Summer, 2018
Vol. X, No. 1

Trade, Law *and* Development

Special Issue: Revisiting WTO's Role in Global Governance

TL&D

ISSN : 0976 - 2329
eISSN : 0975 - 3346

Trade, Law *and* Development

Vol. 10, No. 1 2018

Published by
The Registrar, National Law University, Jodhpur

ISSN : 0976-2329 | eISSN : 0975-3346

Trade, Law *and* Development

Marieke Koekkoek, *In search of the final frontier - An analysis of the extraterritorial effect of international trade measures from a jurisdictional perspective*
10(1) TRADE L. & DEV. 65 (2018)

IN SEARCH OF THE FINAL FRONTIER – AN ANALYSIS OF THE EXTRATERRITORIAL EFFECT OF INTERNATIONAL TRADE MEASURES FROM A JURISDICTIONAL PERSPECTIVE

MARIEKE KOEKKOEK*

In this paper an approach to the assessment of permissible extraterritorial effect of international trade measures is proposed in which the law on jurisdiction is central. A changing reality has altered the thinking about concepts typically related to the law on jurisdiction. The ever emerging threat of climate change, the simultaneous developments of globalization and increasing nationalism, the introduction of new technologies; it is these changes that have affected the interpretation of concepts such as state sovereignty, coercion and proportionality. In turn, it is to these changes that WTO law has to adapt to remain relevant and legitimate. At the same time, it is fundamental to uphold the unique characteristics of WTO law. Principles such as the regulatory autonomy of the Members and non-discrimination cannot be discarded for the benefit of jurisdictional analysis. Here it will be shown that the introduction of the 'new' interpretation of the 'old' principles related to the law on jurisdiction allow for a customized analysis of the extraterritorial effect of international trade measures. WTO law is the lex specialis within which the assessment of legality of a trade measure falls. However, the analysis of the permissibility of the extraterritorial effect of the measure should be executed under the lex generalis of the principles of jurisdiction as they exist in customary international law. It is proposed that framing the legal issues in jurisdictional terms will in particular benefit the discussion on the relationship between trade and non-trade related concerns in WTO law.

---

* PhD Research Fellow and Assistant researcher, KU Leuven Institute for International Law - Leuven Centre for Global Governance Studies. E-mail: marieke.koekkoek@kuleuven.be.

TABLE OF CONTENTS

I. INTRODUCTION

Although often discussed, international trade measures pursuing an objective seemingly unrelated to the territory of the regulating Member of the World Trade

Organization (WTO) still pose legal questions under the law of the WTO. Famous examples such as the *EC- Seal Products* decision or the *US-Shrimp Turtle* decision have been amply discussed both by the Dispute Settlement Body (DSB) of the WTO as well as by scholars. It is well-known that the extraterritorial effect of national policies is, in principle, not prohibited under WTO law.[1] It is also well-known that an inherent jurisdictional limitation to the application of international trade measures does exist.[2] Despite the noted importance of this legal question, there has to date not been a systematic analysis of the appropriate approach needed to address the extraterritorial effect of trade measures in WTO law.[3]

The legal challenge at hand stems from the unique design of a number of trade measures, evolved mostly in developed markets such as the European Union (EU), the United States (US), Australia and Canada. The trade measures concerned are those that include a so-called non-trade related concern as one of the main objectives of the measure. Typically, such a trade measure provides an incentive to the producer in the country where production takes place to adapt the production process for the benefit of a non-trade related objective. Two examples hereof are the Regulation laying down the obligations of operators who place timber and timber products on the market (the Timber Regulation) and the Directive on the promotion of the use of energy from renewable sources (RED).[4] Both legal

---

[1] P. Van den Bossche et al., *Unilateral Measures Addressing Non-Trade Concerns*, MINISTRY OF FOREIGN AFF. OF THE NETH. (2007), http://www.iuscommune.eu/html/activities/2007/2007-11-29/workshop8_vdBossche.pdf (last visited July 3, 2018).

[2] Appellate Body Report, *U.S. – Import Prohibition of Certain Shrimp and Shrimp Products*, ¶ 133, WTO Doc. WT/DS58/AB/R (adopted Nov. 6, 1998) [hereinafter "US-Shrimp"].

[3] Appellate Body Report, *European Communities — Measures Prohibiting the Importation and Marketing of Seal Products*, ¶ 5.173, WTO Doc. WT/DS400/AB/R; WT/DS401/AB/R (adopted June 18, 2014) [hereinafter "EC-Seals"].

