Corporate Due Diligence Obligations in Supply Chains this act entered into force on 1st January 2023 (subject to para. 2). Consequently, since this date, according to § 1 para. 1 sentence 1 LkSG, this act applies to enterprises regardless of their legal form that

1. have their central administration, their principal place of business, their administrative headquarters or their statutory seat in Germany and
2. that normally have at least 3.000 employees in Germany; employees posted abroad are included.

As per § 1 para. 1 sentence 2 LkSG, notwithstanding sentence 1 no. 1, this act also applies to enterprises regardless of their legal form that

1. have a domestic branch office pursuant to § 13d of the HGB and
2. that normally have at least 3.000 employees in Germany.

Sentence 3 expands the with "Scope of application" titled § 1 LkSG further by determining that from 1st January 2024 the thresholds stipulated in sentence 1 no. 2 and sentence 2 no. 2 amount to 1.000 employees, respectively.

The § 2 LkSG headed "Definitions" provides what protected legal positions the LkSG addresses (para. 1), what the LkSG understands under a human rights risk (para. 2), under an environment-related risk (para. 3) or under a violation of a human rights-related obligation (para. 4).

Having in mind the overarching research objective and the title of this work, there are some explained terms in § 2 LkSG, which call attention.

As per § 2 para. 5 sentence 1 LkSG refers the supply chain within the meaning of this act to all products and services of an enterprise. According to § 2 para. 5 sentence 2 LkSG it includes all steps in Germany and abroad that are necessary to produce the products and provide the services, starting from the extraction of the raw materials to the delivery to the end customer and includes

1. the actions of an enterprise in its own business area,
2. the actions of direct suppliers and
3. the actions of indirect suppliers.

The next one comes from § 2 para. 6 sentence 1 LkSG, which characterizes that the own business area within the meaning of this act covers every activity of the enterprise

to achieve the business objective. Pursuant to § 2 para. 6 sentence 2 LkSG this includes any activity for the creation and exploitation of products and services, regardless of whether it is carried out at a location in Germany or abroad. Based on § 2 para. 6 sentence 3 LkSG, in affiliated enterprises, the parent company's own business area includes a group company if the parent company exercises a decisive influence on the group company.

Furthermore, § 2 para. 7 LkSG describes that a direct supplier within the meaning of this act is a partner to a contract for the supply of goods or the provision of services whose supplies are necessary for the production of the enterprise's product or for the provision and use of the relevant service.

Moreover, § 2 para. 8 LkSG determines that an indirect supplier within the meaning of this act is any enterprise which is not a direct supplier and whose supplies are necessary for the production of the enterprise's product or for the provision and use of the relevant service.

(bb) Requirements and Sanctions

Insofar as the scope of application from § 1 LkSG is opened in relation to individual subjects, § 3 LkSG, entitled "Due diligence obligations", sets out what is then expected of them under this act. According to § 3 para. 1 sentence 1 LkSG are enterprises under an obligation to exercise due regard for the human rights and environment-related due diligence obligations set out in this division in their supply chains with the aim of preventing or minimizing any risks to human rights or environment-related risks or of ending the violation of human rights-related or environment-related obligations. As per § 3 para. 1 sentence 2 LkSG the due diligence obligations include

1. establishing a risk management system (§ 4 para. 1 LkSG),
2. designating a responsible person or persons within the enterprise (§ 4 para. 3 LkSG),
3. performing regular risk analyses (§ 5 LkSG),
4. issuing a policy statement (§ 6 para. 2 LkSG),
5. laying down preventive measures in its own area of business (§ 6 para. 1 and 3 LkSG) and vis-à-vis direct suppliers (§ 6 para. 4 LkSG),
6. taking remedial action (§ 7 para. 1 to 3 LkSG),
7. establishing a complaints procedure (§ 8 LkSG),

8. implementing due diligence obligations with regard to risks at indirect suppliers (§ 9 LkSG) and
9. documenting (§ 10 para. 1 LkSG) and reporting (§ 10 para. 2 LkSG).

In § 3 para. 2 LkSG the appropriate manner of acting in accordance with the due diligence obligations is determined according to

1. the nature and extent of the enterprise's business activities,
2. the ability of the enterprise to influence the party directly responsible for a risk to human rights or environment-related risk or the violation of a human rights-related or environment-related obligation,
3. the severity of the violation that can typically be expected, the reversibility of the violation, and the probability of the occurrence of a violation of a human rights-related or an environment-related obligation as well as
4. the nature of the causal contribution of the enterprise to the risk to human rights or environment-related risk or to the violation of a human rights-related or environment-related obligation.

The § 3 para. 3 sentence 1 LkSG provides an important hint in the form that a violation of the obligations under this act does not give rise to any liability under civil law. But § 3 para. 3 sentence 2 LkSG states that any liability under civil law arising independently of this act remains unaffected.

Based on § 14 para. 1 LkSG, the competent authority (which is according to § 19 para. 1 sentence 1 LkSG the Federal Office for Economic Affairs and Export Control of Germany) will take action:

1. ex officio, in the proper exercise of its discretion,
 - a) to monitor compliance with the obligations under §§ 3 to 10 para. 1 with regard to possible human rights and environment-related risks as well as violations of a human-rights related or environment-related obligation and
 - b) to detect, end and prevent violations of obligations under letter a;
2. upon request, if the person making the request makes a substantiated claim
 - a) that he or she has been violated in his or her protected legal position as a result of the non-fulfilment of an obligation contained in §§ 3 to 9 or
 - b) that a violation referred to in letter a) is imminent.

Following § 15 sentence 1 LkSG, the competent authority makes the appropriate and necessary orders and takes the appropriate and necessary measures to detect, end and prevent violations of the obligations under § 3 to 10 para. 1 LkSG. Therefore, according to § 15 sentence 2 LkSG, it may in particular

1. summon people,
2. order the enterprise to submit, within three months of the notification of the order, a corrective action plan, including clear timelines for its implementation and
3. require the enterprise to take specific action to fulfil its obligations.

The § 16 LkSG states that insofar as this is necessary for the performance of the duties pursuant to § 14 LkSG, the competent authority and its representatives are authorized

1. to enter and inspect the enterprise's premises, offices and commercial buildings during normal business or operating hours and
2. to inspect and examine, within normal business or operating hours, the enterprise's business documents and records from which it is possible to deduce whether the due diligence obligations under §§ 3 to 10 para. 1 LkSG have been complied with.

Enterprises and persons summoned pursuant to § 15 sentence 2 number 1 LkSG are according to § 17 para. 1 sentence 1 LkSG obliged to provide the competent authority, upon request, with the information and to surrender the documents required by the authority to carry out the duties assigned to it by this act or on the basis of this act – except in the case of the requirements of § 17 para. 3 LkSG. The § 17 para. 1 sentence 2 LkSG goes further as it determines that the obligation also extends to information on affiliated enterprises (§ 15 of the Stock Corporation Act of Germany (AktG)), direct and indirect suppliers and the surrender of documents of these enterprises insofar as the enterprise or person obliged to provide information or surrender documents has the information at its disposal or is in a position to obtain the requested information due to existing contractual relationships.

As per § 18 sentence 1 LkSG, the enterprises must tolerate the measures of the competent authority and its representatives and support them in the implementation of the measures. Furthermore, by virtue of § 18 sentence 2 LkSG, sentence 1 also applies to

the enterprise owners and their representatives, and in the case of legal persons, to the persons appointed to represent them by law or under the legal person's statutes.

It is obvious that all this can cost the companies concerned a lot of resources and can thus already be seen indirectly as a sanction itself. The LkSG also contains other possible sanctions. Thus, § 24 para. 1 LkSG provides the determinations for possible administrative offences under the LkSG. The § 24 para. 2 LkSG provides the different levels of fines for the catalogue of administrative offences under § 24 para. 2 LkSG. According to § 24 para. 3 sentence 1 LkSG a regulatory offence under para. 1 no. 6 or 7 a) may be punished with an administrative fine of up to 2 percent of the average annual turnover (in cases of a legal person or association of persons with an average annual turnover of more than 400 million euros) in derogation from para. 2 sentence 2 in conjunction with sentence 1 number 1 b). This threshold can be reached quickly, as § 24 para. 3 sentence 2 LkSG stipulates that the calculation of the average annual turnover of the legal person or association of persons is based on the worldwide turnover of all natural and legal persons as well as all associations of persons in the last three financial years preceding the decision by the authority insofar as these persons and associations of persons operate as an economic unit.

Another potentially painful sanction is that arising from § 22 para. 1 sentence 1 LkSG which has the headline "Exclusion from the award of public contracts" and states that enterprises that have been fined in accordance with § 24 para. 2 for a violation under § 24 para. 1 that has been established by final and binding decision shall, as a rule, be excluded from participation in a procedure for the award of a supply, works or service contract by the contracting authorities referred to in §§ 99 and 100 of the Act against Restraints of Competition of Germany (GWB) until they have proved that they have cleared themselves in accordance with § 125 GWB. In § 99 GWB the contracting authorities and in § 100 GWB the sector contracting authorities are defined.

d. Special Focus on the Scope of the LkSG

As briefly shown above, the scope of application of the LkSG is legally defined in § 1 LkSG.⁶⁶⁵ In this framework, both the company-related (personal) and the territorial scope of application are addressed.⁶⁶⁶ In principle, companies with a robust connection

⁶⁶⁵ Cf. Falder/Frank-Fehle/Poleacov, in: LkSG, p. 5.

⁶⁶⁶ Cf. *ibid.*

to the Federal Republic of Germany and at least 3.000 (from 1st January 2024: 1.000) employees are covered.⁶⁶⁷ These are initially about 900, of which about 700 are German companies, and then a total of about 4.800, of which about 2.900 are German companies.⁶⁶⁸ In this context, § 1 para. 3 LkSG provides for the calculation of the number of employees and thus for the opening of the scope of application in the case of affiliated companies (§ 15 AktG) that subsidiaries and sub-subsidiaries, as well as sister companies and their subsidiaries and sub-subsidiaries, are to be included.⁶⁶⁹ The industry in which the company operates does not matter.⁶⁷⁰ Even though the regulation regarding the scope of application is basically detailed, questions remain regarding an indirect scope of application.⁶⁷¹ The legislator differentiates between direct and indirect suppliers within the supply chain and accordingly sets different requirements for the different types of suppliers.⁶⁷² Point of application here is companies based in Germany.⁶⁷³ Although the legal definition of enterprises is made in a concrete degree, questions remain open, especially with regard to the geographical, i.e., company-related scope of application.⁶⁷⁴

The German legislator has been strongly guided by the principle of territoriality in regulating the personal scope of application of the LkSG.⁶⁷⁵ Companies with a domestic connection are covered by the scope of application of the LkSG, regardless of their legal form.⁶⁷⁶ Within the meaning of § 1 para. 1 sentence 1 No. 1 LkSG, a domestic connection may result from the fact that the central administration, the principal place of business, the administrative headquarters or the statutory seat is in the Federal Republic of Germany.⁶⁷⁷ In the absence of any indications to the contrary in the act or its explanatory memorandum, it follows that it will be possible to rely on the definitions of the connecting factors for a domestic connection set out in § 1 para. 1 sentence 1 No. 1 LkSG, which are established in other areas of law.⁶⁷⁸

⁶⁶⁷ Cf. Falder/Frank-Fehle/Poleacov, in: LkSG, p. 5.

⁶⁶⁸ Cf. Grabosch, in: Grabosch/LkSG, § 2 para. 3.

⁶⁶⁹ Cf. Falder/Frank-Fehle/Poleacov, op. cit., p. 10.

⁶⁷⁰ Cf. Johann/Wildfeuer, in: Johann/Sangi LkSG, § 1 para. 2 with further references.

⁶⁷¹ Cf. Falder/Frank-Fehle/Poleacov, op. cit., p. 5.

⁶⁷² Cf. *ibid.*

⁶⁷³ Cf. *ibid.*, p. 6.

⁶⁷⁴ Cf. *ibid.*

⁶⁷⁵ Cf. Grabosch, op. cit., § 3 para. 9.

⁶⁷⁶ Cf. Falder/Frank-Fehle/Poleacov, op. cit., p. 7.

⁶⁷⁷ Cf. *ibid.*

⁶⁷⁸ Cf. Johann/Wildfeuer, op. cit., § 1 para. 9.

The terms "central administration", "principal place of business" and "administrative headquarters" originate from European Union law, so that their use and definition is harmonized and their terminology and systematics have already been used in several directives and transposition laws (e.g. the General Data Protection Regulation – GDPR).⁶⁷⁹ Often these terms are further filled with criteria by the jurisprudence of national courts.⁶⁸⁰ The central administration is to be understood as the place where the formation of the will and – objectively recognizable for third parties – the actual entrepreneurial management of the company takes place, i.e., usually the seat of the organs, in the case of a company integrated in a group, however, not the seat of the group management, but the seat of the organs of that dependent company which wants to claim the right of establishment.⁶⁸¹ In principle, indications for determining the place of the central administration can also be drawn from Art. 3 para. 1 of the European Insolvency Regulation, which refers to the "centre of main interests".⁶⁸²

The principal place of business represents the actual business focus and, from a business perspective, the centre of operations, which in the case of a factory is the central production site or other location where the essential human or material resources are concentrated.⁶⁸³ Thus, in the present context, central administration and principal place of business may correctly differ, if the entrepreneurial management (administration) and the economic focus of the activity (production) are located in different places.⁶⁸⁴ The administrative headquarters is the place from which the company's business is permanently and actually managed, i.e., the place of activity of the management and the representative bodies appointed for this purpose.⁶⁸⁵ Therefore, it is decisive where the fundamental decisions of the management are effectively implemented in the day-to-day operations of the company.⁶⁸⁶ For *Walden*, it is unclear which cases the legislator intended to additionally cover with the administrative headquarters in distinction to the concept of the central administration.⁶⁸⁷ According to *Grabosch*, the terms are

⁶⁷⁹ Cf. Falder/Frank-Fehle/Poleacov, in: LkSG, p. 7.

⁶⁸⁰ Cf. *ibid.*

⁶⁸¹ Cf. *ibid.*

⁶⁸² Cf. *ibid.*

⁶⁸³ Cf. *ibid.*

⁶⁸⁴ Cf. *Walden*, in: Depping/Walden LkSG, § 1 para. 48.

⁶⁸⁵ Cf. Falder/Frank-Fehle/Poleacov, *op. cit.*, p. 7.

⁶⁸⁶ Cf. *ibid.*

⁶⁸⁷ Cf. *Walden*, *op. cit.*, § 1 para. 51.

synonymous.⁶⁸⁸ The administrative headquarters is to be distinguished from the statutory seat of the company, but can be equated with the concept of the place of management, which has become entrenched in tax law.⁶⁸⁹ The statutory seat is the place in domestic territory determined by the articles of association or the partnership agreement, whereby the statutory seat and the administrative headquarters of the company do not have to be identical.⁶⁹⁰ It is assumed by the German legislator that the relevant decisions regarding the risk management of supply chains are made in these "control centres" and insofar justify the applicability of the LkSG, which conversely means that an foundation according to German law is not required.⁶⁹¹ Thus, the scope of application also includes companies that were founded abroad and establish the corresponding domestic connection by the fact that the "control centre" (central administration, principal place of business or administrative headquarters) is located in Germany.⁶⁹²

Beyond the domestic connection as a result of a "control centre" in Germany, the scope of application of the LkSG within the meaning of § 1 para. 1 sentence 2 No. 1 LkSG also extends to all branches, pursuant to § 13d HGB, of foreign companies registered in the German commercial register, irrespective of whether their central administration or administrative headquarters are located in Germany.⁶⁹³ Accordingly, a branch is deemed to exist if a foreign company has a sufficiently independent place of business domestically (in Germany) which is physically separate from the main place of business and which represents a further centre of business.⁶⁹⁴ The foreign company itself is then liable, not the branches.⁶⁹⁵

All in all, it can be summarized that with regard to the territorial or geographical scope of application of the LkSG, the companies must have a domestic connection to Germany.⁶⁹⁶ The provision of § 2 para. 5 sentence 2 LkSG clarifies that all steps in Ger-

⁶⁸⁸ Cf. Grabosch, in: Grabosch/LkSG, § 3 para. 11.

⁶⁸⁹ Cf. Falder/Frank-Fehle/Poleacov, in: LkSG, p. 8.

⁶⁹⁰ Cf. *ibid.*

⁶⁹¹ Cf. *ibid.*

⁶⁹² Cf. *ibid.*

⁶⁹³ Cf. *ibid.*

⁶⁹⁴ Cf. Walden, in: Depping/Walden LkSG, § 1 para. 56.

⁶⁹⁵ Cf. Wagner/Wagner/Schuler, in: Wagner/Ruttloff/Wagner LkSG, § 1 para. 4 with further references.

⁶⁹⁶ Cf. Falder/Frank-Fehle/Poleacov, *op. cit.*, p. 10.

many and abroad that are necessary for the production of the products and the provision of the services are included in the supply chain definition.⁶⁹⁷ As a result, companies are also subject to due diligence and investigation obligations across German borders, and the LkSG, as defined in § 2 para. 5 sentence 2 LkSG, extends not only to actions within the company's own business area, but also to direct suppliers and indirect suppliers, whereby suppliers need only have a connection to the supply chain of a company based in Germany.⁶⁹⁸ Following on from this, § 2 para. 6 sentence 2 LkSG defines the entrepreneurial business area, according to which every activity for the production, creation and utilization of products and for the provision of services is covered, regardless of whether it is carried out at a location in Germany or abroad.⁶⁹⁹ Hence, this applies irrespective of whether the facts of the case triggering the obligation take place abroad, because there is no restriction to German facts.⁷⁰⁰

In this respect, the territorial scope of application of the LkSG with regard to production processes and service provision also extends abroad, insofar as production or service provision takes place abroad.⁷⁰¹ This might be the rule rather than the exception in a globalized business world, especially for companies with a size of more than 3.000 or 1.000 employees. Once again, this demonstrates the importance of exploring and researching the extraterritorial impacts of the LkSG and the significance of the work presented here.

e. Special Focus on the Supply Chain in the Meaning of the LkSG

Due diligence as defined by the LkSG must be applied in the enterprise's own business area and in the supply chain.⁷⁰² Nowadays, companies are generally dependent on subcontracting and suppliers.⁷⁰³ Only a few companies operate exclusively in Germany.⁷⁰⁴ Thus, it is not unusual for suppliers to come from abroad and this results in the fact that almost every company has an economic influence – even on business partners abroad.⁷⁰⁵ Companies that organize their supply chains in an economically integrative

⁶⁹⁷ Cf. Falder/Frank-Fehle/Poleacov, in: LkSG, p. 10.

⁶⁹⁸ Cf. *ibid.*

⁶⁹⁹ Cf. *ibid.*

⁷⁰⁰ Cf. Wagner/Wagner/Schuler, in: Wagner/Ruttloff/Wagner LkSG, § 1 para. 4 with reference to BMAS, LkSG FAQ, IV.12.

⁷⁰¹ Cf. Falder/Frank-Fehle/Poleacov, *op. cit.*, p. 10.

⁷⁰² Cf. Grabosch, in: Grabosch/LkSG, § 2 para. 35.

⁷⁰³ Cf. Falder/Frank-Fehle/Poleacov, *op. cit.*, p. 40.

⁷⁰⁴ Cf. *ibid.*

⁷⁰⁵ Cf. *ibid.*

way also support economic development abroad by creating jobs or higher incomes.⁷⁰⁶ Indirectly, sustainability as well as social and ecological development can thus be significantly influenced across borders.⁷⁰⁷ This has prompted German lawmakers to require larger companies based in Germany to improve human rights and environmental conditions along their own supply chains by implementing due diligence obligations.⁷⁰⁸ In this context, the meaning of the term "supply chain" is of central importance.⁷⁰⁹

The already presented § 2 para. 5 LkSG contains a legal definition of the supply chain, whereby the term refers to the products produced and services rendered by a company and covers all steps that are necessary for this domestically and abroad.⁷¹⁰ However, the legislator has refrained from taking a clear position on the scope of the supply chain within the meaning of § 2 para. 5 LkSG, because although it has included an explicit legal definition there, this remains unclear, which is questionable in view of the central importance of the term supply chain for the scope of due diligence obligations.⁷¹¹

Neither the law nor the explanatory memorandum explains what is meant by necessity.⁷¹² Ultimately, no minimum can be interpreted from this, but each component of a manufacturing process will have to be regarded as necessary in case of doubt.⁷¹³ The wording of § 2 para. 5 sentence 2 LkSG could suggest that only product-specific required value-added steps are to be taken into account.⁷¹⁴ However, this is contradicted by the explanatory memorandum, which suggests a broad understanding of the supply chain and speaks of steps necessary for the manufacture of products.⁷¹⁵ That is upheld by the current view of the competent authority, which states that "[t]he term 'necessary' must be understood broadly."⁷¹⁶ What is decisive is that the component or service fulfils a function in the end product or plays a role in the manufacturing process and the manufacturing process would not function smoothly if the raw material, component or

⁷⁰⁶ Cf. Falder/Frank-Fehle/Poleacov, in: LkSG, p. 40.

⁷⁰⁷ Cf. *ibid.*

⁷⁰⁸ Cf. *ibid.*

⁷⁰⁹ Cf. *ibid.*

⁷¹⁰ Cf. *ibid.*

⁷¹¹ Cf. Walden, in: Depping/Walden LkSG, § 2 para. 497.

⁷¹² Cf. Falder/Frank-Fehle/Poleacov, *op. cit.*, p. 41.

⁷¹³ Cf. *ibid.*

⁷¹⁴ Cf. Grabosch, in: Grabosch/LkSG, § 2 para. 38.

⁷¹⁵ Cf. *ibid.* with reference to BT-Drucks. 19/28649, p. 40.

⁷¹⁶ BMAS, LkSG FAQ, II.4.

service were omitted.⁷¹⁷ With their current view, the competent authority also provide an indication so that "[f]or example, an industrial enterprise's office supplies are also covered."⁷¹⁸

The obtaining of raw materials is the beginning of the supply chain and the end is usually the delivery of the product to the end customer.⁷¹⁹ Depending on the type of product or service,⁷²⁰ the components of the supply chain can vary, especially at the level of indirect suppliers, there can basically be any number of ramifications.⁷²¹ This also includes the use of services that are necessary for the production of the product (e.g., the transport or temporary storage of goods as well as financial services such as loans and insurance).⁷²²

Furthermore, it is not clearly regulated whether the supply chain of the addressees of the LkSG only covers the "upstream"⁷²³ area from their point of view or also the "downstream"⁷²⁴ area.⁷²⁵ According to the current view of the authorities (from 27th February 2023), the due diligence obligations should not refer to the "downstream"⁷²⁶ area.⁷²⁷ "In the case of direct suppliers and indirect suppliers the due diligence obligations refer to the risks within the own business area pursuant to section 2 (5) LkSG."⁷²⁸

The due diligence obligations apply primarily to the actions of the company in its own business area.⁷²⁹ This is defined in the already presented § 2 para. 6 LkSG and covers every activity of the company to achieve the company's goal.⁷³⁰ In this directly influenceable area, the primary and immediate due diligence obligations apply.⁷³¹ It is explicitly stated in § 2 para. 6 LkSG that every activity for the creation and com-

⁷¹⁷ Cf. Grabosch, in: Grabosch/LkSG, § 2 para. 38.

⁷¹⁸ BMAS, LkSG FAQ, II.4.

⁷¹⁹ Cf. Falder/Frank-Fehle/Poleacov, in: LkSG, p. 41.

⁷²⁰ See for a more detailed overview of this and the distinction in the production of goods and of financial services as example *ibid.*

⁷²¹ Cf. *ibid.*

⁷²² Cf. *ibid.*

⁷²³ Walden, in: Depping/Walden LkSG, § 2 para. 497.

⁷²⁴ *Ibid.*

⁷²⁵ Cf. *ibid.*

⁷²⁶ *Ibid.*

⁷²⁷ Cf. *ibid.* with reference to BMAS, LkSG FAQ, VI.7., what is now VI.8., which is due to the fact that BMAS, LkSG FAQ regularly receive an update.

⁷²⁸ BMAS, *op. cit.*, VI.8.

⁷²⁹ Cf. Falder/Frank-Fehle/Poleacov, *op. cit.*, p. 42.

⁷³⁰ Cf. *ibid.*

⁷³¹ Cf. *ibid.*

mercialization of products is covered if the company concerned maintains several locations at which the company itself creates or commercializes products or services, which applies irrespective of the question of location.⁷³² In this respect, activities can be carried out domestically or abroad at the registered office, branch office, subsidiary or production site of a company.⁷³³ Decisive factor is that the location is part of the company as a legal entity (possibly with reference to a group).⁷³⁴

Furthermore, since the supply chain includes all steps from the obtaining of raw materials to the final delivery to the end customer, all direct and indirect suppliers are included.⁷³⁵ Because the suppliers in the sense of § 2 paras. 7 and 8 LkSG are part of the supply chain in the sense of § 2 para. 5 LkSG, the terms and their interpretation are interrelated.⁷³⁶

The responsibility and actual liability of the companies directly subject to the LkSG is measured according to the degree of closeness as well as the possibility of knowledge and influence with regard to the respective supplier (direct/indirect) and follows a graduated system.⁷³⁷ By its very nature, the company falling within the scope of the LkSG has a greater influence on a direct supplier than on its sub-suppliers (so-called indirect suppliers), which the German legislator takes into account by imposing more extensive obligations on companies with regard to the first group (direct suppliers).⁷³⁸

Nevertheless, the point of reference for determining the supply chain within the meaning of the LkSG always remains the respective products and services of the company covered by the LkSG.⁷³⁹ The cumulative list of further criteria for determining the supply chain in § 2 para. 5 sentence 2 LkSG shows that the supply chain in the sense of this law does not include every action, but only such actions that represent a step necessary for the production of the products or the provision of the services of the company affected by the LkSG.⁷⁴⁰ This applies first to the own business area of the

⁷³² Cf. Falder/Frank-Fehle/Poleacov, in: LkSG, p. 42.

⁷³³ Cf. *ibid.*

⁷³⁴ Cf. *ibid.*

⁷³⁵ Cf. *ibid.*, p. 43.

⁷³⁶ Cf. Walden, in: Depping/Walden LkSG, § 2 para. 610.

⁷³⁷ Cf. Falder/Frank-Fehle/Poleacov, *op. cit.*, p. 43.

⁷³⁸ Cf. *ibid.*

⁷³⁹ Cf. Walden, *op. cit.*, § 2 para. 552.

⁷⁴⁰ Cf. *ibid.*

company directly affected by the LkSG, because other business activities of the company do not belong to its supply chain.⁷⁴¹ Furthermore, it also applies to this company's direct and indirect suppliers that not all their actions are part of the company's supply chain, but only those actions that relate to the steps necessary for the production of the company's products and the provision of its services.⁷⁴² Since this company's due diligence obligations regulated in the LkSG relate exclusively to "its" supply chain, this has a direct impact on the scope of due diligence obligations with regard to suppliers.⁷⁴³

The corporate due diligence obligations apply with regard to indirect suppliers within the meaning of § 9 para. 3 LkSG only if the company based in Germany has substantiated knowledge of possible violations.⁷⁴⁴ It should be noted, however, that this knowledge is not subject to high requirements.⁷⁴⁵ Thus, according to the explanatory memorandum, knowledge of the company can already be considered if the respective supplier is active in a region or sector with generally existing human rights or environmental risks.⁷⁴⁶ However, knowledge of an individualized violation of human rights or environmental obligations is not required.⁷⁴⁷ Against this background, *Grabosch* discusses whether lack of knowledge or ignorance represents an economic advantage here and considers it an economic question that the company within the scope of the LkSG must ask itself whether it more or less consciously foregoes certain knowledge of its supply chain.⁷⁴⁸

According to the presented § 2 para. 7 LkSG, the direct supplier is a contractual partner whose supplies are necessary for the creation of the product or for the provision of the service and in line with the mentioned § 2 para. 5 LkSG, which defines the supply chain, the term supply also includes services in addition to material goods.⁷⁴⁹ What is meant by "necessary" – this term is used in the definition of both direct and indirect

⁷⁴¹ Cf. Walden, in: Depping/Walden LkSG, § 2 para. 552 with further reference for a more detailed discussion of this topic at para. 526 and para. 527.

⁷⁴² Cf. *ibid.*, § 2 para. 552.

⁷⁴³ Cf. *ibid.*

⁷⁴⁴ Cf. Falder/Frank-Fehle/Poleacov, in: LkSG, p. 43.

⁷⁴⁵ Cf. *ibid.*

⁷⁴⁶ Cf. *ibid.* with reference to BT-Drucks. 19/28649, p. 50.

⁷⁴⁷ Cf. Falder/Frank-Fehle/Poleacov, *op. cit.*, p. 43.

⁷⁴⁸ Cf. Grabosch, in: Grabosch/LkSG, § 2 para. 115 and see for a more detailed discussion paras. 115-118.

⁷⁴⁹ Cf. Falder/Frank-Fehle/Poleacov, *op. cit.*, p. 43.

supplier – is not specified.⁷⁵⁰ Depending on the conventional linguistic usage, something is necessary that cannot be thought away.⁷⁵¹ Since it can be assumed that companies do not enter into superfluous contracts, a "necessity" in this sense can generally be assumed, because otherwise the legislator would have had to set value limits, as an example, in order to comply with the requirement of certainty.⁷⁵² On the other hand, it can be deduced from the wording that in any case not all contractual partners are covered who supply goods to the enterprise or provide services for the enterprise, because the supply must be one of the steps in the sense of § 2 para. 5 sentence 2 LkSG which are necessary for the production of the products and the provision of the services of the enterprise.⁷⁵³ The corresponding formulations in § 2 para. 5 sentence 2 and § 2 para. 7 LkSG should therefore be interpreted uniformly despite the differences in wording, which is why reference is made to the relevant comments on § 2 para. 5 LkSG here.⁷⁵⁴

From the legal definition of an indirect supplier in the sense of the presented § 2 para. 8 LkSG, the decisive points can be derived that this must be a company with which there is no direct contractual relationship and whose supply or supplies must be necessary.⁷⁵⁵ In this respect, all suppliers are covered with whom the company within the scope of the LkSG is somehow connected as a result of its contractual relationships, its business activities, its products or services, despite the absence of direct contractual relationships.⁷⁵⁶ It is striking that the aforementioned legal definition of indirect supplier deviates from the legal definition of direct supplier in that it only refers to companies and not to a partner, which is probably due to the fact that there are no contractual relationships with indirect suppliers and that they are therefore not business partners from the perspective of the company in scope located in Germany.⁷⁵⁷ The criterion of "necessity" is more difficult to handle in the context of the assessment of indirect suppliers, since there are no contractual relations with the company in scope located in Germany that can be used in the assessment of necessity.⁷⁵⁸ In particular, it

⁷⁵⁰ Cf. Falder/Frank-Fehle/Poleacov, in: LkSG, p. 43.

⁷⁵¹ Cf. *ibid.*, pp. 43-44.

⁷⁵² Cf. *ibid.*, p. 44.

⁷⁵³ Cf. Walden, in: Depping/Walden LkSG, § 2 para. 618.

⁷⁵⁴ Cf. *ibid.* with further references for a more detailed discussion of this topic and to the relevant comments on § 2 para. 5 LkSG at paras. 535-549.

⁷⁵⁵ Cf. Falder/Frank-Fehle/Poleacov, *op. cit.*, p. 44.

⁷⁵⁶ Cf. *ibid.*

⁷⁵⁷ Cf. *ibid.*

⁷⁵⁸ Cf. *ibid.*

is unclear whether minor indirect supplies, which are rather insignificant in the overall context, are also covered.⁷⁵⁹ At least in the case of easy interchangeability, this could be doubted on the one hand, on the other hand, in such a case a remedial action is also relatively easy (and can therefore be demanded rather).⁷⁶⁰

For the concept of subcontracting and its necessity, the relevant explanations on the direct supplier apply accordingly in principle, but with the modification that there is no direct contractual relationship between the indirect supplier and the company directly affected by the LkSG, so that it must be an indirect subcontracting.⁷⁶¹ Therefore, it must be assumed that § 2 para. 8 LkSG requires a contract for the supply of goods or the provision of services between the indirect supplier and a direct supplier of the enterprise directly affected by the LkSG or an additional indirect supplier of this enterprise in between.⁷⁶² Thus, the indirect supplier does not provide its supplies (i.e., goods or services) directly to the company within the direct scope of the LkSG, but to its direct contractual partner, which may be the direct supplier of this directly from the LkSG affected company or another indirect supplier in between.⁷⁶³ In summary, it can be said that the indirect supplier within the meaning of the LkSG covers all further "upstream"⁷⁶⁴ stages of the supply chain beyond the first – so-called "tier 1"⁷⁶⁵ – stage of the supply chain.⁷⁶⁶ The supply chain within the meaning of the LkSG is thus quite broad, but all its due diligence obligations require appropriateness according to § 3 para. 2 LkSG.⁷⁶⁷ There, the four criteria already presented specify how much attention is to be paid to the respective risks.⁷⁶⁸

The differentiation between direct and indirect suppliers is relevant in view of the legal consequences, with regard to which a general distinction can be made between preventive measures (see § 6 LkSG) and remedial actions (see § 7 LkSG).⁷⁶⁹ Within the

⁷⁵⁹ Cf. Falder/Frank-Fehle/Poleacov, in: LkSG, p. 44.

⁷⁶⁰ Cf. *ibid.*

⁷⁶¹ Cf. Walden, in: Depping/Walden LkSG, § 2 para. 622 with further references for a more detailed discussion of this topic and to the relevant explanations on § 2 para. 5 LkSG at paras. 614-619.

⁷⁶² Cf. *ibid.*, § 2 para. 622.

⁷⁶³ Cf. *ibid.*, § 2 para. 622.

⁷⁶⁴ *Ibid.*, § 2 para. 497.

⁷⁶⁵ *Ibid.*, § 2 para. 622.

⁷⁶⁶ Cf. *ibid.*

⁷⁶⁷ Cf. Grabosch, in: Grabosch/LkSG, § 2 para. 55 and see for a more detailed discussion of the appropriateness paras. 55-56 and 66-69 and there with further references.

⁷⁶⁸ Cf. *ibid.*, § 2 para. 55.

⁷⁶⁹ Cf. Falder/Frank-Fehle/Poleacov, *op. cit.*, p. 45.

framework of preventive measures, the knowledge gained in the course of documentation and risk analysis is to be used as a basis, whereby a graduated due diligence standard basically applies here.⁷⁷⁰

Since the concrete content of these legal consequences, but also of the other obligations already mentioned, the discussion and interpretation of these and, e.g., the derivation of recommendations for action for companies could be the subject of a separate work, this will not be pursued further in the context of this work. In the following, the focus will be on the concrete extraterritorial impacts of the LkSG, with a particular spotlight on the effects of the actors just described within the supply chain.

2. Extraterritorial Impacts of the LkSG

The previous section has shown that the LkSG, based on the described domestic scope of application from § 1 LkSG, can also reach out to situations or actors outside the borders of Germany. This seems to be very close to the definition of "Territorial Extension"⁷⁷¹ from *Scott*, where "[t]he application of a measure is triggered by a territorial connection but in applying the measure the regulator is required, as a matter of law, to take into account conduct or circumstances abroad."⁷⁷² Additionally, it could be learned in chapter III that the enlargement of laws in this nature produces extraterritorial impacts, despite the fact that it refers to subjects of law that have a connection to the territory of the state claiming competence.⁷⁷³ What the extraterritorial impacts of the LkSG are, how these and the circumstance of the extraterritorial outreach of the LkSG are to be evaluated, is the subject of the following section.

a. Extraterritorial Impacts in General

Legal uncertainty arises in particular from the fact that the prohibitions normed in the LkSG are based on international treaties which have all been ratified by the Federal Republic of Germany, but not – with the exception of ILO Convention No. 182⁷⁷⁴ – by all major trading partners of the Federal Republic of Germany.⁷⁷⁵ As an example,

⁷⁷⁰ Cf. Falder/Frank-Fehle/Poleacov, in: LkSG, p. 45.

⁷⁷¹ Scott, in: AJCL, Vol. 62 (2014), 87, 90.

⁷⁷² *ibid.*

⁷⁷³ Cf. Ryngaert, in: Jurisdiction in International Law, p. 94.

⁷⁷⁴ ILO, News on ILO Convention No. 182, 2020: "All 187 member States of the International Labour Organization (ILO) have ratified the ILO Convention on the Worst Forms of Child Labour, 1999 (No. 182)."

⁷⁷⁵ Cf. Ruttloff/Wilske/Schulga, in: Wagner/Ruttloff/Wagner LkSG, § 2 para. 104 with reference to ILO, News on ILO Convention No. 182, 2020.

the ICCPR mentioned in the Annex (to § 2 para. 1, § 7 para. 3 sentence 2) of the LkSG regarding the conventions under No. 10 has not been ratified by China⁷⁷⁶ and the ICESCR mentioned under No. 11 has not been ratified by the USA^{777, 778}

Ratification means the affirmative signature of the convention by a head of state before the approval of the convention by the national legislature.⁷⁷⁹ In general, a state only becomes a party to the convention upon ratification, not upon signature.⁷⁸⁰ According to the will of the legislator, the prohibitions normed in the LkSG apply irrespective of the ratification status of the conventions on which they are based.⁷⁸¹ This already follows from § 7 para. 3 sentence 2 LkSG, according to which the mere fact that a state has not ratified one of the conventions listed in the Annex to this act or has not implemented it into its national law does not result in an obligation to terminate the business relationship.⁷⁸²

This provision would be superfluous if the lack of ratification of a convention already meant that the prohibitions normed in the LkSG did not have to be complied with in the state concerned.⁷⁸³ Thus, there is no obligation to terminate the business relationship because of government deficits.⁷⁸⁴ According to the explanatory memorandum the principle of enablement before withdrawal applies here.⁷⁸⁵ A confirmation of this opinion can also be found in the Report of the Committee on Labour and Social Affairs (11th Committee) on the LkSG.⁷⁸⁶ With regard to the above mentioned § 7 para. 3 sentence 2 LkSG it is stated in that Report that the ratification of conventions and their implementation into national law is a matter for states, not companies, and consequently the non-ratification of human rights or environmental conventions or their non-implementation into national law is not in itself a trigger for the obligation to terminate the business relationship or not to enter into it in the first place.⁷⁸⁷ In line with

⁷⁷⁶ UN Treaty Collection, ICCPR.

⁷⁷⁷ UN Treaty Collection, ICESCR.

⁷⁷⁸ Cf. Ruttloff/Wilske/Schulga, in: Wagner/Ruttloff/Wagner LkSG, § 2 para. 104 with references to UN Treaty Collection, ICCPR and UN Treaty Collection, ICESCR.

⁷⁷⁹ Cf. Ruttloff/Wilske/Schulga, op. cit., § 2 para. 104.

⁷⁸⁰ Cf. *ibid.*

⁷⁸¹ Cf. *ibid.*, § 2 para. 105.

⁷⁸² Cf. *ibid.* with further reference to Wagner/Wagner, in: Wagner/Ruttloff/Wagner LkSG, § 2 paras. 771-780 for a deeper explanation and discussion.

⁷⁸³ Cf. Ruttloff/Wilske/Schulga, op. cit., § 2 para. 105.

⁷⁸⁴ Cf. Depping, in: Depping/Walden LkSG, § 7 para. 76.

⁷⁸⁵ Cf. BT-Drucks. 19/28649, p. 49.

⁷⁸⁶ Cf. Ruttloff/Wilske/Schulga, op. cit., § 2 para. 105 with reference to BT-Drucks. 19/30505, p. 41.

⁷⁸⁷ Cf. Ruttloff/Wilske/Schulga, op. cit., § 2 paras. 105-106 with reference to BT-Drucks. 19/30505, p. 41.

the protective purpose of the LkSG, nothing else can apply to prohibitions that are based on conventions that a state has not even signed (yet)⁷⁸⁸ or to which a state consistently and openly contradicts, i.e., feels officially not obliged to comply with (so-called "persistent objectors"⁷⁸⁹).⁷⁹⁰ By signing, a state declares its willingness to be bound by the treaty and undertakes to refrain in good faith from any action contrary to the object and purpose of the treaty during the period between signature and ratification.⁷⁹¹

It is nothing new in terms of the basic idea that German companies are not given a completely free hand when operating abroad, but that they are also accompanied by German law there.⁷⁹² Taking responsibility at the global level and being bound by extraterritorial German legal obligations has been legally required for some time.⁷⁹³ However, with the entry into force of the LkSG, a new level would now have been reached.⁷⁹⁴ According to *Grabosch*, the LkSG would even be the most ambitious of all due diligence laws worldwide.⁷⁹⁵ With the LkSG, companies are de facto forced to ensure protection under international law everywhere in the world – along their supply chain.⁷⁹⁶ And this also applies where local law has not provided for this so far.⁷⁹⁷

The status of ratification of a convention can be a suitable criterion for risk prioritization for the purposes of the required risk analysis under the LkSG.⁷⁹⁸ According to the report of the Committee on Labour and Social Affairs (11th Committee) on the LkSG state deficits in the area of human rights or state violations of human rights can result in relevant human rights risks in the context of corporate due diligence or increase them, which is why companies can be expected to include the circumstance of non-

⁷⁸⁸ Saudi Arabia and Malaysia, e.g., have not (yet) signed the ICCPR and the ICESCR, cf. Ruttloff/Wilske/Schulga, in: Wagner/Ruttloff/Wagner LkSG, § 2 para. 106 to their footnote 81 with reference to UN Treaty Collection, ICCPR and UN Treaty Collection, ICESCR.

⁷⁸⁹ Ruttloff/Wilske/Schulga, op. cit., § 2 para. 106.

⁷⁹⁰ Cf. *ibid.*

⁷⁹¹ Cf. *ibid.* with reference to Art. 45 para. 1 of the Energy Charter Treaty, which provides for the preliminary enforcement of this Treaty until its effective date under international law, cf. Ruttloff/Wilske/Schulga, op. cit., § 2 para. 106 to their footnote 82.

⁷⁹² Cf. *ibid.*, § 2 para. 107.

⁷⁹³ Cf. *ibid.*

⁷⁹⁴ Cf. *ibid.*

⁷⁹⁵ Cf. *Grabosch*, in: *Grabosch/LkSG*, § 1 para. 5.

⁷⁹⁶ Cf. Ruttloff/Wilske/Schulga, op. cit., § 2 para. 107.

⁷⁹⁷ Cf. *ibid.*

⁷⁹⁸ Cf. *ibid.*, § 2 para. 110 and with reference to Wagner/Wagner, in: Wagner/Ruttloff/Wagner LkSG, § 4 para. 778 for a deeper explanation and discussion and there with further references.

ratification or non-implementation in the risk analysis and to examine the consequences for the risk situation as a whole.⁷⁹⁹ Thus, non-ratification or non-implementation of a convention may indicate that the state concerned does not meet, or at least does not fully meet, the standard set out in the convention.⁸⁰⁰ And, due to § 6 para. 1 LkSG, if an enterprise identifies a risk in the course of a risk analysis pursuant to § 5 LkSG, it must take appropriate preventive measures as per paras. 2 to 4 without undue delay. The clarification made in § 7 para. 3 sentence 2 LkSG therefore does not relieve the company of its due diligence obligations with regard to preventive but also remedial measures, the implementation of which faces particular challenges in the regions concerned.⁸⁰¹ At most, the requirements for appropriate measures could be slightly reduced in individual cases due to the company's reduced ability to exert influence and contribution to causation.⁸⁰² This leads to the expectation that in particular these measures to be taken by the company directly within the scope of the LkSG, which will be discussed in more detail later on, could have to be adopted in such countries, and thus extraterritorially, which constitutes extraterritorial impacts of the LkSG in these countries.