[4] Regulation No. 995/2010 of the European Parliament and of the Council of Oct. 20, 2010 laying down the Obligations of Operators Who Place Timber and Timber Products on the Market, 2010 O.J. (L 295/23) [hereinafter Timber Regulation]; Directive 2009/28/EC of the European Parliament and of the Council of Apr. 23, 2009 on the Promotion of the Use

measures aim to promote the sustainable use of natural resources and protect what can be considered a common concern. Two features stand out: first, the trade measure aims to regulate a process that fully or partially takes place somewhere other than in the regulating State. Second, the consequences of the adapted production process are not noticeable in the end-product. Translated into 'trade jargon' these measures are referred to as non-product related production and process methods (non-product related PPMs). By no means is this a new development; non-trade related PPMs have been the subject of discussion both within WTO dispute settlement as well as in academic circles.[5] Still, to date, it has proven difficult to conclusively analyse the legal issues surrounding this type of trade measures.

Keeping the discussion alive is now all the more relevant as WTO Members seem to increasingly employ trade measures in pursuit of non-trade related objectives. Moreover, a number of WTO Members seem to turn away from multilateral cooperation which increases the perceived necessity to pursue unilaterally established standards by means of trade measures. This is worrisome as it brings back concerns of power-based trade policies.[6] At the same time, there is no denial of the gravity of the current environmental challenges and the lack of time to counter the negative impact of declining biodiversity and climate change (to name a few). It can, therefore, easily be argued that there is a need for unilateral solutions when there is little to no progress in multilateral negotiations. Notwithstanding the justifiable arguments for the need of such international trade measures as described, their application may have far-reaching consequences for the WTO as international organization.[7] The absence of a systematic analysis of the extraterritorial effect of

---

of Energy from Renewable Sources and amending and subsequently repealing Directives 2001/77/EC and 2003/30/EC, 2009 O.J. (L140) [hereinafter RED].

[5]PETER VAN DE BOSSCHE & WERNER ZDOUC, THE LAW AND POLICY OF THE WORLD TRADE ORGANIZATION 393 (3rd ed., 2013); *see*, ERICH VRANES, TRADE AND THE ENVIRONMENT: FUNDAMENTAL ISSUES IN INTERNATIONAL LAW, WTO LAW AND LEGAL THEORY 160 (2009).

[6] K. Zeng, *Trade Structure and the Effectiveness of America's "Aggressive Unilateral" Trade Policy*, 46 INT'L STUD. Q. 93, 99 (2002).

[7] A. Bianchi, *Jurisdictional Rules in Customary International Law*, *in* EXTRATERRITORIAL

trade measures undermines the predictability of the international trading system, as well as its perceived legitimacy.[8]

This paper argues that the discussion on extraterritoriality and international trade law would benefit from a different perspective. So far, most ideas proposed have taken the objective of the trade measure as the starting point of the analysis.[9] It is proposed here that the objective is relevant in determining the legality of the measure from the perspective of WTO law. It is less relevant in determining the permitted extent of the reach of a trade measure. A preferred approach takes the existing principles of jurisdiction as part of customary international law as a starting point. The paper discusses why the law on jurisdiction is the more appropriate legal basis for an analysis of extraterritorial effect in WTO law. It is also explained how a jurisdictional perspective could contribute to clarifying the relationship between non-trade related concerns and trade concerns. The first section of this paper discusses the legal questions with respect to the (perceived) extraterritorial effect of trade measures. Second, it will be explained in what way the law on jurisdiction serves as a basis for the analysis of extraterritorial effect in international trade law. Finally, a discussion will be included on how the legal principles on the law on jurisdiction can be embedded in WTO law.

II. DEFINING EXTRATERRITORIALITY IN THE CONTEXT OF INTERNATIONAL TRADE LAW

When discussing extraterritoriality and international trade law, one fundamental and

---

JURISDICTION IN THEORY AND PRACTICE 100 (Karl M. Meessen ed., 1996) [hereinafter "Bianchi, *Jurisdiction*"] (arguing that, as certain contemporary concerns are no longer exclusively domestic issues, the question of jurisdictional competence should evolve and should no longer be looked at primarily in term of connections with a State's territory).

[8] R. J. McLaughlin, *Sovereignty, Utility, and Fairness: Using U.S. Taking Law to Guide the Evolving Utilitarian Balancing Approach to Global Environmental Disputes in the WTO*, 78(4) OR. L. REV. 855, 938 (1999).