Such extraterritorial impacts of the LkSG may, under certain circumstances, be so far-reaching that they and the associated obligations of the companies falling under the scope of the LkSG contradict applicable rights and laws in states outside Germany. This is because in individual cases there may also be conflicts between a prohibition under the LkSG and the applicable national law of the place of employment, such as between the prohibition of abuse of freedom of association standardized in § 2 para. 2 No. 6 LkSG⁸⁰³ and the Chinese applicable law.⁸⁰⁴ While § 2 para. 2 No. 6 a) LkSG protects the free formation of trade unions, in the People's Republic of China the formation of free trade unions is generally prohibited.⁸⁰⁵

⁷⁹⁹ Cf. Ruttloff/Wilske/Schulga, in: Wagner/Ruttloff/Wagner LkSG, § 2 para. 110 with reference to BT-Drucks. 19/30505, p. 41.

⁸⁰⁰ Cf. Ruttloff/Wilske/Schulga, op. cit., § 2 para. 110 with reference to the comparable result of Grabosch, in: Grabosch/LkSG, § 2 para. [7], who ultimately comes to the same conclusion in the reverse of his argumentation.

⁸⁰¹ Cf. Depping, in: Depping/Walden LkSG, § 7 para. 77.

⁸⁰² Cf. *ibid.*

⁸⁰³ See for further discussion und explanation of this topic Ruttloff/Schulga, in: Wagner/Ruttloff/Wagner LkSG, § 2 paras. 172-181.

⁸⁰⁴ Cf. Ruttloff/Wilske/Schulga, op. cit., § 2 para. 111.

⁸⁰⁵ Cf. *ibid.*

It is not excluded that the LkSG and the applicable national law of the place of employment make conflicting provisions that cannot be easily resolved because they stand side by side with the same application order.⁸⁰⁶

In this context, it is generally a rule that the companies affected by the LkSG are bound by the applicable national law of the place of employment, but should at the same time endeavour to comply with the prohibitions standardized in the LkSG.⁸⁰⁷ According to the explanatory memorandum to the law, the responsibility of companies to respect human rights exists independently of the ability or willingness of states to fulfill their duty to protect human rights.⁸⁰⁸ Moreover, the fact is that, as a further rule, companies are not generally prohibited from selecting suppliers who operate in a country whose applicable national law contradicts the prohibitions standardized in the LkSG.⁸⁰⁹ In these cases, however, they must demonstrate their efforts to respect the human rights and environmental prohibitions of the LkSG as far as possible and in any case not to make the situation worse.⁸¹⁰ A stricter standard will probably have to be applied in the case of generally known, regular and serious human rights violations (such as North Korean forced labor camps of persecuted minorities with extermination character).⁸¹¹

The situation comes to a head in constellations in which a violation of the applicable national law of the place of employment is also sanctioned or even further if the applicable national law of the place of employment should actively prohibit the compliance with the prohibitions standardized by Germany in the LkSG, whereby, e.g., the Chinese Anti-Sanctions Act come to mind⁸¹².⁸¹³ This act was decided one day before the adoption of the LkSG and is intended to counteract foreign sanctions on the occasion of differences in trade, technology protection and in the field of human rights.⁸¹⁴ In individual cases, a German company will have to ask itself whether, in view of such legal risks, which go hand in hand with reputational risks, it wishes to remain in such

⁸⁰⁶ Cf. Ruttloff/Wilske/Schulga, in: Wagner/Ruttloff/Wagner LkSG, § 2 para. 112.

⁸⁰⁷ Cf. *ibid.* with reference to Smit/Griffith/McCorquodale, in: BIICL Recommendations, p. 12 and there with further references.

⁸⁰⁸ Cf. BT-Drucks. 19/28649, p. 1.

⁸⁰⁹ Cf. Ruttloff/Wilske/Schulga, *op. cit.*, § 2 para. 115 and see for the detailed derivation of this argumentation para. 113 and para. 114 and there with further references.

⁸¹⁰ Cf. *ibid.*, § 2 para. 115 with reference to DGCN, 2014, pp. 29-30.

⁸¹¹ Cf. Ruttloff/Wilske/Schulga, *op. cit.*, § 2 para. 115.

⁸¹² Cf. *ibid.* to their footnote 97.

⁸¹³ Cf. *ibid.*, § 2 para. 115.

⁸¹⁴ Cf. Grabosch, in: Grabosch/LkSG, § 5 para. 118 and see for more details paras. 118-120.

a place of employment.⁸¹⁵ Should a German company then decide against it, this would have an extraterritorial influence resulting from the LkSG on the local economy and the local people, especially the workers, as well as the whole local society because, among other things, jobs and tax revenues would be lost.

The British Institute of International and Comparative Law⁸¹⁶ and the United Nations Global Compact Human Rights Working Group⁸¹⁷ are of the opinion that companies should not ignore such regulatory contradictions.⁸¹⁸ Depending on the individual case, they suggest measures such as negotiating exceptions or favorable interpretations of national law with the government of the place of business, contractually securing compliance with human rights and environmental protection while agreeing on sanctions, contacting influential organizations or individuals to change the legal situation, and setting up parallel structures or equally effective channels that are not subject to a ban under the national law of the place of business.⁸¹⁹

Ruttloff/Wilske/Schulga assess that these measures would require precise knowledge of the regulatory leeway and hierarchies on site, which often only established and experienced large companies with the necessary negotiating weight would have.⁸²⁰ Such measures would regularly not be implementable in the short term and individual negotiation of exceptions to national law would often not seem very promising in view of possible precedents.⁸²¹ The same would apply to contractual agreements with suppliers, since even if a supplier company would agree to do so, respect for human rights and environmental protection would actually have to be lived and monitored, because mere trust would not result in exculpation in many situations, but would trigger queries and, in the worst case, could lead to the assumption of an indifferent mindset with regard to the goals of the LkSG.⁸²²

⁸¹⁵ Cf. Ruttloff/Wilske/Schulga, in: Wagner/Ruttloff/Wagner LkSG, § 2 para. 115.

⁸¹⁶ Ibid., § 2 para. 116 with reference in footnote 98 to Smit/Griffith/McCorquodale, in: BIICL Recommendations.

⁸¹⁷ Ruttloff/Wilske/Schulga, op. cit., § 2 para. 116 with reference in footnote 99 to Bersagel, in: UN GC Human Rights Working Group Good Practice Note.

⁸¹⁸ Cf. Ruttloff/Wilske/Schulga, op. cit., § 2 para. 116.

⁸¹⁹ Cf. ibid. with reference to Bersagel, in: UN GC Human Rights Working Group Good Practice Note, pp. 7-14 and see there for more potential measures and a more detailed discussion and there with further references as well as Smit/Griffith/McCorquodale, op. cit., pp. 24-32 and see there for more potential measures and a more detailed discussion and there with further references.

⁸²⁰ Cf. Ruttloff/Wilske/Schulga, op. cit., § 2 para. 116.

⁸²¹ Cf. ibid.

⁸²² Cf. ibid.

All in all, companies in such constellations will take even stronger and/or more measures especially to safeguard themselves, and measures in this context always mean extraterritorial impacts from the LkSG on those affected by the measures or even only indirectly connected to these measures.

b. Extraterritorial Impacts on the Suppliers

As shown, the LkSG distinguishes between direct suppliers (defined in § 2 para. 7 LkSG) and indirect suppliers (defined in § 2 para. 8 LkSG). At the beginning, it should be emphasized once again what the LkSG means with these terms in order to start further considerations and analyses from this understanding. According to § 2 para. 7 LkSG is a direct supplier within the meaning of this act a partner to a contract for the supply of goods or the provision of services whose supplies are necessary for the production of the enterprise's product or for the provision and use of the relevant service. This is to be distinguished from the indirect supplier, pursuant to § 2 para 8. LkSG, which within the meaning of this act is any enterprise which is not a direct supplier and whose supplies are necessary for the production of the enterprise's product or for the provision and use of the relevant service. In the following, it will be examined whether and which extraterritorial effects the LkSG can have on suppliers, taking into account the distinction made by the act between direct and indirect suppliers.

Impacts on these seem to come from § 6 LkSG. Because, once again, as per § 6 para. 1 LkSG, if an enterprise (directly in scope of the LkSG) identifies a risk in the course of a risk analysis pursuant to § 5, it must take appropriate preventive measures pursuant to paras. 2-4 without undue delay. It should be noted that this is a largely theoretical prerequisite, as it seems rather unlikely that an enterprise falling into the scope of the LkSG will actually identify no risks at all in the course of the risk analysis.⁸²³

(aa) Extraterritorial Impacts on Suppliers due to Preventive Measures

The LkSG lists in its § 6 para. 4 four rule examples of preventive measures against a direct supplier with whom a contractual relationship is in the process of being established or with whom a contractual relationship already exists.⁸²⁴ The LkSG restricts the discretionary scope for the "appropriate" fulfilment of due diligence obligations by

⁸²³ Cf. Walden, in: Depping/Walden LkSG, § 6 para. 8.

⁸²⁴ Cf. Grabosch, in: Grabosch/LkSG, § 5 para. 88.

specifying (rule) examples of more precise measures for individual due diligence obligations.⁸²⁵ Exemplary measures are always to be applied and rule examples only as long as concrete, unusual circumstances do not justify a deviation, because exceptionally also or only other measures are suitable to achieve the objective of the law.⁸²⁶ However, this will only be possible in rare exceptional cases, as these are four basic and well-established procedures in practice.⁸²⁷ Especially, sector- and company-specific circumstances may make such modifications appear permissible or even necessary.⁸²⁸

According to § 6 para. 4 LkSG, the enterprise must lay down appropriate preventive measures vis-à-vis a direct supplier, in particular

1. the consideration of human rights-related and environment-related expectations when selecting a direct supplier,
2. contractual assurances from a direct supplier that it will comply with the human rights-related and environment-related expectations required by the enterprise's senior management and appropriately address them along the supply chain,
3. the implementation of initial and further training measures to implement the contractual assurances made by the direct supplier according to No. 2,
4. agreeing on appropriate contractual control mechanisms and their risk-based implementation to verify compliance with the human rights strategy at the direct supplier.

In practice, it will often not be possible to make a clear distinction between the measures listed in the rule examples, as they partly overlap or build on each other.⁸²⁹ From this follows that the four examples mean to be applied as a rule are partly blurred in practice and can at the same time take on the character of remedial measures in the sense of § 7 LkSG.⁸³⁰ For instance, the purchasing department is guided by the criteria of the company guidelines, communicates these to the contract partners in question,

⁸²⁵ Cf. Grabosch, in: Grabosch/LkSG, § 5 para. 5.

⁸²⁶ Cf. *ibid.*

⁸²⁷ Cf. Depping, in: Depping/Walden LkSG, § 6 para. 57.

⁸²⁸ Cf. Grabosch, *op. cit.*, § 5 para. 5.

⁸²⁹ Cf. Gehne/Humbert/Philippi, in: Johann/Sangi LkSG, § 6 para. 45; also Grabosch, *op. cit.*, § 5 para. 89.

⁸³⁰ Cf. Grabosch, *op. cit.*, § 5 para. 89.

arranges for background research and uses appropriately designed clauses that are discussed with the contract partner; sites are visited or inspected by external auditors, employees are trained, and improvements are agreed upon and reviewed.⁸³¹ This process, which can involve a lot of effort, (ideally) results in close, reliable and lasting cooperation between the parties involved,⁸³² and, last but not least, in better conditions for humans and the environment in the sense of the LkSG. With regard to the appropriateness of the measures, the company can make its efforts dependent to a certain degree on the extent to which it can benefit from such cooperation in the long term.⁸³³

In the following it will be examined which consequences these four examples can have in order to evaluate the possible extraterritorial impacts of them.

When selecting a possible contractual partner in the meaning of § 6 para. 4 No. 1 LkSG, the company's expectations should be taken into account by assessing and evaluating the supplier accordingly, what applies not only to suppliers in the narrower sense (of goods or components), but also to service providers and other contractual partners in the supply chain, such as trade representatives who are familiar with a procurement market and partly coordinate and support the procurement processes there as well as business partners that may be considered for a joint venture.⁸³⁴ Expectations should be based on the relevant conventions listed in the Annex to § 2 LkSG, and in particular provide clear guidance on the prevention, minimization or remediation of risks.⁸³⁵

To meet this requirement, the implementation of standardized processes is necessary, especially in companies with numerous suppliers.⁸³⁶ In practice, various tools are used for this purpose, such as the widespread self-disclosures or the more effort-intensive but often more informative background researches, in particular business partner integrity analyses.⁸³⁷ These researches are offered by specialized service providers ("business intelligence analysts"⁸³⁸) and have been used in the past to investigate targets for suspected involvement in corruption, money laundering and other crimes

⁸³¹ Cf. Grabosch, in: Grabosch/LkSG, § 5 para. 89.

⁸³² Cf. *ibid.*, § 5 para. 90.

⁸³³ Cf. Gehne/Humbert/Philippi, in: Johann/Sangi LkSG, § 6 para. 45.

⁸³⁴ Cf. Grabosch, *op. cit.*, § 5 para. 91 with further reference to a detailed discussion on who a supplier is at § 2 paras. 41-49 and see particularly to the the trade representatives para. 46.

⁸³⁵ Cf. *ibid.*, § 5 para. 91 with reference to BT-Drucks. 19/28649, p. 47.

⁸³⁶ Cf. Depping, in: Depping/Walden LkSG, § 6 para. 59.

⁸³⁷ Cf. Grabosch, *op. cit.*, § 5 para. 92.

⁸³⁸ *Ibid.*

through searches of specialized databases, social media and interviews, which are increasingly being applied to related human rights and environmental risks at the same time.⁸³⁹ Meaningful certifications or audits by independent service providers can also be requested and could even serve as a prerequisite for entering into contract negotiations in industries in which these are already common.⁸⁴⁰

As a result, the demands on potential suppliers of companies that are in the scope of the LkSG have risen once again and they have to put in more and more effort to meet these expectations. Furthermore, if such suppliers want to do business with a company that is in the scope of the LkSG, they have to pass through the selection process and in some cases provide in-depth information and allow insights into their company or invest in a certification process by a third party. As soon as a potential supplier of a company in the scope of the LkSG is located outside Germany, these impacts on this potential supplier are extraterritorial in nature, which could lead to collisions and conflicts, particularly with regard to background searches and local data protection rights. For the handling of such collisions between LkSG and local law, reference is made to chapter IV. 2. a.

The contractual assurances from a direct supplier in the meaning of § 6 para. 4 No. 2 LkSG require, according to the explanatory memorandum, that the company in the scope of the LkSG obliges its direct supplier, when concluding the contract, to comply with the human rights and environmental requirements demanded by the company's management in its own area of business and to address them appropriately vis-à-vis its suppliers.⁸⁴¹ In this context, the company should contractually stipulate, on the basis of its supplier code, which requirements the contractual partner must observe when accepting a contract in order to prevent or minimize certain human rights and environmental risks identified in the risk analysis, and the obligation should be structured in such a way that the requirements can also be adjusted after the conclusion of the contract depending on the results of the risk analysis.⁸⁴² In the meantime, the publication of a separate code of conduct for suppliers has emerged as the preferred approach in

⁸³⁹ Cf. Grabosch, in: Grabosch/LkSG, § 5 para. 92.

⁸⁴⁰ Cf. Depping, in: Depping/Walden LkSG, § 6 para. 59.

⁸⁴¹ Cf. BT-Drucks. 19/28649, p. 47.

⁸⁴² Cf. *ibid.*

practice, to which reference is simply made in the supply contract or which must be signed separately by the supplier.⁸⁴³

The company in the scope of the LkSG should, as stated in the explanatory memorandum, ensure through contractual arrangements that the human rights-related expectations are also fulfilled in the further supply chain – i.e., by upstream suppliers – e.g., through the agreement of transfer clauses, through which the contractual partner is obliged to enforce the supplier code also vis-à-vis its own contractual partners through suitable contractual regulations (cascadation⁸⁴⁴).⁸⁴⁵ If appropriate, the company can additionally stipulate contractually that the contractual partner may only purchase certain products from selected (previously audited) suppliers or must prove that certain products come from certified regions or raw materials from certified smelters (e.g., chain of custody certification).⁸⁴⁶

From the suppliers' point of view, the following should be considered: Those who enter into such obligations should also be able to fulfill them. If they are not already fulfilled, a greater effort, especially in terms of human, time and financial resources, is likely to be required in order to fulfill them. Because this requires appropriate structures and processes, which may first have to be developed, then implemented, then trained and lived, and last but not least monitored and reviewed. Fulfillment of these expectations, which is contractually guaranteed, entails that standards set by the LkSG, i.e., the German legislator, are also implemented at a supplier based abroad, although this may not even be required by local legislation, so that the conditions on site may change in the sense of the LkSG and the conventions mentioned there, especially in the Annex. Thus, the LkSG does not only have an extraterritorial impact on the direct suppliers via the above-mentioned cascadation⁸⁴⁷, because they may hold their suppliers responsible to fulfill their contractual obligations and so on. This therefore reveals not only possible extraterritorial impacts of the LkSG on direct suppliers, but also on indirect suppliers. The bottom line is that the extraterritorial impacts of the LkSG could lead to lasting changes in entire business locations and in entire sectors of the economy, which would

⁸⁴³ Cf. Depping, in: Depping/Walden LkSG, § 6 para. 66.

⁸⁴⁴ Cf. Grabosch, in: Grabosch/LkSG, § 5 para. 93.

⁸⁴⁵ Cf. BT-Drucks. 19/28649, p. 48.

⁸⁴⁶ Cf. *ibid.*

⁸⁴⁷ Cf. Grabosch, *op. cit.*, § 5 para. 93.

then be oriented towards the LkSG and in particular the conventions mentioned in the Annex.

The implementation of initial and further training measures, pursuant to § 6 para. 4 No. 3 LkSG, to implement the contractual assurances made by the direct supplier according to No. 2 are on the one hand necessary to enforce them and on the other hand they also serve as the legally required enablement of the contractual partner to be able to fulfil these requirements.⁸⁴⁸ Personal target groups for training measures at the supplier's site are not specified by the legislator, but in any case, the supplier's managing employees who come into contact with the order in any way should be trained, as they are generally responsible for the working conditions and must understand what the requirements mean in detail.⁸⁴⁹ Time scope of the trainings should be based on the scope established for workshops on product training in practice, i.e., usually about 1-2 working days.⁸⁵⁰ In order for the company to be able to request participation in training and further education, the obligation to participate must also be stipulated in the agreements with the suppliers.⁸⁵¹ Through the above mentioned cascading⁸⁵² this may also apply for indirect suppliers of the company in scope of the LkSG.

Furthermore, as per § 6 para. 4 No. 4 LkSG, an agreeing on appropriate contractual control mechanisms and their risk-based implementation to verify compliance with the human rights strategy at the direct supplier as a preventive measure must be laid down. According to the explanatory memorandum, the verification of compliance with the company's own human rights-related standards at direct suppliers can be carried out, e.g., through the company's own on-site inspections ("Supplier Visits"⁸⁵³), through third parties commissioned to carry out audits, as well as through the use of recognized certification systems or audit systems, insofar as they guarantee the implementation of independent and appropriate controls, whereby the commissioning of external third parties does not release the company in scope from its responsibility under the

⁸⁴⁸ Cf. Grabosch, in: Grabosch/LkSG, § 5 para. 98, with further reference to para. 95 for a detailed explanation on the legally required enablement.

⁸⁴⁹ Cf. Depping, in: Depping/Walden LkSG, § 6 para. 83.

⁸⁵⁰ Cf. *ibid.*, § 6 para. 84.

⁸⁵¹ Cf. Grabosch, *op. cit.*, § 5 para. 98; also Depping, *op. cit.*, § 6 para. 86.

⁸⁵² Cf. Grabosch, *op. cit.*, § 5 para. 93.

⁸⁵³ *Ibid.*, § 5 para. 99.

LkSG.⁸⁵⁴ Unless otherwise agreed, both parties have to bear their own costs incurred in the course of the audit.⁸⁵⁵

Controls at indirect suppliers are not prescribed by the wording of the law.⁸⁵⁶ However, according to the explanatory memorandum, a focus on strategically relevant intermediaries and suppliers should be considered with regard to the review of indirect suppliers.⁸⁵⁷ And indirect suppliers can be obliged to cooperate in the inspections by means of contractual assurances that are to be passed on along the supply chain, as explained with regard to § 6 para. 4 No. 2 LkSG (cascadation⁸⁵⁸).⁸⁵⁹

Thus, extraterritorial impacts can also be discovered from § 6 para. 4 No. 3 and 4 LkSG, if the explained preventive measures are either applied directly by the company in the scope of the LkSG towards a direct supplier not located in Germany or at the latest if these obligations and preventive measures are applied through the described cascadation⁸⁶⁰ towards an indirect supplier of the company in the scope of the LkSG not located in Germany. This is because at least time and financial resources must be made available for both the training and the controlling inspections, and the training and controlling inspections will have an influence on the operational process, possibly changing it permanently in the sense of the LkSG and the conventions mentioned in the Annex. Furthermore, the described extraterritorial impact from § 6 para. 4 No. 1 LkSG can also be transferred here in a similar way, that with these controls, the companies concerned are forced to grant deep insights into their company, which could possibly also be in collision with local law. For the handling of such collisions between LkSG and local law, reference is made to chapter IV. 2. a.

Finally, it should be noted that the catalogue of § 6 para. 4 LkSG merely provides rule examples and is therefore not exhaustive, which is why the company within the scope of the LkSG can also take other measures and contractual agreements in individual cases in order to minimize the human rights and environmental risks of its direct

⁸⁵⁴ Cf. BT-Drucks. 19/28649, p. 48.

⁸⁵⁵ Cf. Depping, in: Depping/Walden LkSG, § 6 para. 101.

⁸⁵⁶ Cf. Grabosch, in: Grabosch/LkSG, § 5 para. 100.

⁸⁵⁷ Cf. BT-Drucks. 19/28649, p. 48.

⁸⁵⁸ Cf. Grabosch, op. cit., § 5 para. 93.