[9] VRANES, *supra* note 5 at 130; B. Cooreman, *Addressing Environmental Concerns through Trade? A Case for Extraterritoriality*, 61 INT'L COMP. L. Q. 229, 235 (2015).

recurring question determines the course of the debate: can international trade measures be qualified as having extraterritorial effect? It is argued here that this fundamental question emanates from two common misconceptions that have shaped the discussion on extraterritorial effect in international trade law. The first misconception is that the law on jurisdiction is not relevant for the assessment of international trade measures. It is assumed that international trade law, specifically the law of the WTO, is *lex specialis* and, therefore, the rules on jurisdiction in international law are not relevant for the analysis of potential extraterritorial effect. The second misconception is that –when it is assumed that international trade measures have extraterritorial effect - the effect has to be justified. It is assumed that extraterritoriality is, by definition, not acceptable under public international law. This by now outdated idea, stems from the time when the law on jurisdiction was first conceived and has been transposed to the context of WTO law. Both misconceptions are firmly rooted in the discussion on extraterritorial effect of international trade measures. In the section below, both misconceptions and the underlying assumptions will be clarified.

A. The (Ir)relevance of the Law on Jurisdiction in the Assessment of International Trade Measures

The first misconception that will be discussed is the supposed irrelevance of the law on jurisdiction when assessing the extraterritorial effect of international trade measures. Some have argued that it is not possible for trade measures to have extraterritorial effect.[10] Such a statement is based on a number of assumptions relating to the law on jurisdiction that should not be transposed to the context of WTO law. It will become clear that the law on jurisdiction and international economic law, specifically WTO law, are based on different perspectives of the role of the State and State sovereignty. This is the main reason why international trade measures are not easily framed in terms of the law on jurisdiction. Consequentially, it is challenging to frame and assess the extraterritorial effect of international trade measures.

---

[10] H. Horn & P. C. Mavroidis, *The Permissible Reach of National Environmental Policies*, 42(6) J. WORLD TRADE 1107, 1113 (2008); *see*, W. MENG, EXTRATERRITORIALE JURISDIKTION IM OFFENTLICHEN WIRTSCHAFTSRECHT 86 (1994).

It is, therefore, important to first briefly discuss the main concepts of the law on jurisdiction. The analysis below does not aim to comprehensively discuss the evolution of the law on jurisdiction. The aim is to point out those significant developments which have shaped the law on jurisdiction in public international law.

1. The Concept of Sovereignty

It is a well-accepted idea that the law on jurisdiction governs the peaceful co-existence between States. A basic principle of public international law is State sovereignty. Each State is sovereign and because of this each State is exclusively mandated to rule and maintain public order in a way that they themselves deem fit within the boundaries of their territory. States are the primary norm-makers and are the subjects of those norms in public international law.

The absolute power of the State poses a question on how relations between States can continue to be peaceful and stable. At first sight it appears paradoxical that equally sovereign State should feel obligated to withhold from enforcing domestic policies on other States. The function of the law on jurisdiction is to ensure that the sovereign powers of one State do not overly intervene with the exercise of the sovereign powers of another State.[11] Different legal principles have been established to ensure that State power is limited appropriately. The Peace of Westphalia in 1648 is typically referred to as the first definitive decision to establish the concept of the nation-State.[12] The treaty divided the European continent in separate territorial units which is usually referred to as the beginning of the nation-State. In reality, the Peace of Westphalia signaled the end of an existing trend in public international law, towards a focus on territory and the indivisible territorial unit. The Peace of

---

[11] F. Weiss, *Extra-Territoriality in the Context of WTO Law*, *in* BEYOND TERRITORIALITY, TRANSNATIONAL LEGAL AUTHORITY IN AN AGE OF GLOBALIZATION 463 (Gunther Handl et al. eds., 2012).

[12] In reality, it was an enumeration of the Peace of Augsburg in 1555. This treaty had already established the freedom of one ruler to exclusively decide on the prevailing religion in that territory.