⁸⁵⁹ Cf. *ibid.*, § 5 para. 100 with further reference to para. 93 for a detailed explanation of the cascada-

⁸⁶⁰ Cf. *ibid.*, § 5 para. 93.

suppliers.⁸⁶¹ For instance, if companies develop and apply innovative measures that are suitable (and possibly more efficient) for achieving the intended purpose of prevention, the need for widespread and consistent implementation of the rule examples may be less, like, e.g., the use of blockchains which is being tested to solve sustainability problems.⁸⁶² In addition, other preventive measures in this respect could include contractual incentive and sanction mechanisms, i.e., rewards for contractually compliant behavior or contractual penalties, damages and termination options in the opposite case.⁸⁶³ By way of the cascading⁸⁶⁴ described above, these measures can and will then also have an impact on indirect suppliers.

The effectiveness of the preventive measures must, according to § 6 para. 5 sentence 1 LkSG, be reviewed once a year and on an ad hoc basis if the enterprise must expect a significantly changed or significantly expanded risk situation in its own business area or at its direct supplier, e.g., due to the launch of new products, projects or a new business field. Pursuant to § 6 para. 5 sentence 3 LkSG, the measures must be updated without undue delay, if necessary. In this respect, the above-mentioned preventive measures and their extraterritorial impacts are not likely to be of an one-off and non-recurring nature, but rather can be expected to occur on an ongoing, continuous and regular basis.

(bb) Extraterritorial Impacts on Suppliers due to Remedial Actions

Furthermore, extraterritorial impacts on the from the LkSG affected enterprise's direct suppliers may arise from § 7 LkSG. Besides in an enterprise's own business area, the legislator principally provides for remedial actions only against direct suppliers, as the concept it foresees with a mixture of cooperation and exertion of pressure against indirect suppliers is not very practicable due to the lack of a direct business relationship.⁸⁶⁵

⁸⁶¹ Cf. Wagner/Wagner, in: Wagner/Ruttloff/Wagner LkSG, § 4 para. 752; this is also the result of Grabosch, in: Grabosch/LkSG, § 5 para. 101, who, however, regards the application of these rule examples there as mandatory, which can only be deviated from in unusual circumstances with further reference to para. 5 for deeper explanation of this opinion.

⁸⁶² Cf. Grabosch, op. cit., § 5 para. 101 and see paras. 102-105 for a deeper explanation of these tests and the underlying problems and there with further references.

⁸⁶³ Cf. Depping, in: Depping/Walden LkSG, § 6 paras. 105-106 and see for details and further possible preventive measures paras. 105-115.

⁸⁶⁴ Cf. Grabosch, op. cit., § 5 para. 93.

⁸⁶⁵ Cf. Depping, op. cit., § 7 para. 29.

According to § 7 para. 1 sentence 1 LkSG, if the enterprise discovers that a violation of a human rights-related or an environment-related obligation has already occurred or is imminent in its own business area or at a direct supplier, it must, without undue delay, take appropriate remedial action to prevent, end or minimize the extent of this violation. Pursuant to § 7 para. 2 sentence 1 LkSG, if the violation of a human rights-related or an environment-related obligation at a direct supplier is such that the enterprise cannot end it in the foreseeable future, it must draw up and implement a concept for ending or minimizing the violation without undue delay. The concept must, as per § 7 para. 2 sentence 2 LkSG, contain a concrete timetable. The § 7 para. 2 sentence 3 LkSG stipulates that the following measures in particular must be taken into consideration, when drawing up and implementing the concept:

1. the joint development and implementation of a plan to end or minimize the violation with the enterprise causing the violation,
2. joining forces with other enterprises in sector initiatives and sector standards to increase the ability of influencing the entity that causes or may cause a harm,
3. a temporary suspension of the business relationship while efforts are made to minimize the risk.

The concept should, according to the explanatory memorandum, also include considerations of when to contemplate breaking off the business relationship.⁸⁶⁶ In regards of the above mentioned measures of § 7 para. 2 sentence 3 LkSG the explanatory memorandum further elaborates concerning No. 1, that vis-à-vis a supplier who has caused the violation due to a breach of the contractually agreed supplier code, the enterprise should demand, on the basis of an individual corrective action plan, to comply with the specifications from the supplier code by a certain deadline (e.g., to establish certain occupational health and safety standards).⁸⁶⁷

The joint development and implementation of a remediation plan should also include concrete support contributions by the company, e.g., accompanying training and further education at the supplier as well as financial, personnel or logistical support for projects to improve working conditions at the supplier or living conditions in the supplier's region.⁸⁶⁸

⁸⁶⁶ Cf. BT-Drucks. 19/28649, p. 48.

⁸⁶⁷ Cf. *ibid.*, pp. 48-49.

⁸⁶⁸ Cf. Depping, in: Depping/Walden LkSG, § 7 para. 45.

On No. 2 the explanatory memorandum states, that joining forces with other companies, e.g., within the framework of industry initiatives and industry standards, could be helpful in order to increase the possibility of exerting influence on the violator and to persuade the latter to address the grievances that are the root cause of the violation.⁸⁶⁹ An industry initiative is a group of companies in the same industry that use joint tools to assess and improve the CSR practices of their trading partners in global value chains, with remediation projects also being jointly planned, funded and implemented.⁸⁷⁰ There is usually a code of conduct that members commit to and promise to enforce in their supply chains (industry standards), whereby suppliers are jointly audited and members have access to the results through platforms.⁸⁷¹

As to No. 3 the explanatory memorandum provides, if it is foreseeable that the direct supplier will not comply with the requirements developed in the concept, that the company should enforce a contractual penalty, temporarily suspend business relations in accordance with contractual agreements or remove the company from possible award lists until the contractual partner has ended the violation.⁸⁷² A temporary suspension of the business relationship will generally worsen the economic situation of the supplier,⁸⁷³ as will the other sanctions proposed in this No. 3 of the explanatory memorandum.

Some possible impacts can already be identified from the explanations given above. In the following, these will be broken down again and discussed in particular against the background of which extraterritorial impacts result from § 7 LkSG.

The participation of the supplier in the preparation of the concept of measures (cf. § 7 para. 2 sentence 3 No. 1 LkSG) is of essential importance in the context of the fulfillment of obligations.⁸⁷⁴ From the point of view of the direct supplier, the LkSG with this provision has an impact on him, although he may not even be within the direct scope of the LkSG, which may be the case in particular, if he is not domiciled in Germany, which in turn would cause extraterritorial impacts of the LkSG on him. This is because the direct supplier affected by § 7 para. 2 sentence 3 No. 1 LkSG must itself

⁸⁶⁹ Cf. BT-Drucks. 19/28649, p. 49.

⁸⁷⁰ Cf. Depping, in: Depping/Walden LkSG, § 7 para. 46.

⁸⁷¹ Cf. *ibid.*

⁸⁷² Cf. BT-Drucks. 19/28649, p. 49.

⁸⁷³ Cf. Depping, *op. cit.*, § 7 para. 56.

⁸⁷⁴ Cf. Wagner/Wagner, in: Wagner/Ruttloff/Wagner LkSG, § 4 para. 767.

provide resources of time, personnel and thus also of a financial nature for this participation, which it could have used in other ways. In addition, the measures developed in this concept will have a direct influence on its business area and on its business processes and the conditions on its site may have to be changed. This also requires resources in terms of time, personnel and finances.

In this respect, the explanatory memorandum to the act states that if the involvement of affected persons in the determination of a remedial measure is not possible or appropriate, the involvement of legitimate stakeholders, e.g., trade union representatives or civil society organizations, should be considered as an alternative.⁸⁷⁵

Hence, as well as from the considerations mentioned in § 7 para. 2 sentence 3 No. 2 LkSG, impacts of the LkSG on institutions not directly in the scope of the LkSG can again be derived – if they are not located in Germany, then again extraterritorial impacts. This is because the institutions mentioned in this context are indirectly influenced by the LkSG and the conventions mentioned therein in the Annex, insofar as the company within the scope of the LkSG puts these considerations into practice. The more of these institutions align themselves with the expectations of the LkSG and the conventions mentioned in the Annex, the greater the extraterritorial (ideally positive) impact on the conditions for society, work(ers) and business as well as politics will be on the local level (abroad). Moreover, it remains to be noted that the considerations mentioned in § 7 para. 2 sentence 3 No. 2 and 3 LkSG are also likely to be intended to increase the pressure on the direct supplier in case of doubt to realize the concept in the sense of § 7 para. 2 LkSG and in particular the jointly developed plan in the sense of No. 1.⁸⁷⁶ This further intensifies the impacts described above (which are extraterritorial if the supplier is located outside of Germany).

In the case of all these impacts described, which have extraterritorial impacts outside Germany, it must be noted that these can also have indirect impacts on indirect suppliers – either by way of the described cascading⁸⁷⁷ or, in particular, on the basis of § 7 para. 2 No. 2 LkSG through a possible change in the general industry or location situation or the like.

⁸⁷⁵ Cf. BT-Drucks. 19/28649, p. 49.

⁸⁷⁶ See for a brief presentation of arguments whether this could also be seen as an illegitimate pressure tool Grabosch, in: Grabosch/LkSG, § 5 paras. 116-117 and there with further references.

⁸⁷⁷ Cf. *ibid.*, § 5 para. 93.

With the measures just described, a not inconsiderable effort can also be expected for the companies directly affected by the LkSG, which gives rise to the thought of whether they would not rather forego a business relationship with a "problematic" supplier than invest such effort. However, § 7 para. 3 LkSG addresses this thought by stating in sentence 1 that the termination of a business relationship is only required if

1. the violation of a protected legal position or an environment-related obligation is assessed as very serious,
2. the implementation of the measures developed in the concept does not remedy the situation after the time specified in the concept has elapsed,
3. the enterprise has no other less severe means at its disposal and increasing the ability to exert influence has no prospect of success.

This is further intensified by § 7 para. 3 sentence 2 LkSG, because it states that the mere fact that a state has not ratified one of the conventions listed in the Annex to this act or has not implemented it into its national law does not result in an obligation to terminate the business relationship. It is only limited by § 7 para. 3 sentence 3 LkSG, which provides that restrictions on foreign trade by or on the basis of federal law, European Union law or international law remain unaffected by sentence 2. This pays off in particular to the stated objective of the act to improve the international human rights situation with this due diligence act,⁸⁷⁸ and underlines once again that the act deliberately does not stop at the national borders of the Federal Republic of Germany, but that extraterritorial (ideally positive) effects and impacts are obviously intended.

In this respect, the explanatory memorandum for § 7 para. 3 LkSG states that the provisions in para. 2 and para. 3 encourage companies to first seek solutions to complex and difficult-to-rectify grievances together with suppliers or within the industry before withdrawing from a business sector.⁸⁷⁹ Additionally, that the principle of enablement before withdrawal applies and only in cases where the breach or violation is assessed as very serious, if after the expiry of the time schedule defined in the concept according to para. 2 all attempts to reduce the risk have failed, no other mitigating measures are available to the company and an increase in the ability to exert influence does not

⁸⁷⁸ Cf. BT-Drucks. 19/28649, p. 2.

⁸⁷⁹ Cf. *ibid*, p. 49.

appear to be promising, a termination of the business relationship with the supplier is called for as a last resort.⁸⁸⁰

Here also, the effectiveness of the remedial action must, according to § 7 para. 4 sentence 1 LkSG, be reviewed once a year and on an ad hoc basis if the enterprise must expect a significantly changed or significantly expanded risk situation in its own business area or at its direct supplier, e.g., due to the launch of new products, projects or a new business field. Pursuant to § 7 para. 4 sentence 3 LkSG, the measures must be updated without undue delay, if necessary. In this respect, the above mentioned remedial actions and their extraterritorial impacts are, also here, not likely to be of an one-off and non-recurring nature, but rather can be expected in case of necessity to occur on an ongoing, continuous and regular basis.

(cc) Direct Extraterritorial Impacts on Indirect Suppliers

Up to this point, it has already been established that even indirect suppliers of a company within the scope of the LkSG can be indirectly affected by the LkSG under the circumstances described – if it is an indirect supplier not based in Germany with the described extraterritorial impacts. The question now arises whether such an indirect supplier can also be affected by the LkSG in direct connection with the company in the scope of the LkSG and then with extraterritorial impacts. Because, according to § 9 para. 3 LkSG, if an enterprise (within direct scope of the LkSG) has actual indications that suggest that a violation of a human rights-related or an environment-related obligation at indirect suppliers may be possible (substantiated knowledge⁸⁸¹), it must without undue delay and as warranted

1. carry out a risk analysis in accordance with § 5 paras. 1-3 LkSG,
2. lay down appropriate preventive measures vis-à-vis the party responsible, such as the implementation of control measures, support in the prevention and avoidance of a risk or the implementation of sector-specific or cross-sector initiatives to which the enterprise is a party,
3. draw up and implement a prevention, cessation or minimization concept and

⁸⁸⁰ Cf. BT-Drucks. 19/28649, p. 49.

⁸⁸¹ See for various discussions on this much debated term, especially on when this can be assumed, e.g., Depping, in: Depping/Walden LkSG, § 9 paras. 8-28; Grabosch, in: Grabosch/LkSG, § 2 paras. 97-118; Gehne/Humbert/Philippi, in: Johann/Sangi LkSG, § 9 paras. 11-34, each with further references. The discussion is intentionally excluded here as this point is not decisive for the outcome and research questions of this work, so it would reach beyond the scope of it. As to when the explanatory memorandum assumes such substantiated knowledge, see and cf. BT-Drucks. 19/28649, p. 50.

4. update its policy statement in accordance with § 6 para. 2, if necessary.

If there is such a substantiated knowledge, the enterprise directly in the scope of the LkSG must carry out the measures specified in § 9 para. 3 No. 1-4 LkSG on an ad hoc basis and without undue delay, thereby extending the basic due diligence obligations of §§ 5-7 LkSG event-driven to indirect suppliers.⁸⁸²

Possible direct impacts on indirect suppliers are initially seen here on the basis of § 9 para. 3 No. 2 LkSG. The explanatory memorandum to this provision states that, with regard to the identified and prioritized risks, the enterprise within the scope of the LkSG must take appropriate preventive measures against the indirect supplier who has caused the risk and that this enterprise has a discretionary margin in the choice of measures therefore, but should be guided by the requirements of § 6 LkSG.⁸⁸³ Usually, the in direct scope of the LkSG lying enterprise's ability to exert influence and contribution to causation are significantly reduced in the case of violations by the indirect supplier, so that generally lower requirements are to be placed on preventive measures than in the case of direct suppliers.⁸⁸⁴

According to the explanatory memorandum, appropriate preventive measures in this respect may include making clear to an indirect supplier that it should comply with human rights expectations and human rights and environmental obligations, and that an enterprise directly in scope of the LkSG that has become aware of a possible violation must try to find out more about the risk and its causes and, if necessary, contact the indirect supplier (directly or through direct suppliers) to clarify its expectations.⁸⁸⁵

The execution of control measures at an indirect supplier, comes into consideration, pursuant to the explanatory memorandum, in particular if this supplier has been contractually obligated – e.g., through a passing-on clause – to implement the supplier code of the enterprise in scope of the LkSG.⁸⁸⁶

Supporting an indirect supplier in the prevention and avoidance of a risk, if necessary, in a targeted and long-term manner, can also be an appropriate measure as per the explanatory memorandum, as well as the support for specific social projects in a region

⁸⁸² Cf. Gehne/Humbert/Philippi, in: Johann/Sangi LkSG, § 9 para. 35.

⁸⁸³ Cf. BT-Drucks. 19/28649, p. 51.

⁸⁸⁴ Cf. Depping, in: Depping/Walden LkSG, § 9 para. 32.

⁸⁸⁵ Cf. BT-Drucks. 19/28649, p. 51.

⁸⁸⁶ Cf. *ibid.*

that serve to strengthen certain rights, such as trade union freedom, is therefore also conceivable.⁸⁸⁷

Finally, in this respect, the explanatory memorandum also suggests joining sector-specific or cross-sector initiatives as an important instrument for developing risk-preventive measures together with other enterprises, as these initiatives serve to standardize requirements, increase one's own ability to exert influence and achieve a reduction in effort through synergy effects, because since the upstream supply chain often consists of complex and non-transparent supplier networks, the importance of cooperative approaches is high.⁸⁸⁸

Various direct impacts of the LkSG on indirect suppliers, and extraterritorial impacts if they are located outside Germany, can be derived from the possible measures described above. These are similar to the already described (extraterritorial) impacts of the LkSG on direct suppliers, which is why they are only briefly transferred to the specific context here. For consultations or support measures such as workshops or the like with the enterprise directly affected by the LkSG, in which the expectations towards the indirect supplier are communicated, the latter must provide resources of time, personnel and financial nature, which could also have been used elsewhere. This intensifies, if these expectations are also to be fulfilled and restructuring in the own business, in the own processes, in the own business partner structure or similar is necessary for this and if these are possibly even checked by means of control measures. From the possible measures described, such as the support of LkSG respective social projects in a region or the respective engagement in sector-specific or cross-sector initiatives, impacts can again be expected for the companies of a sector, a business location (i.e., also direct or indirect suppliers, but also completely uninvolved companies), or even an entire society, as they increase the pressure and much more if the expectations of the LkSG and the conventions mentioned in the Annex are implemented sustainably through these measures – and if this happens outside the borders of Germany, then these are extraterritorial impacts of the LkSG.

In addition, possible direct impacts on indirect suppliers are seen on the basis of § 9 para. 3 No. 3 LkSG. According to the explanatory memorandum to this provision, the company within the scope of the LkSG must, in relation to a violation that the company

⁸⁸⁷ Cf. BT-Drucks. 19/28649, p. 51.

⁸⁸⁸ Cf. *ibid.*

was not able to mitigate or end in accordance with § 7 para. 1 LkSG, draw up and implement a concept for minimizing and avoiding the violation, the aim of which is to remedy the situation and the requirements of which are based accordingly on § 7 para. 2 LkSG, insofar as no further details have been regulated by a statutory instrument in accordance with § 9 para. 4 LkSG.⁸⁸⁹ In this respect, reference can be made to the previously described impacts of § 7 para. 2 LkSG, including the extraterritorial, which also apply accordingly in this case.

In conclusion, it can be said that the LkSG can have various possible extraterritorial impacts on both direct and indirect suppliers of an enterprise within the scope of the LkSG, but also beyond that to entire sectors or regions.

c. Extraterritorial Impacts on and because of the Obligations in the Affected Enterprise's Own Business Area

At the beginning, also here, it should be emphasized once again what the LkSG means by "own business area" in order to start further considerations and analyses from this understanding. The definition can be found in § 2 para. 6 LkSG. The own business area within the meaning of this act covers, according to § 2 para. 6 sentence 1 LkSG, every activity of the enterprise to achieve the business objective. This includes, pursuant to § 2 para. 6 sentence 2 LkSG any activity for the creation and exploitation of products and services, regardless of whether it is carried out at a location in Germany or abroad. As per § 2 para. 6 sentence 3 LkSG, in affiliated enterprises, the parent company's own business area includes a group company if the parent company exercises a decisive influence on the group company. This means that the diligence of the parent company must also be suitable to avoid, minimize or remedy the risks within the meaning of § 2 paras. 2 and 3 LkSG, which the parent company can achieve by directing its decisive influence towards the fulfillment of the due diligence obligations.⁸⁹⁰

⁸⁸⁹ Cf. BT-Drucks. 19/28649, p. 51.

⁸⁹⁰ Cf. Grabosch, in: Grabosch/LkSG, § 5 para. 29 and with reference to the suction effect of the diligence to § para. 32.

(aa) Extraterritorial Impacts on the Affected Enterprise's Own Business Area due to Preventive Measures

Extraterritorial impacts on the affected enterprise's own business area can arise from § 6 LkSG. Because, according to § 6 para. 1 LkSG, an enterprise must take appropriate preventive measures pursuant to paras. 2 to 4 without undue delay, if it identifies a risk in the course of a risk analysis pursuant to § 5 LkSG. It should be noted, once again, that this is a largely theoretical prerequisite, as it seems rather unlikely that an enterprise falling into the scope of the LkSG will actually identify no risks at all in the course of the risk analysis.⁸⁹¹ Besides the due to § 6 para. 2 LkSG requested policy statement on its human rights strategy, the enterprise must according to § 6 para. 3 LkSG lay down appropriate preventive measures in its own area of business, in particular

1. the implementation of the human rights strategy in the relevant business processes set out in the policy statement,
2. the development and implementation of appropriate procurement strategies and purchasing practices that prevent or minimize identified risks,
3. the delivery of training in the relevant business areas,
4. the implementation of risk-based control measures to verify compliance with the human rights strategy contained in the policy statement in its own business area.

According to the explanatory memorandum to the act, the rule examples listed in No. 1-3 describe measures that serve to integrate the human rights strategy contained in the policy statement into everyday corporate procedures and decisions – especially the procurement process – and to establish it as an integral part.⁸⁹²

Regarding No. 1 of § 6 para. 3 LkSG, it should be noted that the human rights strategy set out in the policy statement must be implemented in the relevant business processes.⁸⁹³ For this purpose, rules of conduct (guidelines, codes of conduct) are derived from human rights strategy and formulated, if necessary, as a group-wide blueprint.⁸⁹⁴ They should primarily concern the risk-relevant business areas.⁸⁹⁵ As an example, the

⁸⁹¹ Cf. Walden, in: Depping/Walden LkSG, § 6 para. 8.

⁸⁹² Cf. BT-Drucks. 19/28649, p. 46.

⁸⁹³ Cf. Grabosch, in: Grabosch/LkSG, § 5 para. 83.