Westphalia was in fact an enumeration of the Peace of Augsburg (1555). This treaty established the freedom of the ruler of a territory to choose the prevailing religion. Additionally, it divided the European continent in separate territorial units.[13] Still, the significance of the Peace of Westphalia cannot be underestimated. The most important contribution of the peace treaty was that it established clearly which State had control over which territory and the subjects therein. The delineation of territorial boundaries brought clarity in the never-ending power struggle among rulers. For the first time in history, the concept of sovereignty was equated with a nation-State.[14]

The doctrine of jurisdiction came into being by the writings of 17th century legal scholars. Probably the best known publications on the doctrine of jurisdiction were the works of Hugo Grotius- 'Mare Liberum' (1609) and 'On the Law of War and Peace' (1625). The latter is sometimes referred to as the foundation of public international law, but this should be put in perspective. Other famous scholars such as Vattel developed similar comprehensive theories on international law. All these theories were developed with a practical, political objective in mind. Theories on international law were closely related to the pragmatic act of justifying colonialism. The political aspirations to expand European-based empires and to increase economic growth led to a dichotomy with respect to the legal status of the newly colonized areas and their inhabitants. On the one hand, colonized areas were given no legal status to allow for the colonizing State to establish its sovereign power. On the other hand, they were recognized as entities with which legal contracts could be established, to ensure the exclusive rights to trade of commodities.[15] It is here that the fundamental differences between the law on Statehood and the law on commercial relations are found. International law was utilized to enforce Statehood

---

[13]H. SPRUYT, THE SOVEREIGN STATE AND ITS COMPETITORS 191 (1994).

[14] The reasoning behind this decision was twofold. First, nation-States were considered to be the only entities able to exercise full control over their territory. Second, the exercise of absolute control was deemed necessary to ensure that territorial entities could be held accountable to their international commitments. See for an overview of the development of the nation-State, SPRUYT, *supra* note 13.

[15]J. KLABBERS, INTERNATIONAL LAW 7 (2013).

and State sovereignty as the central concepts around which relations among States had to evolve. Simultaneously, a different conception of State sovereignty was developed to facilitate commercial relations in the era of colonization. Similar political considerations led to the establishment of the term '*terra communis*' and the theory on the freedom of the high seas (*Mare Liberum*). Grotius was stimulated to develop these ideas to accommodate the commercial aspirations of the Dutch East India Trading Company.[16]

From these examples, it becomes clear that the development of public international law and the law on jurisdiction has been heavily influenced by economic and political objectives relevant in the 17th century. Pragmatic considerations driven by economic aspirations have greatly influenced the rules on territorial rights and limitations in public international law.[17]

2. Principles of the Law on Jurisdiction

The law on jurisdiction recognizes three forms of jurisdiction: legislative, adjudicatory, enforcement. The definitions of these forms are self-explanatory.[18] 'For the purpose of this paper, legislative jurisdiction is the most relevant form of jurisdiction. Therefore, the discussion on the legal principles of the law on jurisdiction will be limited to legislative jurisdiction.

The most recognized basis for the exercise of legislative jurisdiction is the territory of the State, better known as the territoriality principle.[19] As discussed, State

---

[16] *Id.* at 7.

[17] *Id.* at 9.

[18] Functional jurisdiction is often described as a fourth form of jurisdiction, but this is limited to specific areas of international law. *See* C. Ryngaert, *The Concept of Jurisdiction in International Law*, *in* RESEARCH HANDBOOK ON JURISDICTION AND IMMUNITIES IN INTERNATIONAL LAW 4-8 (Alexander Orakhelashvili ed., 2015), https://unijuris.sites.uu.nl/wp-content/uploads/sites/9/2014/12/The-Concept-of-Jurisdiction-in-International-Law.pdf [last accessed 18 July 2018].

[19] H. G. Maier, *Jurisdictional Rules in Customary International Law*, *in* EXTRATERRITORIAL

sovereignty and territory were equated in the time when the law on jurisdiction was first codified. It is not surprising, then, that the territoriality principle is not disputed as a basis for legislative jurisdiction. In common law countries it was for a long time the only basis for legislative jurisdiction.[20] In the early 20th century, a Harvard based study group summarized the existing principles of the law on jurisdiction.[21] Their findings form the basis for the Restatements on Foreign Relations Law of the United States (US) and are, as a result thereof, still influential.[22] Later however, the study identified, that besides the territoriality principle, legislative jurisdiction could also be exercised on the basis of the nationality principle, the protective principle and the universality principle.[23] The passive personality principle was only accepted as jurisdictional principle at a later moment in time.[24] The identified principles are all to a certain extent connected to the territory of the regulating State. The nationality principle allows for a State to assume jurisdiction over a subject based on the fact that the person holds the nationality of that State. The protective principle allows for an assertion of jurisdiction over conduct outside the States' territory that threatening the security of the regulating State. The universality principle is farthest removed

---

JURISDICTION IN THEORY AND PRACTICE 66 (K. M. Meessen ed., 1996).