⁸⁹⁴ Cf. *ibid.*

⁸⁹⁵ Cf. *ibid.*; BT-Drucks. 19/28649, p. 46.

significance of a standard to which the company has committed itself in the policy statement can be concretized and explained to the employees.⁸⁹⁶ The government's explanatory memorandum suggests that codes of conduct should also be used as an aid in negotiating and drafting contracts.⁸⁹⁷ Since the company directly within the scope of the LkSG must make every reasonable and feasible effort to implement the "LkSG-Code of Conduct", particularly at locations and companies belonging to the group that are under a controlling influence abroad, this and the processes and measures implemented in the course of this create extraterritorial impacts.⁸⁹⁸

In the case of such transnational group-wide policies, the possible framework conditions of the applicable foreign works constitution law must then be taken into account.⁸⁹⁹ In particular, the rules of conduct cannot be imposed on employees in foreign group companies without further consideration; instead, employee participation requirements must often be observed there as well.⁹⁰⁰ The requirement of works council participation and restrictions based on employees' personal rights must also be observed for the scope of application of directives in Germany.⁹⁰¹

From No. 2 of § 6 para. 3 LkSG it follows that procurement strategies and practices must be designed to minimize risks.⁹⁰² As distinct from procurement strategies, procurement practices refer to the concrete treatment of existing suppliers and those to be contracted.⁹⁰³ If these are located outside Germany, this regulation can influence the concrete treatment of them extraterritorially. Purchasing staff can significantly influence production conditions by setting delivery times and purchase prices as well as the duration of a contractual relationship.⁹⁰⁴ If the production of supplied goods takes place abroad, then this regulation influences the production conditions there, i.e., extraterritorially. And if action is taken in the sense of this regulation, it should be possible to expect that these will improve and thus be positively influenced extraterritorially.

⁸⁹⁶ Cf. Grabosch, in: Grabosch/LkSG, § 5 para. 83; BT-Drucks. 19/28649, p. 46.

⁸⁹⁷ Cf. Grabosch, op. cit., § 5 para. 83 with reference to BT-Drucks. 19/28649, pp. 46-47.

⁸⁹⁸ Cf. Depping/Walden, in: Depping/Walden LkSG, § 6 para. 35.

⁸⁹⁹ Cf. Grabosch, op. cit., § 5 para. 84 with reference to Junker, in: BB, Vol. 11 (2005), 602, 602.

⁹⁰⁰ Cf. Grabosch, op. cit., § 5 para. 84 with reference to Junker, in: BB, op cit., 603-604 and there with further references.

⁹⁰¹ Cf. Grabosch, op. cit., § 5 para. 84 with further references.

⁹⁰² Cf. *ibid.*, § 5 para. 85.

⁹⁰³ Cf. Depping/Walden, op. cit., § 6 para. 41.

⁹⁰⁴ Cf. Grabosch, op. cit., § 5 para. 85; BT-Drucks. 19/28649, p. 47.

The government's explanatory memorandum recommends that the measures to be taken for the individual procurement steps (e.g., product development, order placement, purchasing, production lead times) be laid down in a company-internal code of conduct.⁹⁰⁵ Such a code of conduct in line with the human rights strategy also includes efforts to ensure transparency and knowledge of the supply chain.⁹⁰⁶ This, in turn, suggests that companies in the scope of the LkSG demand and expect more information from the companies in their supply chains than before, which indicates a further extra-territorial impact on foreign suppliers. However, transparency is not always in line with requirements and needs that a company has from a competition law or even business point of view.⁹⁰⁷ Such foreign suppliers may feel compelled to disclose much more than they actually want or have to and are used to under their national legislation.

From No. 3 of § 6 para. 3 LkSG it follows that employees in the relevant business areas are to be trained and educated so that they know, understand and correctly apply the human rights strategy and policies, so that purchasers can, e.g., recognize and address conflicts of objectives in the individual work processes in day-to-day business.⁹⁰⁸ Relevant departments are likely to be Human Resources, Product Development and Purchasing, while it also seems useful to train management personnel in all departments accordingly, since all employees with personnel responsibility can contribute to the implementation of human rights requirements in the company.⁹⁰⁹ The scope of the training should be mastered in one working day, whereby a differentiation can be made based on the idea of appropriateness.⁹¹⁰

Furthermore, No. 4 from § 6 para. 3 LkSG implies that appropriate risk-based controls must be used to verify whether the human rights strategy is integrated into day-to-day business processes and whether the human rights and environmental expectations set out therein are actually implemented.⁹¹¹ Controls can take the form of, e.g., spot checks and interviews, and it can also be useful to review documented procedures.⁹¹² In this context, "risk-based" means that the checks should be carried out precisely where the

⁹⁰⁵ Cf. Grabosch, in: Grabosch/LkSG, § 5 para. 85 with reference to BT-Drucks. 19/28649, p. 47.

⁹⁰⁶ Cf. Grabosch, op. cit., § 5 para. 85; BT-Drucks. 19/28649, p. 47.

⁹⁰⁷ Cf. Gehne/Humbert/Philippi, in: Johann/Sangi LkSG, § 6 para. 37.

⁹⁰⁸ Cf. Grabosch, op. cit., § 5 para. 86; BT-Drucks. 19/28649, p. 47.

⁹⁰⁹ Cf. Depping/Walden, in: Depping/Walden LkSG, § 6 para. 48.

⁹¹⁰ Cf. Ibid.

⁹¹¹ Cf. Grabosch, op. cit., § 5 para. 87; BT-Drucks. 19/28649, p. 47.

⁹¹² Cf. Gehne/Humbert/Philippi, op. cit., § 6 para. 43.

most risk-minimizing potential is likely to be lost due to negligence or deliberate violations.⁹¹³ In particular, if an heightened risk situation is identified or there is a lack of appropriate internal resources, a review by external auditors should be considered.⁹¹⁴ Controls should take place all the more frequently where employees have not yet proven themselves to be reliable and where it is a matter of avoiding and minimizing the priority risks.⁹¹⁵

Another extraterritorial impact of the LkSG can be seen here. If employees who work for a foreign group company of a parent company within the scope of the LkSG are expected to behave in accordance with these codes of conduct, are trained accordingly and also have to fear controls in this respect, they can be indirectly forced to behave in a way that is desired by their parent company and the legislator of the Federal Republic of Germany, but possibly does not correspond to their own and/or the locally customary set of values and the underlying ways of behavior. Perhaps LkSG and local law are in collision here as well, for the handling of which, reference is made to chapter IV. 2. a. In addition, the previously frequently mentioned impacts in the form of company resources are also relevant here, which are required for, e.g., training, workshops, implementation of the processes and participation in the control measures. Even if it is, e.g., a controlled subsidiary, this company could have used the resources elsewhere. If such a company is located outside Germany, then these impacts are also extraterritorial in nature.

Moreover, and as already said before also here: The effectiveness of the preventive measures must, according to § 6 para. 5 sentence 1 LkSG, be reviewed once a year and on an ad hoc basis if the enterprise must expect a significantly changed or significantly expanded risk situation in its own business area or at its direct supplier, e.g., due to the launch of new products, projects or a new business field. Pursuant to § 6 para. 5 sentence 3 LkSG, the measures must be updated without undue delay, if necessary. In this respect, the above-mentioned preventive measures and their extraterritorial impacts are not likely to be of an one-off and non-recurring nature, but rather can be expected to occur on an ongoing, continuous and regular basis.

⁹¹³ Cf. Grabosch, in: Grabosch/LkSG, § 5 para. 87.

⁹¹⁴ Cf. Depping/Walden, in: Depping/Walden LkSG, § 6 para. 53.

⁹¹⁵ Cf. Grabosch, op. cit., § 5 para. 87.

(bb) Extraterritorial Impacts on Affected Enterprise's Own Business Area due to Remedial Actions

Furthermore, extraterritorial impacts on the affected enterprise's own business area can arise from § 7 LkSG. Because, according to § 7 para. 1 sentence 1 LkSG and as mentioned before, if the enterprise discovers that a violation of a human rights-related or an environment-related obligation has already occurred or is imminent in its own business area or at a direct supplier, it must, without undue delay, take appropriate remedial action to prevent, end or minimize the extent of this violation. Moreover, the § 7 para. 1 sentence 3 LkSG states that in its own business area in Germany, the remedial action must bring the violation to an end. Thus, in an affected company's own business area, the principle that the due diligence obligations are obligations of best effort⁹¹⁶ is breached, because here the remedial action must successfully lead to an end of the violation.⁹¹⁷ The § 7 para. 1 sentence 4 LkSG restricts this so that in the own business area abroad and in the own business area pursuant to § 2 para. 6 sentence 3 LkSG, the remedial action must only usually bring the violation to an end. In these cases, an enterprise may not have sufficient influence in particular factual or legal circumstances to successfully provide a remedy.⁹¹⁸

Although the legislator has specified the objectives of the remedial actions in the abstract and emphasized the appropriateness of the measures, it has not otherwise specified what is to be understood by remedial actions apart from some suggestions in the absence of a possibility to end the violation in the foreseeable future.⁹¹⁹ The company thus has a wide range of instruments at its disposal, whereby all reasonable measures that are suitable to achieve the objectives can be remedial actions in this sense.⁹²⁰ In an affected company's own business area, at least domestically, instructions from management to remedy an identified grievance will usually suffice as an effective remedial measure.⁹²¹ This can be linked, e.g., to a tightening of the policy statement, the strengthening of monitoring measures, e.g., in the "Compliance-System"⁹²², or

⁹¹⁶ According to the explanatory memorandum the due diligence obligations establish a duty of best effort and not a duty to succeed, cf. BT-Drucks. 19/28649, p. 41.

⁹¹⁷ Cf. Grabosch, in: Grabosch/LkSG, § 5 para. 109.

⁹¹⁸ Cf. *ibid.*

⁹¹⁹ Cf. Depping, in: Depping/Walden LkSG, § 7 para. 15.

⁹²⁰ Cf. *ibid.*

⁹²¹ Cf. *ibid.*, § 7 para. 16.

⁹²² *Ibid.*

measures under labor law if the violation has occurred with culpable disregard of internal rules or violations of the law.⁹²³ The implementation of remedial actions is already made more difficult in the case of group companies within the meaning of § 2 para. 6 sentence 3 LkSG, in which the affected company is not the sole shareholder, as in this case the only way to implement remedial actions is usually through shareholder resolutions that have to be discussed and areas are possibly affected for which qualified majorities are required.⁹²⁴ If the remedial measures taken by the enterprise are unsuccessful, it must examine in each individual case whether or not an exception to the standardized rule from § 7 para. 1 sentence 4 LkSG can be assumed.⁹²⁵

More interestingly for this work, however, broader remedial actions with extraterritorial impacts beyond internal measures may need to be considered at foreign sites if the violations there result from structural problems or if individual prohibitions of § 2 para. 2 and para. 3 LkSG are even in conflict with local law.⁹²⁶ In these cases, remedial actions may include establishing or joining sector initiatives⁹²⁷, cooperating with NGOs or foreign chambers of commerce, contacting foreign government agencies, or self-organized projects or workshops with the local population.⁹²⁸ This is accompanied by extraterritorial impacts not only for the affected foreign company or location directly through the remedial actions themselves, but indirectly even for the local society, politics and, possibly, other companies located there, which are made aware and aware of the consequences and values associated with these remedial actions and may be involved.

If in an affected company's own foreign business area and in controlled companies, despite all efforts, the cessation of the violation specified as the rule is not achievable in the foreseeable future, a limited analogous application of § 7 para. 2 sentences 1 and 2 LkSG, which according to their wording only apply to the relationship with the direct supplier, appears to make sense above all.⁹²⁹ The obligation to draw up a concept with a concrete timetable without undue delay also appears to be an essential step here.⁹³⁰

⁹²³ Cf. Depping, in: Depping/Walden LkSG, § 7 para. 16.

⁹²⁴ Cf. *ibid.*

⁹²⁵ Cf. Wagner/Wagner, in: Wagner/Ruttloff/Wagner LkSG, § 4 para. 701.

⁹²⁶ Cf. Depping, in: *op. cit.*, § 7 para. 16.

⁹²⁷ Cf. *ibid.*, § 7 paras. 46-55 for further discussion and explanation with regard to the sector initiatives.

⁹²⁸ Cf. *ibid.*, § 7 para. 16.

⁹²⁹ Cf. *ibid.*, § 7 para. 28.

⁹³⁰ Cf. *ibid.*

Also here, the above mentioned applies: If the remedial measures taken by the enterprise are unsuccessful, it must examine in each individual case whether or not an exception to the standardized rule from § 7 para. 1 sentence 4 LkSG can be assumed.⁹³¹ As a rule, however, the goal must remain the cessation of the violation, unlike in § 7 para. 2 LkSG.⁹³² The extraterritorial effects described above in this context for direct suppliers then apply equally to the affected company's own foreign business area and in its controlled companies in that case.

In conclusion, it can be said that the LkSG can have various possible extraterritorial impacts as well in the own business area of an enterprise within the scope of the LkSG.

3. Discussion of the Legitimacy of the Extraterritorial Impacts of the LkSG

So far, the research has revealed various possible extraterritorial impacts of the LkSG. The following chapter is dedicated to the question of whether this possible extraterritorial impacts of the LkSG can be considered legitimate. Because, taking into account the limits of international law for an extraterritorially effective regulation, a sufficient reason is required to justify the indirect regulatory access to the sections of the value chain located abroad.⁹³³ In the process, opinions and voices from the relevant literature will first be illustrated before finally arriving at an own opinion and the result represented here in the light of the gained knowledge and results in the course of this work.

In the forefront of the final LkSG, *Henn/Jahn* assessed in July 2020 (with special consideration of chemicals and biodiversity), among other things, which Union constitutional and international law guidelines would have to be complied with in the enactment of a supply chain law.⁹³⁴ In this context, they raised the question from the perspective of international law whether the jurisdictional authority of the Federal Republic of Germany covers such a regulatory and related jurisdictional competence as that,

⁹³¹ Cf. Wagner/Wagner, in: Wagner/Ruttloff/Wagner LkSG, § 4 para. 701.

⁹³² Cf. Depping, in: Depping/Walden LkSG, § 7 para. 28.

⁹³³ Cf. Krebs, in: ZUR, Vol. 7-8 (2021), 394, 396 with further references for a more detailed discussion to Krisch, in: *Entgrenzte Jurisdiktion: Die extraterritoriale Durchsetzung von Unternehmensverantwortung* [Debordered Jurisdiction: The Extraterritorial Enforcement of Corporate Responsibility], pp. 11-38, Henn/Jahn, in: *Rechtsgutachten LieferkettenG* [Legal Opinion Supply Chain Act], pp. 29-35, Krebs, in: *Environmental Due Diligence Obligations in Home State Law with Regard to Transnational Value Chains*, pp. 245-350.

⁹³⁴ Cf. Henn/Jahn, op. cit., pp. 1 and 8.

by regulating corporate due diligence along the supply and value chain, domestic companies would have to ensure within their supply chain that they analyze the negative impacts caused by their activities and business relationships on environmental media located abroad and, if necessary, take appropriate measures to prevent, minimize and remedy them.⁹³⁵ Mirroring this, they also addressed the question raised in some quarters as to whether such legislative action would violate the prohibition on intervention.⁹³⁶

In their opinion, *Henn/Jahn* first state in this regard that a law imposing corresponding due diligence obligations on domestic companies in the supply chain could be objected to on the grounds that a nation state lacks the regulatory competence (jurisdictional authority) for such regulations and that, with such a regulation, the state would extend the due diligence to be applied by companies beyond national borders.⁹³⁷ Thus, there would be an extraterritorial exercise of jurisdiction, which is only permissible or recognized to a limited extent under international law.⁹³⁸ If this would be the case, the due diligence obligations would have to be within the limits of the recognized case groups for the exercise of jurisdiction.⁹³⁹ The theoretical foundations for this were laid in chapter III, which is why reference is made to it at this point.

The concept of jurisdictional authority covers the judicial, regulatory and enforcement activities of a state.⁹⁴⁰ These exercises of authority are only problematic if they have an extraterritorial impact.⁹⁴¹ *Henn/Jahn* come to the conclusion in their opinion that neither an extraterritorial exercise of judicial authority nor an extraterritorial enforcement activity is implied.⁹⁴²

However, *Henn/Jahn* see an extraterritorial dimension with regard to the regulatory exercise of state authority, insofar as domestic companies are required to agree on regulations regarding human rights and environmental standards in contracts with their business partners and suppliers abroad.⁹⁴³ Even if the due diligence exercise were

⁹³⁵ Cf. Henn/Jahn, in: Rechtsgutachten LieferkettenG [Legal Opinion Supply Chain Act], p. 29.

⁹³⁶ Cf. *ibid.*, p. 29 with further references.

⁹³⁷ Cf. *ibid.*

⁹³⁸ Cf. *ibid.* with a more detailed explanation in its footnote 125 and there with further references.

⁹³⁹ Cf. *ibid.*

⁹⁴⁰ Cf. *ibid.*, p. 30 with reference to van Arnould, in: Völkerrecht [International Law] (previous 3rd Edition 2016), paras. 344-348 to the differentiations and there with further references (in van Arnould, in: Völkerrecht [International Law] (current 5th Edition 2023), paras. 349-354.

⁹⁴¹ Cf. Henn/Jahn, *op. cit.*, p. 30.

⁹⁴² Cf. *ibid.* and see there for a more detailed explanation and there with further references.

⁹⁴³ Cf. Henn/Jahn, in: Rechtsgutachten LieferkettenG [Legal Opinion Supply Chain Act], p. 30.

elaborated and managed in Germany, it would have to be implemented in contractual relationships and general business relationships along the value chain, thus adding an extraterritorial element that characterizes this due diligence.⁹⁴⁴

Hence, the act, through the duty to act that it imposes, also entails an extraterritorial reach in the view of *Henn/Jahn*.⁹⁴⁵ This result is consistent with the previous results of this work. *Henn/Jahn* mention that *Krisch* described such a case as a territorial extension of jurisdictional authority.⁹⁴⁶ How to deal with this circumstance is described in corresponding literature. In the context of his work "Environmental Due Diligence Obligations in Home State Law with Regard to Transnational Value Chains", *Krebs* discussed if "[...] the general principles [...] of value chain due diligence legislation can be drafted in a lawful manner, notwithstanding any extraterritorial impacts."⁹⁴⁷ In it, he does not specifically address the LkSG, but discusses more abstractly the general design of such laws.⁹⁴⁸ Regarding this topic, he states that "[i]n order to justify an extraterritorial reach or impact given the potential conflict with another State's sovereignty, a certain kind of connection to the acting State is required."⁹⁴⁹

For those cases that lie between a genuine, comprehensive extraterritorial exercise of jurisdiction and a non-extraterritorial exercise of jurisdiction (like the present extension of the jurisdictional authority), international law scholarship applies the classic categories for which the legality of an extraterritorial jurisdictional authority is recognized as well.⁹⁵⁰ The result is that "[...] even if a sufficient connection is provided, the exercise of jurisdiction shall not infringe the principle of non-intervention."⁹⁵¹

⁹⁴⁴ Cf. *Henn/Jahn*, in: *Rechtsgutachten LieferkettenG* [Legal Opinion Supply Chain Act], p. 30, footnote 129.

⁹⁴⁵ Cf. *ibid.*, p. 30.

⁹⁴⁶ Cf. *ibid.* with reference to *Krisch*, in: *Entgrenzte Jurisdiktion: Die extraterritoriale Durchsetzung von Unternehmensverantwortung* [Debordered Jurisdiction: The Extraterritorial Enforcement of Corporate Responsibility], p. 11 et seq. (e.g., on p. 22) and noting that he thereby refers back to Scott's conceptualization (both wrongly referring to Scott, in: *AJCL*, Vol. 61 (2014), 87, 90 and not to the right Scott, in: *AJCL*, Vol. 62 (2014), 87, 90) and rendering the following definition of it (here in original) by Scott in their own words: "The application of a measure is triggered by a territorial connection but in applying the measure the regulator is required, as a matter of law, to take into account conduct or circumstances abroad.", Scott, in: *AJCL*, Vol. 62 (2014), 87, 90.

⁹⁴⁷ *Krebs*, in: *Environmental Due Diligence Obligations in Home State Law with Regard to Transnational Value Chains*, p. 317, para. 162 and see for his whole work pp. 245-350.

⁹⁴⁸ Cf. *ibid.*, 7.1, p. 246, paras. 1-3.

⁹⁴⁹ *Ibid.*, pp. 320-321, para. 173.

⁹⁵⁰ Cf. *Henn/Jahn*, op. cit., p. 30 with further references.

⁹⁵¹ *Krebs*, op. cit., p. 321, para. 173.

In the beginning of the discussion of that point and the overall assessment of the legitimacy of the LkSG in view of international law, there should be mentioned *Thalhammer*, who sees the export of the standards contained in the LkSG critically from the point of view of international law.⁹⁵²

She first notes, also on the bottom line consistent with the previous findings of this work, that § 6 para. 4 No. 2 LkSG requires companies to obtain contractual assurances from direct suppliers that they will comply with the requirements and address them appropriately in the wider supply chain, which is why the human rights conventions mentioned in § 2 para. 1 LkSG in conjunction with the Annex to the LKSG are de facto enforced in this way throughout the whole supply chain and why it is a matter of extraterritorial jurisdiction due to this effect abroad.⁹⁵³ In her opinion, it is problematic under international law that the conventions covered have been ratified by many states, but not by all of them.⁹⁵⁴ *Thalhammer* explains that as long as a supplier's country of domicile has signed the respective convention, the LkSG would not violate the prohibition of unlawful interference in internal and external affairs⁹⁵⁵ (prohibition of intervention)⁹⁵⁶.⁹⁵⁷ In this case, the protected exclusive territory would not be interfered with, because this area is no longer subject to the exclusive regulatory power of this state as a result of accession to the treaty⁹⁵⁸ and thus there would be no need for a necessary actual connection to the regulating state to justify extraterritorial jurisdiction.⁹⁵⁹

According to *Thalhammer*, this would be different for non-signatory states.⁹⁶⁰ Because then the companies would have to contractually oblige their suppliers to comply with standards that do not apply in their country where they are domiciled.⁹⁶¹ Indeed, there

⁹⁵² Cf. *Thalhammer*, in: DÖV, Vol. 18 (2021), 825, 825.

⁹⁵³ Cf. *ibid.*, 827 with examples for further and more detailed illustration.

⁹⁵⁴ Cf. *ibid.* with reference to Joint letter of associations, p. 2, where, e.g., it is stated that free trade unions are banned in China.

⁹⁵⁵ Cf. *Thalhammer*, *op. cit.*, 827 with reference to Beyerlin, in: *Lexikon des Rechts, Völkerrecht* [Encyclopedia of Law, International Law], Nichteinmischung [Non-interference], p. 296 (whereby the relevant explanations and terms reach up to p. 297); she sees the basis for this in the sovereign equality of the states and refers in this respect to UN, Charter, Art. 2 para. 1.

⁹⁵⁶ Cf. *Thalhammer*, *op. cit.*, 827 with reference to von Bernstorff, in: AVR, Vol. 49 (2011), 34, 58 and there with reference to Meng, in: *Extraterritoriale Jurisdiktion im öffentlichen Wirtschaftsrecht* [Extraterritorial Jurisdiction in Public Economic Law], p. 63 et seq.

⁹⁵⁷ Cf. *Thalhammer*, *op. cit.*, 827.

⁹⁵⁸ Cf. *ibid.* with further references.

⁹⁵⁹ Cf. *ibid.*, 827-828.

⁹⁶⁰ Cf. *ibid.*, 828 with reference to Zimmermann/Weiß, in: AVR, Vol. 58 (2020), 424, 452 who see this constellation as at least questionable in terms of politics of international law.

⁹⁶¹ Cf. *Thalhammer*, *op. cit.*, 828 with further references.

would be some human rights that belong to customary international law and are thus not subject to the exclusive dispositional power of a state.⁹⁶² These would be, e.g., the right to life and physical integrity, the prohibition of slavery, the prohibition of torture and other inhuman or degrading treatment and the prohibition of discrimination on the basis of race or ideology⁹⁶³ – but even not all the standards required by the LkSG.⁹⁶⁴

Thalhammer states that if a state has not signed an agreement, it would be allowed to determine for itself whether the standards apply on its territory.⁹⁶⁵ If the LkSG indirectly requires companies of this state to comply with such a standard⁹⁶⁶ it would actually lose this freedom of choice.⁹⁶⁷ This interference in the economic policy of the affected state could be seen as an impermissible intervention according to *Thalhammer*,⁹⁶⁸ although it would be controversial whether economic pressure is sufficient for this.⁹⁶⁹ Ultimately, in the opinion of *Thalhammer*, it is irrelevant whether one affirms an intervention or only assumes extraterritorial jurisdiction,⁹⁷⁰ because in any case a legitimizing actual connection would be required.⁹⁷¹

⁹⁶² Cf. Thalhammer, in: DÖV, Vol. 18 (2021), 825, 828 with further references.

⁹⁶³ Cf. *ibid.* with further references.

⁹⁶⁴ Cf. *ibid.*

⁹⁶⁵ Cf. *ibid.* with further references for a more detailed discussion and different positions on this point, but this will not be addressed further in this work, as it is only included here to explain Thalhammer's point of view to be discussed.

⁹⁶⁶ Cf. *ibid.* with reference to Schmalenbach, in: AVR, Vol. 39 (2001), 57, 76 and there with further references, while noting in footnote 36 that some of the behavior is even prohibited, such as trade unions in China. In this context, Thalhammer, *op. cit.*, 828, refers in footnote 36 to Nordhues, in: Die Haftung der Muttergesellschaft und ihres Vorstands für Menschenrechtsverletzungen im Konzern [The Liability of the Parent Company and its Management Board for Human Rights Violations in the Group], p. 326, who also only then assumes an impermissible intervention.

⁹⁶⁷ Cf. Thalhammer, *op. cit.*, 828 with reference to Schmalenbach, *op. cit.*, 58 (whereby the corresponding elaborations reach until p. 60) and there with further references, while noting in footnote 37 that supplier companies may freely choose their contractors, *de facto* they adhere to the standards in order to maintain the German sales market.

⁹⁶⁸ Cf. Thalhammer, *op. cit.*, 828 with reference to Schmalenbach, *op. cit.*, 73 (whereby the corresponding elaborations begin on p. 72) and see footnote 38 with further references for a more detailed discussion and derivation on this point, but this will not be addressed further in this work, as it is only included here to explain Thalhammer's point of view to be discussed.

⁹⁶⁹ Cf. Thalhammer, *op. cit.*, 828 and see footnote 39 with further references for a more detailed discussion and derivation on this point, but this will not be addressed further in this work, as it is only included here to explain Thalhammer's point of view to be discussed.

⁹⁷⁰ Cf. *ibid.*, 828 with reference to Henn/Jahn, in: Rechtsgutachten LieferkettenG [Legal Opinion Supply Chain Act], p. 30, while noting in footnote 40 that they differ between extraterritorial jurisdiction (pp. 29 et seq.) and prohibition of intervention (pp. 32 et seq.) and that this distinction is not made in her work, since all that matters to her is whether there is an inadmissible intervention in the sovereignty of the other state and whether there is a justifiable genuine link.

⁹⁷¹ Cf. Thalhammer, *op. cit.*, 828 with reference to Henn/Jahn, *op. cit.*, p. 29, footnote 125 and there with a more detailed explanation and derivation and with further references; Schmalenbach, *op. cit.*, 73 and there with further references.

However, *Thalhammer* is of the opinion that such a legitimizing actual connection would hardly be found here.⁹⁷² The principle of personality, according to which Germany may regulate companies that are subject to its sovereignty,⁹⁷³ would only cover the regulation of German companies, so that the de facto effects on foreign companies would not be justified by the principle of personality.⁹⁷⁴ The same would apply to the principle of territoriality, which justifies regulations on a country's own territory.⁹⁷⁵ It would be effective with regard to business activities in Germany, but would not be able to justify pressure on foreign suppliers because the reference to the German territory would be too vague.⁹⁷⁶ Also, according to *Thalhammer*, the principle of universality would not apply in this constellation.⁹⁷⁷ Protected interests that are safeguarded by intergovernmental agreements would be part of this.⁹⁷⁸ But this would not apply in relation to states that have not signed the agreements.⁹⁷⁹ In addition, the principle of universality would be recognized for human rights under mandatory customary international law.⁹⁸⁰ But not all the standards set out in the LkSG are mandatory human rights under international law.⁹⁸¹ Freedom of association, e.g., is not covered.⁹⁸² According to *Thalhammer*, interference in the economy of the affected state is therefore not justified with regard to such protected interests.⁹⁸³

Thalhammer holds that the LkSG exceeds the limits of permissible extraterritorial jurisdiction with regard to states to which the conventions mentioned in the Annex do

⁹⁷² Cf. *Thalhammer*, in: DÖV, Vol. 18 (2021), 825, 828.

⁹⁷³ Cf. *ibid.* with reference to Meng, in: Extraterritoriale Jurisdiktion im öffentlichen Wirtschaftsrecht [Extraterritorial Jurisdiction in Public Economic Law], p. 56 et seq. with further references (whereby the corresponding elaborations and for the context necessary explanations begin on p. 53).

⁹⁷⁴ Cf. *Thalhammer*, *op. cit.*, 828 with reference to Henn/Jahn, in: Rechtsgutachten LieferkettenG [Legal Opinion Supply Chain Act], p. 32 for a contrary opinion regarding environmental due diligence. However, this comment by *Thalhammer* in her footnote 43 is incorrect, as *Henn/Jahn* do not limit their opinion to environmental due diligence obligations in this aspect.

⁹⁷⁵ Cf. *Thalhammer*, *op. cit.*, 828.

⁹⁷⁶ Cf. *ibid.*, while noting in footnote 45 that the justification would in any case fail on the grounds of reasonableness, with reference to Täger, in: Der Schutz von Menschenrechten im internationalen Investitionsrecht [The Protection of Human Rights in International Investment Law], p. 245 for the requirement of the test of reasonableness, where he speaks from an individual case weighing.

⁹⁷⁷ Cf. *Thalhammer*, *op. cit.*, 828.

⁹⁷⁸ Cf. *ibid.* with reference to Täger, *op. cit.*, p. 282.

⁹⁷⁹ Cf. *Thalhammer*, *op. cit.*, 828.

⁹⁸⁰ Cf. *ibid.* with further references.

⁹⁸¹ Cf. *ibid.* with reference to Haider, in: Haftung von transnationalen Unternehmen und Staaten für Menschenrechtsverletzungen [Liability of Transnational Corporations and States for Human Rights Violations], p. 125 and there with further references and deeper explanations.

⁹⁸² Cf. *Thalhammer*, *op. cit.*, 828-829 with reference to § 2 para. 2 No. 6 and Annex No. 4 LkSG.

⁹⁸³ Cf. *Thalhammer*, *op. cit.*, 829.

not apply, or violates the prohibition of intervention.⁹⁸⁴ According to *Schäfer*, who finds *Thalhammer's* arguments convincing and follows them, this indirectly builds up economic pressure on third countries to also comply with these standards.⁹⁸⁵ He notes, however, that only the states affected in their sovereignty could take legal action against this, which in his opinion is unlikely.⁹⁸⁶

Pursuant to *Thalhammer*, only environmental due diligence obligations would also be justified in such constellations, because the "effects doctrine"⁹⁸⁷ would apply here.⁹⁸⁸ This is because environmental pollution caused by companies abroad would not always stop at national borders, but could also have a negative impact on Germany.⁹⁸⁹

Opposed to this is *Grabosch*, who holds a different opinion.⁹⁹⁰ He first notes that almost all of the 14 conventions annexed to the LkSG have been ratified by the vast majority of states, but in most of the conventions individual economic partner countries of Germany fall out of line.⁹⁹¹ Furthermore, he asserts that the risk definitions crystallized by the LkSG from the conventions must, however, be complied with worldwide, if necessary taking into account the convention referred to in each case, also in non-contracting states and whether the respective country in which a risk occurs has ratified a convention or not is irrelevant, with the exception of § 2 para. 3 No. 6 LkSG.⁹⁹²

According to *Grabosch*, the LkSG does in this way not violate international law and in particular the prohibition of intervention.⁹⁹³ He also refers directly to *Thalhammer's*

⁹⁸⁴ Cf. Thalhammer, in: DÖV, Vol. 18 (2021), 825, 829 with reference to Zimmermann/Weiß, in: AVR, Vol. 58 (2020), 424, 452 (who at least critically question the permissibility of such a scope and see it as not required) and with further references to opinions and approaches to discussion and arguing these in footnote 51. In the result so as well Schäfer, in: ZLR, Vol. 1 (2022), 22, 33.

⁹⁸⁵ Cf. Schäfer, op. cit., 33-34 and there in footnote 51 with reference to Thalhammer, op. cit., 827 et seq.

⁹⁸⁶ Cf. Schäfer, op. cit., 34.

⁹⁸⁷ Cf. Thalhammer, op. cit., 829 with reference to Crawford, in: Brownlie's Principles of Public International Law (previous 8th Edition 2012), pp. 462-463 for further explanation on this term there with further references and for the term itself with reference to *O'Keefe*, in: JICJ, Vol. 2 (2004), 735, 739 and there with more detailed explanations and further references to them (in Crawford, in: Brownlie's Principles of Public International Law (current 9th Edition 2019), pp. 447-448 in a similar way and with further references, also for the term itself).

⁹⁸⁸ Cf. Thalhammer, op. cit., 829.

⁹⁸⁹ Cf. *ibid.* with reference to Henn/Jahn, in: Rechtsgutachten LieferkettenG [Legal Opinion Supply Chain Act], p. 32 and there with a reference to a research on that topic by Rockström et al., in: Ecology & Society, Vol. 14 (2009), Art. 32.

⁹⁹⁰ See Grabosch, in: Grabosch/LkSG, § 2 para. 5.

⁹⁹¹ Cf. *ibid.* and para. 4, especially for details in regards of this finding.

⁹⁹² Cf. *ibid.*, § 2 para. 5 with reference to § 4 para. 65 for details on the mentioned exception.

⁹⁹³ Cf. *ibid.*, § 2 para. 5 with further references in favor of admissibility under international law.

statement doubting the existence of the required "genuine link"⁹⁹⁴ because a connection between the activities of foreign companies abroad and the supply chains of companies based in Germany would be too vague.⁹⁹⁵ According to *Grabosch*, she fails to see that the design of supply chains and also their production conditions depend to a considerable extent on the pricing policy and supply conditions of the companies subject to the due diligence obligations.⁹⁹⁶ The "genuine link"⁹⁹⁷ to Germany therefore lies in the fact that it is precisely this creative power in German corporate headquarters that is subjected to basic human rights standards.⁹⁹⁸

Grabosch is moreover of the opinion that the principle of effects is also likely to be effective.⁹⁹⁹ This is because domestic market participants could certainly benefit from setting global minimum standards in order not to come under pressure to deregulate social and environmental standards as a result of a "race to the bottom"¹⁰⁰⁰.¹⁰⁰¹ According to *Grabosch*, the Federal Republic of Germany has closed gaps in the universality of human rights by adopting the LkSG, and if a convention grants the contracting states leeway for implementation, the respective applicable national law must be considered, which the LkSG points out in the relevant places.¹⁰⁰²

Furthermore, *Ruttloff/Wilske/Schulga* also comments on this question.¹⁰⁰³ They begin by stating that there would be nothing new in the basic idea that German companies would not be given a completely free hand when operating abroad, but that these would also be accompanied by German law when doing so.¹⁰⁰⁴ Taking responsibility on a global level and being bound by extraterritorial German legal obligations would have been legally required for some time, but with the entry into force of the LkSG, a new

⁹⁹⁴ Grabosch, in: Grabosch/LkSG, § 2 para. 5.

⁹⁹⁵ Cf. *ibid.* with reference to Thalhammer, in: DÖV, Vol. 18 (2021), 825, 828 and there with references for more details.

⁹⁹⁶ Cf. Grabosch, *op. cit.*, § 2 para. 5 with further references.

⁹⁹⁷ *Ibid.*

⁹⁹⁸ Cf. *ibid.*

⁹⁹⁹ Cf. *ibid.* with reference to Paschke, in: RdTW, Vol. 4 (2016), 121, 124 and there with reference for further explanations to the principles of justification of jurisdiction to Tietje, in: Tietje Internationales Wirtschaftsrecht [International Business Law (previous 1st Edition 2009), p. 1 (45 et seq.), which seems to be an erroneous reference, since the relevant elaborations are to be found in § 1 pp. 45 et seq. and there with further references (in Tietje, in: Tietje/Nowrot Internationales Wirtschaftsrecht [International Business Law] (current 3rd Edition 2022), § 1 pp. 51 et seq. in a similar way and also with further references).

¹⁰⁰⁰ Grabosch, *op. cit.*, § 2 para. 5.

¹⁰⁰¹ Cf. *ibid.*

¹⁰⁰² Cf. *ibid.*

¹⁰⁰³ See Ruttloff/Wilske/Schulga, in: Wagner/Ruttloff/Wagner LkSG, § 2 paras. 108-109.

¹⁰⁰⁴ Cf. *ibid.*, § 2 para. 107.

level would now be reached, as the LkSG would de facto force companies to ensure protection under international law everywhere in the world – along their supply chain – even where local law has not provided for this so far.¹⁰⁰⁵

Against this background, *Ruttloff/Wilske/Schulga* also raise the question of whether the German legislator has thereby exceeded the permissible limits of the exercise of extraterritorial jurisdiction.¹⁰⁰⁶ Initially, they explain that international law by no means excludes the exercise of extraterritorial jurisdiction from the outset, but that this requires a special justification.¹⁰⁰⁷ Also according to them, this could be the case for the German legislator because the pricing policy and supply conditions of German companies are also significantly determined by the entrepreneurial actions of suppliers and service providers based abroad.¹⁰⁰⁸ They support this view with the argument that German companies usually benefit not only from lower foreign wage levels, but also from lower labor and environmental standards as a result of the global division of labor.¹⁰⁰⁹ In this respect, the danger is seen that these could in turn put German locations under pressure to also lower protection standards in order to remain competitive and thus favor a "race to the bottom"¹⁰¹⁰, which would not be in the interest of the German self-image, what in other words means that there would be a sufficiently strong domestic relationship that would allow the Federal Republic of Germany to also regulate conduct outside its own state (principle of effect).¹⁰¹¹

Ruttloff/Wilske/Schulga point out that the application order of the LkSG only directly affects the German company, but not suppliers located abroad, which may be indirectly – and of course factually – affected by the LkSG, but are not themselves directly bound by the LkSG as legal entities.¹⁰¹² Additionally, that a final assessment of the question whether the LkSG is in conformity with international law for this reason alone or whether it is (in parts) contrary to international law for the purposes of German law,

¹⁰⁰⁵ Cf. *Ruttloff/Wilske/Schulga*, in: *Wagner/Ruttloff/Wagner LkSG*, § 2 para. 107.

¹⁰⁰⁶ Cf. *ibid.*, § 2 para. 108 with reference to the different positions of *Thalhammer*, in: *DÖV*, Vol. 18 (2021), 825, 827 et seq., Joint letter of associations, p. 2 and *Grabosch*, in: *Grabosch/LkSG*, § 2 para. 5.

¹⁰⁰⁷ Cf. *Ruttloff/Wilske/Schulga*, *op. cit.*, § 2 para. 108.

¹⁰⁰⁸ Cf. *ibid.* with reference to *Grabosch*, *op. cit.*, § 2 para. 5 and noting a different view of *Thalhammer*, *op. cit.*, 828.

¹⁰⁰⁹ Cf. *Ruttloff/Wilske/Schulga*, *op. cit.*, § 2 para. 108 with reference to *Verheyen*, in: *A German Supply Chain Act*, p. 1.

¹⁰¹⁰ *Ruttloff/Wilske/Schulga*, *op. cit.*, § 2 para. 108.

¹⁰¹¹ Cf. *ibid.* with reference to the result of *Grabosch*, *op. cit.*, § 2 para. 5.

¹⁰¹² Cf. *Ruttloff/Wilske/Schulga*, *op. cit.*, § 2 para. 108.

i.e., whether the legislator has exceeded its legislative competences with this, could ultimately only be made by the Federal Constitutional Court.¹⁰¹³

Henn/Jahn also see a permissibility under international law of corporate due diligence obligations along the supply and value chain.¹⁰¹⁴ This is because it would be unanimously recognized that there is a connection for the regulation of corporate due diligence obligations if the obligated companies are domiciled in Germany (personality principle).¹⁰¹⁵ Furthermore, according to *Henn/Jahn*, who paid, as said before, particular attention to chemicals and biodiversity in their assessment,¹⁰¹⁶ it can be assumed that pollution and overexploitation of environmental goods abroad have a negative effect on the Federal Republic of Germany, at least in the area where the global "planetary boundaries"¹⁰¹⁷ are crossed, so that environmental due diligence obligations that focus precisely on these environmental goods are likely to be covered by the effects principle.¹⁰¹⁸ As a result, *Henn/Jahn* come to the conclusion that the Federal Republic of Germany does not exceed its jurisdictional authority.¹⁰¹⁹

Henn/Jahn also see no violation of the prohibition of intervention.¹⁰²⁰ They argue that the prohibition of intervention must be viewed as a mirror image of the jurisdictional authority, since both concern the sovereignty of the other state.¹⁰²¹ The prohibition of intervention prohibits states from interfering in the internal and external affairs of another state through the use or threat of coercion.¹⁰²² In the sense of protecting the sovereign and equal freedom of decision of states, the prohibition of intervention regularly covers only such coercion with which the acting state pursues the goal of influencing the political will of the other state.¹⁰²³ Applying these principles, the ordering of corporate due diligence by the German legislature would not qualify as a violation of the

¹⁰¹³ Cf. Ruttloff/Wilske/Schulga, in: Wagner/Ruttloff/Wagner LkSG, § 2 para. 109.

¹⁰¹⁴ See *Henn/Jahn*, in: Rechtsgutachten LieferkettenG [Legal Opinion Supply Chain Act], 2. c., pp. 29-35 and there with further references.

¹⁰¹⁵ Cf. *ibid.*, p. 32.

¹⁰¹⁶ Cf. *ibid.*, p. 1.

¹⁰¹⁷ See for a research on that topic Rockström et al., in: *Ecology & Society*, Vol. 14 (2009), Art. 32.

¹⁰¹⁸ Cf. *Henn/Jahn*, op. cit., p. 32.

¹⁰¹⁹ Cf. *ibid.*, p. 29 and for the full and detailed discussion 2. c. (1), pp. 29-32 with further references.

¹⁰²⁰ Cf. *ibid.*, p. 33 and for the full and detailed discussion of this topic 2. c. (2), pp. 32-34 with further references.

¹⁰²¹ Cf. *ibid.*, p. 33.

¹⁰²² Cf. *ibid.* with further references.

¹⁰²³ Cf. *ibid.* with references to van Arnauld, in: *Völkerrecht [International Law]* (previous 3rd Edition 2016), paras. 350, 372 (in van Arnauld, in: *Völkerrecht [International Law]* (current 5th Edition 2023), paras. 356, and now more differentiated but in the result similar 378 with reference to a practical example of Boor/Nowrot, in: *FW*, Vol. 89 (2014), 211 et seq. regarding the Ukraine crisis.

prohibition of intervention, because with the act the Federal Republic of Germany does not directly interfere into the sovereignty of other states, since with it no other country would be required to comply with certain standards and instead it would only oblige domestic companies to ensure compliance with certain standards within their value chain, be it through contractual clauses or informal means.¹⁰²⁴ *Krebs* comes to a similar result regarding this question by stating that "[...] neither interference in exclusively domestic affairs [...] nor coercion [...] are likely to be raised as objections by the discussed value chain due diligence legislation."¹⁰²⁵

In this respect, only the economic negotiating power of such a company could be, pursuant to *Henn/Jahn*, considered here, which even according to current international law does not violate the prohibition of intervention, since this only obligates states.¹⁰²⁶ Thus, the act could only indirectly – via the de facto effect of the economic power of individual German companies – exert pressure on foreign companies to adapt.¹⁰²⁷ The due diligence obligation only leads to economic pressure when mediated by the behavior of private parties, which does not result in any direct coercive effect for the affected state, which is free to do nothing in terms of changing the legal situation in the country.¹⁰²⁸ *Krebs* comes to the conclusion that "[i]t is, for example, incomparable to the impacts of an embargo or a boycott and, therefore, EDD [abbreviation of *Krebs* for 'environmental due diligence'¹⁰²⁹] obligations for transnational value chains in home State law will be, generally speaking, in line with the principle of non-intervention."¹⁰³⁰

These more general findings now have to be applied to the specific case of the LkSG. Broken down abstractly and in line with the arguments presented here, *Krebs* summarizes as follows:

¹⁰²⁴ Cf. *Henn/Jahn*, in: *Rechtsgutachten LieferkettenG* [Legal Opinion Supply Chain Act], p. 33.

¹⁰²⁵ *Krebs*, in: *Environmental Due Diligence Obligations in Home State Law with Regard to Transnational Value Chains*, p. 327, para. 190 and see for the detailed discussion and assessment pp. 326-330, paras. 188-197.

¹⁰²⁶ Cf. *Henn/Jahn*, op. cit., p. 33; p. 33 footnote 156 with reference to van Arnould, in: *Völkerrecht [International Law]* (previous 3rd Edition 2016), para. 352 (in van Arnould, in: *Völkerrecht [International Law]* (current 5th Edition 2023), para. 358.

¹⁰²⁷ Cf. *Henn/Jahn*, op. cit., p. 33.

¹⁰²⁸ Cf. *ibid.*, p. 34.

¹⁰²⁹ See *Krebs*, op. cit., p. 246, para. 3.

¹⁰³⁰ *Ibid.*, p. 330, para. 197 with reference to *Henn/Jahn*, op. cit., 2. c. (2), pp. 32-34 and there with further references.

"This suggests that the discussed type of home State regulation can be designed in an essentially lawful manner, as such, by limiting the personal scope to companies domiciled in its own territory as the legislating State may always invoke the place of the statutory seat, central administration or principal place of business as sufficient territorial and personal link."¹⁰³¹

That is applicable to the LkSG, as it states in § 1 para. 1 sentence 1 that this act applies to enterprises regardless of their legal form that have their central administration, their principal place of business, their administrative headquarters or their statutory seat in Germany. According to the abstract assessment of *Krebs*, "[a] similar argument can be made, if the personal scope is extended to foreign companies regularly engaged in business on the regulating State's territory."¹⁰³² This also applies to the LkSG, as it states in § 1 para. 1 sentence 2 that notwithstanding sentence 1 No. 1, this act also applies to enterprises regardless of their legal form that have a domestic branch office pursuant to § 13d HGB in which domestic branches of persons with registered offices or principal places of business abroad are regulated.

Thus, the LkSG obviously appears to be designed in such a way that there is a sufficient link in the sense of international law between the Federal Republic of Germany as the regulator and the matters to be regulated by the LkSG, since the LkSG directly addresses only those subjects that are either German subjects in line with the active personality principle or also foreign subjects that have a connection to the territory of Germany through a domestic branch office in Germany in line with the territoriality principle. Other arguments in favor of the legality of the LkSG in the view of international law presented in the literature are also (sometimes more, sometimes less) convincing. However, these merely provide additional support for the main argumentation just presented and it is therefore irrelevant whether there are individual opinions that these additional arguments might be too vague in certain cases.

All in all, therefore, and after evaluating the respective literature, it can be summarized that the predominant opinion is that the LkSG with its extraterritorial impacts seems to be within the limits of international law and thus could be considered legal from the perspective of international law. Above all, it is based on permissible connecting factors and principles of international law that are not controversial in themselves (such

¹⁰³¹ Krebs, in: *Environmental Due Diligence Obligations in Home State Law with Regard to Transnational Value Chains*, p. 323, para. 177 with further references, especially for a broader discussion.

¹⁰³² *Ibid.*

as, e.g., the passive personality principle¹⁰³³), but on principles that are recognized by the overwhelming majority of states.

This makes it possible for the Federal Republic of Germany to regulate the conduct of the direct addressees of the LkSG abroad as well. However, it is questionable and open to discussion whether the LkSG, in regulating the conduct of its direct addressees, might not interfere too much with the interests of other states and thus could be designed outside the barriers of international law. It is not problematic if the situation to be regulated takes place entirely in the Federal Republic of Germany, since then it can be argued on the basis of the principle of territoriality and the interests or territories of other states are not inadmissibly interfered with. As shown, it is also unproblematic at first if the conduct of direct addressees and in their own business area is regulated abroad, since in this case the active personality principle can be applied – similar to a domestic branch office in Germany, in which case the territoriality principle can be used as an argument.

"Nevertheless, problematic constellations remain where the due diligence legislation established by a home State requires certain extraterritorial conduct which is unlawful under foreign local law but the foreign local law does not violate any international obligations of the host State."¹⁰³⁴

This abstract observation of *Krebs* can also be applied to the LkSG of the Federal Republic of Germany, which make such constellations seem worth discussing. It could be a case of interfering too much with the interests of other states.

Furthermore, it appears problematic that direct and indirect suppliers abroad, while not being direct addressees of the LkSG and thus not being directly obligated to the conduct prescribed by the LkSG, are indirectly obligated or even pressured by the subject directly addressed by the LkSG to conduct themselves in conformity with the LkSG due to the possible dependency of these suppliers on the subject in direct scope of the LkSG, which may not be rare. In individual cases, such constellations could bring the LkSG with its extraterritorial impacts outside the bounds of international law by inadmissibly interfering with the interests of other states. *Krebs* provides a possible argumentation for this:

¹⁰³³ See therefore and for the arguments for this status once again Chapter III. 2. d.

¹⁰³⁴ Krebs, in: Environmental Due Diligence Obligations in Home State Law with Regard to Transnational Value Chains, p. 327, para. 192.

"Although the discussed value chain due diligence legislation may be categorized as a domestic measure with extraterritorial impacts or entail 'territorial extension' rather than an exercise of 'extraterritorial jurisdiction', host States could nevertheless argue that even indirect extraterritorial effects, which are clearly intended, unduly narrow their freedom regarding how to regulate businesses operating on their territory including their freedom 'not to regulate'."¹⁰³⁵

In the following, it will be examined whether the LkSG in the above-mentioned constellations does not possibly act outside the limits of international law by inadmissibly interfering with the interests of other states. To this end, it is first necessary to identify the conditions under which such constellations go beyond the limits of international law in more detail, in order to apply them to the specific case of the LkSG.

The prohibition of intervention prohibits interference in the internal and external affairs of a state through the use or threat of coercion,¹⁰³⁶ whereby it is thus factually doubly conditioned by

1. interference in the affairs of another state and
2. the use or threat of coercion.¹⁰³⁷

While the general validity of the principle of non-intervention is ensured today, its substantive definition poses difficulties, which applies both to the delimitation of protected state affairs and to the attempt to establish generally applicable criteria for the prohibited forms of interference.¹⁰³⁸ The area of internal and external affairs reserved to the state roughly coincides with the right of states to freely choose their political, economic, social, and cultural systems and to take responsibility for their own foreign relations.¹⁰³⁹

With every international treaty or customary law rule to which a state adheres, it opens its legal order to influences of international law, and the area of domestic and foreign

¹⁰³⁵ Krebs, in: Environmental Due Diligence Obligations in Home State Law with Regard to Transnational Value Chains, p. 327, para. 190.

¹⁰³⁶ Cf. van Arnould, in: Völkerrecht [International Law], § 4 para. 355 with reference to ICJ, I.C.J. Reports 1986, 14, 107-108, para. 205 and his Annex No. 18, where he elaborates on this decision and its statements, there with reference to his para. 486, there with further references, and with further references.

¹⁰³⁷ Cf. van Arnould, op. cit., § 4 para. 355.

¹⁰³⁸ Cf. Stein/von Buttlar/Kotzur, in: Völkerrecht [International Law], § 36 para. 636.

¹⁰³⁹ Cf. van Arnould, op. cit., § 4 para. 359.

affairs that is independent of international law is thereby reduced.¹⁰⁴⁰ In fact, the reserve of intervention-free affairs is becoming visibly smaller as international law relations as a whole become closer, and many areas that traditionally belonged to the state's competences are no longer completely withdrawn from interference as affairs reserved to the state on the basis of treaty obligations, because compliance with the obligations entered into is becoming an international matter, at least in relation to the treaty partners.¹⁰⁴¹ As long as the obligation under international law exists, other states (or inter-governmental organizations of which the state in question is a member) can require compliance with these obligations and, if necessary, enforce them by peaceful means without violating the prohibition on intervention.¹⁰⁴²

In relation to the LkSG, this means that the Federal Republic of Germany, with the LkSG and its extraterritorial impacts, does not interfere with the exclusive affairs of other states and thus does not violate the prohibition of intervention under international law in cases where these states have also committed themselves to the conventions listed in the Annex to the LkSG. This is consistent with the results of referenced literature presented earlier.¹⁰⁴³ As described above, however, it could become problematic in constellations where states have not committed themselves to the respective convention in individual cases and specific circumstances.¹⁰⁴⁴ But, "referring to the locally applicable [...] laws of the host State/'place of effect' does not appear to raise any concerns with regard to the prohibition of intervention."¹⁰⁴⁵

Such a reference can be implicitly derived from the explanatory memorandum to the LkSG. According to this, the responsibility of companies to respect human rights exists independently of the ability or willingness of states to fulfill their duty to protect human rights, and if the domestic context makes it impossible to fulfill this responsibility without restriction, enterprises are to be expected to respect the principles of internationally recognized human rights to the extent that this is possible in view of the circumstances.¹⁰⁴⁶ This is supported by the fact that the explanatory memorandum to the law states that the LkSG merely establishes an obligation to use best efforts, but,

¹⁰⁴⁰ Cf. van Arnould, in: *Völkerrecht* [International Law], § 4 para. 360.

¹⁰⁴¹ Cf. Stein/von Buttlar/Kotzur, in: *Völkerrecht* [International Law], § 36 para. 639.

¹⁰⁴² Cf. van Arnould, *op. cit.*, § 4 para. 360.

¹⁰⁴³ See especially on p. 128 Thalhammer.

¹⁰⁴⁴ See especially on p. 137 et seq. Krebs and on p. 128 et seq. Thalhammer.

¹⁰⁴⁵ Krebs, in: *Environmental Due Diligence Obligations in Home State Law with Regard to Transnational Value Chains*, p. 328, para. 193.

¹⁰⁴⁶ Cf. BT-Drucks. 19/28649, p. 1.

generally, neither an obligation to succeed nor a guarantee liability.¹⁰⁴⁷ If the legislator wanted the requirements of the LkSG to be enforced in every case regardless of the circumstances, thus also the local laws, these explanations would be superfluous. In the opinion expressed here, the legislator of the LkSG has therefore implicitly included a corresponding reference to foreign local laws. "This mechanism exclusively addresses an enforcement deficit and is designed only to ensure compliance with local laws."¹⁰⁴⁸ Consequently, under no circumstances does the Federal Republic of Germany with the LkSG interfere with the exclusive affairs of other states. *Krebs* provides a convincing argument for this conclusion:

"It is virtually inconceivable that a State could successfully assert that this constitutes a prohibited interference in domestic affairs because any non-enforcement of its own laws would be an intentional development policy and strategy to attract foreign direct investment."¹⁰⁴⁹

Even if one does not share this view, the use or threat of coercion by the Federal Republic of Germany as a subject of international law would still have to be present in addition to the interference in the affairs of another state for the realization of the prohibition of intervention against the LkSG.¹⁰⁵⁰ The use of economic pressure is a controversial issue.¹⁰⁵¹ According to relevant resolutions, economic coercion can fall under the prohibition of intervention.¹⁰⁵² It is undisputed, however, that economic pressure measures are in principle legitimate foreign policy instruments, which in turn raises the key question of how to distinguish them from coercive measures that violate international law.¹⁰⁵³ The relevant resolutions assume that only such extreme forms of economic pressure fall under the prohibition of intervention that affect vital state interests and hinder it in the exercise of its sovereignty.¹⁰⁵⁴ In principle, the assessment

¹⁰⁴⁷ Cf. BT-Drucks. 19/28649, p. 2.

¹⁰⁴⁸ *Krebs*, in: *Environmental Due Diligence Obligations in Home State Law with Regard to Transnational Value Chains*, p. 328, para. 193.

¹⁰⁴⁹ *Ibid.*

¹⁰⁵⁰ Cf. van Arnould, in: *Völkerrecht [International Law]*, § 4 para. 355 with reference to ICJ, I.C.J. Reports 1986, 14, 107-108, para. 205 and his Annex No. 18, where he elaborates on this decision and its statements, there with reference to his para. 486, there with further references, and with further references; similar *Krebs*, op. cit., p. 329, para. 195.

¹⁰⁵¹ Cf. van Arnould, op. cit., § 4 para. 378.

¹⁰⁵² Cf. Stein/von Buttlar/Kotzur, in: *Völkerrecht [International Law]*, § 36 para. 650 with reference to A/RES/2625(XXV), p. 123; A/RES/3281(XXIX), e.g., p. 51 Chapter 1 or p. 55 Art. 32; A/RES/36/103, p. 79, Annex.

¹⁰⁵³ Cf. Stein/von Buttlar/Kotzur, op. cit., § 36 para. 650.

¹⁰⁵⁴ Cf. Stein/von Buttlar/Kotzur, op. cit., § 36 para. 650 with reference to A/RES/2625(XXV), p. 123; A/RES/3281(XXIX), p. 55 Art. 32; A/RES/36/103, pp. 79-80, Annex.

must be made on the basis of the individual case, and in the literature, criteria for the delimitation are repeatedly proposed, first and foremost the severity and intensity of the measures and their impacts on the affected state, as well as the purpose-means relationship.¹⁰⁵⁵ Also, the intention of the sanctioning state is partly taken into account, depending on whether the sanctions merely aim at protecting and strengthening its own economy or at restricting the sovereignty and autonomy of decision of other states.¹⁰⁵⁶ However, these criteria are relative and very difficult to prove and can only provide indications for the assessment of the individual case.¹⁰⁵⁷

In the opinion expressed here, the LkSG and its explanatory memorandum do not reveal any of these criteria with the intensity to serve as sufficient evidence for proving interference in the internal and external affairs of a state through the use or threat of coercion, so that the prohibition of intervention in the sense of international law would affect the LkSG.¹⁰⁵⁸ Regardless of the fact that the Federal Republic of Germany very likely wants to strengthen its own economy with the LkSG¹⁰⁵⁹ (which, as described, would still be within the limits of international law), it is rather pursuing the goal of improving the international human rights situation with this act.¹⁰⁶⁰ This is an objectively supportable goal, which is also likely to be in the interest of the vast majority of all states. It does not pursue the goal of influencing the political will of another state,¹⁰⁶¹ at least not obviously. In fact, the due diligence obligations only address trade between private parties and not between states.¹⁰⁶² Private parties do not violate the prohibition of intervention even if they are in a position to exert considerable pressure on foreign states (such as transnational business enterprises), so that perpetrators of violations of the prohibition of intervention, as is generally the case in international

¹⁰⁵⁵ Cf. Stein/von Buttlar/Kotzur, in: *Völkerrecht [International Law]*, § 36 para. 651.

¹⁰⁵⁶ Cf. *ibid.*

¹⁰⁵⁷ Cf. *ibid.*

¹⁰⁵⁸ Cf. van Arnould, in: *Völkerrecht [International Law]*, § 4 para. 355 with reference to ICJ, I.C.J. Reports 1986, 14, 107-108, para. 205 and his Annex No. 18, where he elaborates on this decision and its statements, there with reference to his para. 486, there with further references, and with further references.

¹⁰⁵⁹ Cf. BT-Drucks. 19/28649, p. 2.

¹⁰⁶⁰ Cf. *ibid.*, p. 23.

¹⁰⁶¹ Cf. – knowing full well that this is not explicitly aimed at the LkSG, nevertheless applicable in this case – Henn/Jahn, in: *Rechtsgutachten LieferkettenG [Legal Opinion Supply Chain Act]*, p. 34 with references to van Arnould, in: *Völkerrecht [International Law]* (previous 3rd Edition 2016), paras. 350, 372 (in van Arnould, in: *Völkerrecht [International Law]* (current 5th Edition 2023), paras. 356, and now more differentiated but in the result similar 378 with reference to a practical example of Boor/Nowrot, in: *FW*, Vol. 89 (2014), 211 et seq. regarding the Ukraine crisis.

¹⁰⁶² Cf. – knowing full well that this is not explicitly aimed at the LkSG, nevertheless applicable in this case – Henn/Jahn, *op. cit.*, p. 34.

law, can only be subjects of international law.¹⁰⁶³ The LkSG does not reveal any of the restrictive case groups and thus allows the conclusion that the Federal Republic of Germany does not illegally infringe on the interests of other states with the LkSG from the perspective of international law.

At this point, it should be noted that the LkSG and its extraterritorial impacts could also be assessed from other legal points of view,¹⁰⁶⁴ but that this is not part of this work, as it focuses with a look at the definitions and questions already provided on (public) international law in the narrow sense. As an example, it is discussed whether the LkSG and its extraterritorial impacts could possibly violate WTO law, which, however, seems unlikely according to respective opinions.¹⁰⁶⁵

In summary, based on the arguments presented and the literature on which reference was made, it can be said that the LkSG, with its accompanying extraterritorial impacts, is legal from the perspective of international law, since its application is at least linked to the active personality principle and the principle of territoriality (also with connection to the effects principle), does not inadmissibly interfere with the interests of other states, and therefore remains within the boundaries of international law. However, this does not automatically answer the question of whether the LkSG, with its extraterritorial impacts, can also be considered legitimate in this respect.

Krisch provides thought-provoking ideas for discussing this question.¹⁰⁶⁶ In the context of his analysis, he first notes that in praxis, jurisdiction claims of states move along classical lines and are formulated almost exclusively on the basis of territoriality and active personality, so that jurisdiction is exercised over acts that take place at least in part on the state's own territory or over persons who have their domicile there.¹⁰⁶⁷ This is also the case with the LkSG, as was discovered in the course of this dissertation.

That the classical categories play such a central role is primarily due to their ever-increasing extensibility, which in turn goes back to the very challenges that have put

¹⁰⁶³ Cf. van Arnould, in: *Völkerrecht [International Law]*, § 4 para. 358.

¹⁰⁶⁴ Possible further points for discussion and assessment could be provided, e.g., by Henn/Jahn, in: *Rechtsgutachten LieferkettenG [Legal Opinion Supply Chain Act]* or Krebs, in: *Environmental Due Diligence Obligations in Home State Law with Regard to Transnational Value Chains*, pp. 245-350.

¹⁰⁶⁵ Cf. for the results of and see for a more detailed discussion Henn/Jahn, op. cit., 2. c. (3), pp. 34-35 with further references; Krebs, op. cit., 7.7.4, pp. 330-337.

¹⁰⁶⁶ See Krisch, in: *Entgrenzte Jurisdiktion: Die extraterritoriale Durchsetzung von Unternehmensverantwortung [Debordered Jurisdiction: The Extraterritorial Enforcement of Corporate Responsibility]*, pp. 11-38.

¹⁰⁶⁷ Cf. *ibid.*, p. 22 on the basis of his praxis analysis on pp. 17-21 and there with further references.

pressure on the jurisdictional regime, what are the placeless acts, the omnipresent actors, and the de-bounded markets that have led to a redefinition of what is understood as territoriality and personality.¹⁰⁶⁸ In the past, discussions of jurisdictional boundaries came down to individual acts and their concrete location, whereas today it is conglomerates of acts, sprawling in time and geography, that take place in many territories and at the same time in none really, and where the territorial link is then no longer an absolute one but a partial one, but this seems sufficient to establish jurisdiction over the entire conglomerate.¹⁰⁶⁹

The same is true of actors, where traditionally persons, especially natural persons, were primarily related to a state.¹⁰⁷⁰ For legal persons, the situation has always been more complex, but the rise of the multinational corporation has made the attempt at attribution even more artificial.¹⁰⁷¹ The evolution of the active personality principle compensates for this by establishing the link through relevant activity, not artificial nationality, and such relevant activity can take place in many states, so that most larger corporations are now subject to different jurisdictions, for their worldwide operations.¹⁰⁷²

Scott has described aspects of this expansion as "Territorial Extension"¹⁰⁷³.¹⁰⁷⁴ This term has already been mentioned before and at this point the circle closes. According to *Krisch*, unlike "true" extraterritoriality, these extensions are characterized by the fact that jurisdiction is linked to a territorial connection (of whatever kind), but that the measures applied require consideration of conduct or circumstances that lie beyond territorial boundaries.¹⁰⁷⁵ Fixed limits to the exercise of jurisdiction can hardly be clearly identified, because far-reaching protests against the exercise of jurisdiction as such are relatively rare, and it often remains unclear what principles these protests follow.¹⁰⁷⁶

¹⁰⁶⁸ Cf. *Krisch*, in: *Entgrenzte Jurisdiktion: Die extraterritoriale Durchsetzung von Unternehmensverantwortung* [Debordered Jurisdiction: The Extraterritorial Enforcement of Corporate Responsibility], p. 22.

¹⁰⁶⁹ Cf. *ibid.*

¹⁰⁷⁰ Cf. *ibid.*

¹⁰⁷¹ Cf. *ibid.*

¹⁰⁷² Cf. *ibid.*

¹⁰⁷³ *Scott*, in: *AJCL*, Vol. 62 (2014), 87, 90.

¹⁰⁷⁴ *Krisch*, *op. cit.*, p. 22 with (wrong) reference to *Scott*, in: *AJCL*, Vol. 61 (2014), 87, 90 (and not to the right *Scott*, in: *AJCL*, Vol. 62 (2014), 87, 90).

¹⁰⁷⁵ Cf. *Krisch*, *op. cit.*, pp. 22-23.

¹⁰⁷⁶ Cf. *ibid.*, p. 25 and see for details on that topic with examples pp. 24-27.

Krisch recognizes that jurisdictional boundaries are not really clearly defined, and especially when it comes to corporate responsibility, there are typically competing jurisdictional claims – claims by the country in which a company raises issues through its actions; the country in which the company is incorporated or headquartered; and other countries in which the company has a relevant presence or in which the company's actions have significant effects.¹⁰⁷⁷ The result is a jurisdictional "Assemblage"¹⁰⁷⁸ – it is not an order of spheres separated from each other, but one of overlaps and concurrences, with the contours of it varying according to subject matter and problem.¹⁰⁷⁹ This term is useful for understanding the jurisdictional regime because it not only suggests a multiplicity of interacting authorities, but also suggests that the various authorities stand in a relationship that is not clearly determined, because legal rules governing the relationship of competing jurisdictional spheres are virtually non-existent.¹⁰⁸⁰ As already discussed in Chapter III on the basis of *Ryngaert*, also according to *Krisch*, different bases of jurisdiction stand in a relationship of equal order, without any of them enjoying priority.¹⁰⁸¹

Pursuant to *Krisch*, such a situation without clear rules of competition may be problematic for many – disputes seem pre-programmed if it is not clear which state has jurisdiction, but the dissolution of boundaries and multiplication of jurisdictional claims also generate broader possibilities for action that could help to meet one of the central challenges of the present more effectively – solving global problems in a politically fragmented world.¹⁰⁸² The public institutions that could help solve these problems – particularly international organizations and states with an eye on their own territory – would often be too weak or have limited room for action.¹⁰⁸³ According to *Krisch*, the fact that several states may be entitled to regulate simultaneously as a result

¹⁰⁷⁷ Cf. *Krisch*, in: *Entgrenzte Jurisdiktion: Die extraterritoriale Durchsetzung von Unternehmensverantwortung* [Debordered Jurisdiction: The Extraterritorial Enforcement of Corporate Responsibility], p. 27.

¹⁰⁷⁸ *Ibid.*, pp. 27 et seq., noting on p. 28 that the term makes a borrowing from Sassen, in: *Territory, Authority, Rights: From Medieval to Global Assemblages* (previous Edition 2006), and summarizing that she uses the term to point out how territory, authority and rights are brought into new relations, and how it is these new relations that characterize the political structure of the present, see there therefore especially her conclusion on pp. 406 et seq. (also in Sassen, in: *Territory, Authority, Rights: From Medieval to Global Assemblages* (current 4th Edition 2008)).

¹⁰⁷⁹ Cf. *Krisch*, op. cit., p. 27.

¹⁰⁸⁰ Cf. *ibid.*, p. 28.

¹⁰⁸¹ Cf. *ibid.* with reference to *Ryngaert*, in: *Jurisdiction in International Law*, pp. 143-144 and there with further references.

¹⁰⁸² Cf. *Krisch*, op. cit., p. 29.

¹⁰⁸³ Cf. *ibid.*

of the extension and that their jurisdictional spheres consequently overlap can thus also be understood as the creation of greater problem-solving capacity to solve certain problems of collective action that are otherwise difficult to deal with in a world of many states without a common government.¹⁰⁸⁴ Accordingly, many observers see a more permissive jurisdictional regime as a way to better realize shared global values and public goods.¹⁰⁸⁵ Jurisdictional extension could, e.g., overcome cooperation difficulties in rulemaking because rules can be set unilaterally, and it could counter difficulties in execution because it would eliminate the underbidding race between states and would enforce rules equally for all relevant companies, thereby also countering the problem of free riders who otherwise have no incentive to share the costs of providing public goods.¹⁰⁸⁶ An extended jurisdiction could also help to compensate to a certain extent for the enormous increase in the power of private actors over public authority in many places, in that more powerful states could take on the regulation.¹⁰⁸⁷ Finally, an extended exercise of jurisdiction, by limiting other states' ability to diverge, could also pave the way for formal international agreements.¹⁰⁸⁸ *Krisch* argues that even if there is not a single country in every context that is factually capable of enforcing its rules worldwide, jurisdictional delimitation significantly reduces the number of countries needed, and thus the hurdles to effective coordination.¹⁰⁸⁹

All these arguments show that extraterritorial legislation or legislation with extraterritorial impacts, and thus also that of the LkSG by the Federal Republic of Germany, are or can be legitimate. However, there is also an argument that might speak against the legitimacy of extraterritorially effective legislations. Namely, problems also (or especially) arise when states use their options for action, because only a few states are actually in a position to do so, such as the U.S. and the EU, which largely stand alone when it comes to extraterritorial regulation.¹⁰⁹⁰ As a result, the expanded jurisdictional spheres in the emerging overlapping are not the same for all states, and extraterritoriality is a feasible path only for those states that have sufficient market power and regu-

¹⁰⁸⁴ Cf. *Krisch*, in: *Entgrenzte Jurisdiktion: Die extraterritoriale Durchsetzung von Unternehmensverantwortung* [Debordered Jurisdiction: The Extraterritorial Enforcement of Corporate Responsibility], p. 29.

¹⁰⁸⁵ Cf. *ibid.* with further references.

¹⁰⁸⁶ Cf. *ibid.*

¹⁰⁸⁷ Cf. *ibid.*, pp. 29-30.

¹⁰⁸⁸ Cf. *ibid.*, p. 30 with further references.

¹⁰⁸⁹ Cf. *ibid.*

¹⁰⁹⁰ Cf. *ibid.*, p. 31 with further references.

latory and supervisory capacity.¹⁰⁹¹ *Krisch* argues that jurisdictional extension builds a tension between the problem-solving capacity of the few and the self-determination and sovereign equality of the many that is difficult to justify normatively.¹⁰⁹² The jurisdictional regime, insofar as it concerns business regulation, is today largely unbounded, resulting in such a jurisdictional overlapping, with competing claims of many different states, in which the state can actually exercise its jurisdiction depending on how much power it has – economically, institutionally and politically.¹⁰⁹³ This unboundedness of jurisdiction intensifies rather than smoothes power differentials, and it undermines the barriers once established by the principles of sovereignty and non-intervention.¹⁰⁹⁴ Or perhaps better, which they once promised to establish, because in fact these barriers have never been effective.¹⁰⁹⁵

In the context of this work, the last sentence in particular, in an overall assessment of the arguments put forward, leads to the conviction that the LkSG with its extraterritorial impacts is legitimate. This is because the German legislature is not technically doing anything with it that has not been practiced before and whose effects have not occurred in a similar way before. Admittedly, this circumstance alone does not automatically mean that it establishes legitimacy. However, the effects are not of a completely new nature, but tie in with an existing trend – both in terms of the design of justifications for juridical competence in the international context and in terms of content. This is also referred to in the explanatory memorandum to the LkSG, which states that the act is part of a more recent legal development at EU level and in individual countries that aims to achieve responsible and sustainable global management, mentioning various examples.¹⁰⁹⁶

Furthermore, the legitimacy of the extraterritorial impacts of the LkSG is supported by the fact that it is, as stated, designed in a legal manner. In addition, it seems that the Federal Republic of Germany is less focused on its own interests or on improving its own situation in the global economy than on pursuing a legitimate and positive goal.

¹⁰⁹¹ Cf. *Krisch*, in: *Entgrenzte Jurisdiktion: Die extraterritoriale Durchsetzung von Unternehmensverantwortung* [Debordered Jurisdiction: The Extraterritorial Enforcement of Corporate Responsibility], p. 31 with further references.

¹⁰⁹² Cf. *ibid.*

¹⁰⁹³ Cf. *ibid.*, p. 35.

¹⁰⁹⁴ Cf. *ibid.*

¹⁰⁹⁵ Cf. *ibid.* with further references.

¹⁰⁹⁶ Cf. BT-Drucks. 19/28649, p. 24.

Because, according to the explanatory memorandum, the purpose of this act is to improve the international human rights situation by responsibly structuring the supply chains of companies based in the Federal Republic of Germany.¹⁰⁹⁷

In order to achieve this goal, legitimate measures are used, according to the opinion expressed here. The explanatory memorandum addresses this by stating that the due diligence requirements set out in the act would be based on the generally accepted due diligence standard of the UN Guiding Principles on Business and Human Rights and the NAP, which would already be increasingly applied in practice.¹⁰⁹⁸ In this context, it should be noted, which also speaks for the legitimacy of the extraterritorial impacts of the LkSG, that the Federal Republic of Germany, with the enactment of the LkSG and its extraterritorial impacts, complies with the fact that, as described in chapter IV. 1. a., international law imposes an extraterritorial obligation on states to regulate the foreign-related activities of companies based domestically, and clearly recommends the adoption of a supply chain act.¹⁰⁹⁹ *Zimmermann/Weiß* see not only an obligation under international law, but also a constitutional obligation for Germany to enact a supply chain law, which results from basic constitutional obligations.¹¹⁰⁰

It is also considered legitimate that the Federal Republic of Germany uses the LkSG, which under certain circumstances has extraterritorial impacts, and thus exerts influence in particular on countries that seem below Germany in the hierarchy of the world order. The Federal Republic of Germany appears to be aware of its role in the world order, uses this role and its associated capacity to exert influence, and takes responsibility for this to achieve the legitimate goal described. That is because the explanatory memorandum states that the importance of corporate responsibility in transnational activities has continuously increased in recent decades and that the Federal Republic of Germany would bear a special responsibility for sustainable and fair world trade due to the high degree of international integration of its economy.¹¹⁰¹ As a consequence, this can contribute to a global improvement of the human rights situation and sustainability in supply chains, because actors are either directly or indirectly affected

¹⁰⁹⁷ Cf. BT-Drucks. 19/28649, p. 23.

¹⁰⁹⁸ Cf. *ibid.*

¹⁰⁹⁹ Cf. Wehrmann, in: Depping/Walden LkSG, § 2 para. 25.

¹¹⁰⁰ Cf. *ibid.* with reference to Zimmermann/Weiß, in: AVR, Vol. 58 (2020), 424, 425 et seq., see there for details and explanations especially pp. 425-432 and there with further references.

¹¹⁰¹ Cf. BT-Drucks. 19/28649, p. 23.

by the LkSG or, due to the signal effect of the LkSG, actors that are not actually affected by the LkSG adapt to this trend. In summary, in the view expressed here, the LkSG with its extraterritorial impacts can be considered legitimate.

V. Conclusion

Based on the findings of the previous chapters and the literature on which they are referenced, the answers and results to the research questions and hypotheses raised in the introduction can be summarized as follows against the background of the "Extraterritorial Impacts of the Supply Chain Due Diligence Act of Germany (Lieferketten-sorgfaltspflichtengesetz – LkSG)".

By way of introduction, extraterritoriality was touched upon. This raised the question of what makes extraterritoriality special or sometimes a problem – and what, contrary to extraterritoriality, is the rule and "normal case". This in turn directed attention to who legislates and on what basis. Chapter II addressed the questions of what states are and what characteristics they have, i.e., what legal nature they have. In order to be considered a state, there must be a state territory, a state people and a state power. In addition, it must be possible to dispose of these characteristics independently – this independence, which is also referred to as sovereignty, is therefore the fourth and decisive criterion for establishing statehood, along with the state territory, the state people and the state power. Furthermore, the chapter II addressed, which privileges and consequences with this statehood or with the status as a state accompany. A sovereign state possesses beside the territorial sovereignty and personnel sovereignty also the regulation sovereignty over its national territory and its state people and has therefore the authority to issue laws in relation to these.

On this basis, chapter III dealt with the fact that several states coexist in this world and that some situations cannot be limited to a certain state territory or that citizens of other states also perform acts on foreign territory, so that it is not always clear which state can claim juridical competence for the corresponding situation. For this purpose, international law serves as a kind of collision law and as an aid in resolving such questions, the basic concepts of which were first discussed in the context of chapter III. In this context, extraterritoriality was defined more precisely and distinguished from the territorial extension of domestic law, which can be accompanied by extraterritorial impacts. In the meantime, customary international law has emerged from these basic concepts in the practice of states, which has developed various principles for such situations, according to which extraterritorial legislation or a territorial extension of do-

mestic law with extraterritorial impacts, to which the same principles apply, is permitted and recognized by the overwhelming majority of states and literature. Thus, the question was addressed under which conditions extraterritorial legislation or legislation with extraterritorial impacts is permissible. After a short historical classification and the derivation of the origins, chapter III thematized these principles, namely the principle of territoriality together with the principle of effect based on it, the active personality principle, the passive personality principle, the protective principle and the universality principle.

Thus, chapters II and III formed the theoretical basis in order to apply them to the concrete example of the LkSG. Chapter IV therefore treated the LkSG, according to which certain due diligence obligations are imposed on companies, from the perspective of international law and the theoretical foundation created. In this context, the topic of the LkSG was first introduced by explaining the background for this act from the perspective of international law. Furthermore, the reasons for the LkSG were presented and this was placed in context. In addition, selected essential contents of the LkSG were demonstrated as a starting point for further considerations and discussion of the research questions, with a special focus on the scope and the definition of the supply chain of the LkSG, which determines who must implement the various due diligence obligations specified in the act.

According to § 1 para. 1 sentence 1 LkSG this act applies to enterprises regardless of their legal form that

1. have their central administration, their principal place of business, their administrative headquarters or their statutory seat in Germany and
2. that normally have at least 3.000 employees in Germany; employees posted abroad are included.

Pursuant to § 1 para. 1 sentence 2 LkSG, this act also applies to enterprises regardless of their legal form that

1. have a domestic branch office pursuant to § 13d HGB and
2. that normally have at least 3.000 employees in Germany.

As per § 1 para. 1 sentence 3 LkSG, from 1st January 2024 the mentioned thresholds amount to 1.000 employees, respectively.

According to § 2 para. 5 LkSG, the supply chain within the meaning of this act refers to all products and services of an enterprise, whereby it includes all steps in Germany and abroad that are necessary to produce the products and provide the services, starting from the extraction of the raw materials to the delivery to the end customer and includes

1. the actions of an enterprise in its own business area,
2. the actions of direct suppliers and
3. the actions of indirect suppliers.

These provisions raised the question of whether the LkSG also has extraterritorial impacts. Precisely these questions were addressed in chapter IV, which differentiates between possible extraterritorial impacts in general, on suppliers and in the enterprise's own business area.

In this respect, it can be summarized that the LkSG does have extraterritorial impacts. The extraterritorial impacts in general can be attributed to the fact that, according to § 2 para. 1 LkSG, protected legal positions within the meaning of this act are those arising from the conventions on the protection of human rights listed in No. 1-11 of the Annex and that these conventions have not been ratified and implemented in all countries. The LkSG, on the other hand, requires that the prohibitions and due diligence obligations be implemented irrespective of the ratification status of individual countries and also in precisely those countries that have not ratified the relevant convention. In addition, the LkSG is also based on the principle of "enablement before withdrawal", which is why affected companies, despite being bound by the law applicable at the place of activity, must also endeavor by means of appropriate measures to achieve the standards required by the LkSG and the conventions mentioned in the Annex in these countries, instead of withdrawing from them. The LkSG thus has an extraterritorial impact on these countries, the companies and people located there.

Also, with regard to the suppliers, the LkSG can have various extraterritorial impacts. These are based first and foremost on the wide range of preventive measures that the enterprise within the direct scope of application of the LkSG must take with regard to its direct suppliers if the risk analysis to be carried out beforehand has revealed human rights or environmental risks. In practice, however, especially due to the globalized, dynamic and widely interconnected world, such risks are unlikely to be not present in

the majority of cases. Thus, the company within the scope of the LkSG must regularly fulfill at least the catalog of preventive measures mentioned in § 6 para. 4 LkSG with regard to its direct suppliers, which requires greater efforts and resources from these direct suppliers in terms of time, personnel and finances. This gives rise to extraterritorial impacts on direct suppliers if they are not located in Germany. Furthermore, these impacts can also be intensified if the company within the scope of the LkSG has to fulfill remedial measures pursuant to § 7 para. 2 LkSG with regard to a direct supplier because a violation of a protected legal position has been identified at the latter and this cannot be remedied in the foreseeable future. This is because additional remedial measures must then be taken in addition to the preventive measures, which would further increase the time, personnel and financial resources required from the direct supplier.

It is true that the LkSG downgrades the catalog of obligations required of the company within the direct scope of application of the LkSG with respect to its indirect suppliers in comparison to its direct suppliers and, within the meaning of § 9 para. 3 LkSG, only in the case of substantiated knowledge of a violation of one of the protected legal positions by an indirect supplier, that this supplier is approached directly and measures for prevention and remedy are worked out with this supplier, so that the corresponding extraterritorial impacts can also be realized with this supplier, despite the lower ability of the company within the scope of the LkSG to exert influence due to the non-existing contractual relationship. However, by way of cascading, the extraterritorial impacts that affect the direct supplier can then also indirectly affect the indirect supplier. This is because one of the preventive measures of the enterprise within the scope of the LkSG with regard to its direct suppliers are, according to § 6 para. 4 No. 2 LkSG, contractual assurances from a direct supplier that it will comply with the human rights-related and environment-related expectations required by the enterprise's senior management and appropriately address them along the supply chain. In this way, the corresponding expectations are passed on to the rest of the supply chain, which is then obliged to a comparable extent. This can also have an impact on companies outside the supply chain, including entire industries or regions, and thus also have an extraterritorial impact on them if they are located outside Germany.

Furthermore, extraterritorial impacts on the affected enterprise's own business area can arise from § 6 LkSG. Because, according to § 6 para. 1 LkSG, an enterprise must take

appropriate preventive measures pursuant to paras. 2-4 without undue delay, if it identifies a risk in the course of a risk analysis pursuant to § 5 LkSG. Particularly in the case of a company that falls within the scope of the LkSG, it is highly unlikely that it will not identify any such risks in its own business area. Besides the due to § 6 para. 2 LkSG requested policy statement on its human rights strategy, the enterprise must according to § 6 para. 3 LkSG lay down appropriate preventive measures in its own area of business, e.g., the implementation of the human rights strategy in the relevant business processes, the development and implementation of appropriate procurement strategies and practices, trainings and risk-based controls to verify compliance with this. Moreover, extraterritorial impacts on the affected enterprise's own business area can arise from § 7 LkSG. Because, according to § 7 para. 1 sentence 1 LkSG, if the enterprise discovers that a violation of a human rights-related or an environment-related obligation has already occurred or is imminent in its own business area, it must, without undue delay, take appropriate remedial action to prevent or end this violation. In the case of sites abroad, all of this has extraterritorial impacts on them and the employees working there, who must align themselves with these measures and expectations in the execution of their work. If it is a legally independent subsidiary abroad, then there are also extraterritorial impacts in nature, as with a supplier – namely that resources of a time, personnel and financial nature have to be made available, which might have been used differently if it were independent of the parent company.

Which solutions for this circumstance, both on the side of the direct addressees as well as on the side of the indirect addressees of the LkSG, are possible, will be shown in practice, on the basis of first court decisions and not least the market and the market power. Discussing possible solutions goes beyond the scope of this work, but it is assumed here that a balance will be found over time as to what affected indirect addressees have the ability to implement and accept, what the direct addressees have the ability to enforce, and what satisfies the Federal Office for Economic Affairs and Export Control of Germany as the competent authority for monitoring and enforcement according to § 19 para. 1 sentence 1 LkSG that the direct addressees of the LkSG have fulfilled their duty of best effort.

Finally, the chapter IV addressed the question whether the LkSG with its possible extraterritorial impacts is legitimate from an international law legal point of view. The answer is that the LkSG with its extraterritorial impacts is legitimate – what means

that the Federal Republic of Germany has the authority and jurisdiction to enact such a seemingly broad scope beyond its borders with the LkSG as a domestic law. This is because the German legislature is not technically doing anything with it that has not been practiced before and whose effects have not occurred in a similar way before. The effects are not of a completely new nature, but tie in with an existing trend – both in terms of the design of justifications for juridical competence in the international context and in terms of content. Furthermore, the legitimacy of the extraterritorial impacts of the LkSG is supported by the fact that it is designed in a legal manner. In summary, based on the arguments presented and the literature on which reference was made, it can be said that the LkSG, with its accompanying extraterritorial impacts, is legal from the perspective of international law, since its application is at least linked to the active personality principle and the principle of territoriality (also with connection to the effects principle), does not inadmissibly interfere with the interests of other states, and therefore remains within the boundaries of international law. The research also showed that the LkSG is not an extraterritorial law, but a territorial extension with extraterritorial impacts due to its linkage to the principle of territoriality and the intention of the law to regulate first and foremost the actions of companies with a link to the territory of Germany. It is indeed not a law that intends to regulate matters completely without connection to the territory of Germany.

In addition, it seems that the Federal Republic of Germany is less focused on its own interests or on improving its own situation in the global economy than on pursuing a legitimate and positive goal – to improve the international human rights situation by responsibly structuring the supply chains of companies based in Germany. In order to achieve this goal, legitimate measures are used, according to the opinion expressed here. The due diligence requirements set out in the act are, according to the explanatory memorandum, based on the generally accepted due diligence standard of the UN Guiding Principles on Business and Human Rights and the NAP, which would already be increasingly applied in practice. In this context, it should be noted, which also speaks for the legitimacy of the LkSG and its extraterritorial impacts from the perspective of international law, that the Federal Republic of Germany, with the enactment of the LkSG and its extraterritorial impacts, complies with the fact that international law imposes an extraterritorial obligation on states to regulate the foreign-related activities of

companies based domestically, and clearly recommends the adoption of a supply chain act.

It is also considered legitimate that the Federal Republic of Germany uses the LkSG, which under certain circumstances has extraterritorial impacts, and thus exerts influence in particular on countries that seem below Germany in the hierarchy of the world order. The Federal Republic of Germany appears to be aware of its role in the world order, uses this role and its associated capacity to exert influence, and takes responsibility for this to achieve the legitimate goal described, what can be seen from the explorations in the explanatory memorandum.

As a consequence, this can contribute to a global improvement of the human rights situation and sustainability in supply chains, because actors are either directly or indirectly affected by the LkSG or, due to the signal effect of the LkSG, actors that are not actually affected by the LkSG adapt to this trend.

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