[20] Civil law countries had acknowledged other bases ever since the 17th century. Legal scholars such as Grotius and Vattel accepted the universality principle and the passive personality principle as a legitimate basis for the exercise of jurisdiction. *See* M. Akehurst, *Jurisdiction in International Law*, 46 BRIT. Y.B. INT'L L. 145, 163 (1972-1973).

[21] *Draft Convention on Jurisdiction with respect to Crime*, 29 AM. J. INT'L L. 445 (1935) [hereinafter "*Draft Convention*"].

[22] A Fourth Restatement of Foreign Relations Law is currently being discussed. RESTATEMENT OF THE LAW FOURTH, AMERICAN LAW INSTITUTE, https://www.ali.org/publications/show/foreign-relations-law-united-states/#drafts (last visited May 31, 2018) (Fourth Restatement of Foreign Relations Law is currently being discussed.); W. S. Dodge, *Jurisdiction in the Fourth Restatement of Foreign Relations Law*, 18 Y.B. PVT. INT'L L. 145 (2016-2017); *see*, Georg Nolte, *Remarks by Georg Nolte*, 108 PROCEEDINGS OF THE ANN. MEETING (AM. SOC'Y INT'L LAW) 27, 27 (2014).

[23] *Draft Convention*, *supra* note 21.

[24] Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belg.), Judgment, 2002 I.C.J. Rep. 3, 63, 76-77 (Feb. 14).

from the territory of the State. It allows for an exercise of jurisdiction due to the fact that the act concerns such a grave activity that addressing that act is a matter of concern for all States. Although the precise application of these jurisdictional principles has been, and still is, highly dependent on the area of law and the context of a specific case,[25] it is evident that territorial link was not the only basis of exercising jurisdiction.

The Harvard based study formed the most comprehensive analysis of existing jurisdictional principles at that time. Still, it was recognized that concurrent claims of jurisdiction were possible and this could lead to conflicts among States.[26] It was apparent that legal guidelines were necessary to prevent conflict in those cases were legitimate overlapping jurisdictional claims exist.[27] This was especially true in an increasingly globalized world. The earlier assumption that any kind of extraterritorial exercise of jurisdiction was illegitimate could not be maintained. Several theories have over time been developed to address the question of the appropriate approach to extraterritorial jurisdiction.[28] Although different in scope and outcome, the scholarly research all revolved around the question: how to best determine which national authority may deal effectively with transnational situations? 'Effective' here

---

[25] For example, the universality principle is conservatively applied. It can be referred to in the context of criminal law in relation to those crimes that are "of a very serious nature". Int'l Law Comm'n, Rep. on the Work of Its Forty-Eighth Session 51 U.N. GAOR Supp. No. 10, at 9, U.N. Doc. A/51/10 (1996), *reprinted in* [1996] 2(2) Y.B. INT'L L. COMM'N. 1, U.N. Doc. A/CN.4/SER.A/1996/Add.1 (Part 2) [hereinafter Int'l Law Comm'n Rep.]; Rome Statute for the International Criminal Court art. 5, July 1, 2002, 2187 U.N.T.S. 90.

[26] Akehurst, *supra* note 20 at 67.

[27] A. Bianchi, *Remarks on Maier, Harold G., Jurisdictional Rules in Customary International Law*, *in* EXTRATERRITORIAL JURISDICTION IN THEORY AND PRACTICE 74 (Karl M. Meessen ed., 1996) (in public international law no conflict rules exist that can be relied on to solve claims of concurrent jurisdictional claims).

[28] *See*, K. M. Meessen, *Antitrust Jurisdiction under Customary International Law,* 78 AM. J. INT'L L. 783, 799 (1984); *see also*, H. E. Yntema, *The Comity Doctrine*, 65(1) MICH. L. REV. 9, 9, 12, 15, 23-25 (1966); *see also*, P. M. Roth, *Reasonable Extraterritoriality: Correcting the "Balance of Interests"*, 41(2) INT'L COMP. L. Q. 245, 255-259 (1992).

is defined as 'a reasonable assertion of authority that is not contested'.[29]

From this definition, it can be derived that any appropriate approach to extraterritorial jurisdiction is subjective. Whether the exercised authority outside of the State is deemed appropriate or not depends on both the perception of the legislative State and the State or States impacted by the exercise of its authority. Limiting the exercise of extraterritorial jurisdiction is a balancing exercise of the interests of the legislative State versus those of the impacted State(s). In other words, it is the absence of contestation by other States from which the reasonableness of the exercise of authority can be derived. Whether or not the affected State(s) accept the extraterritorial effect stemming from the actions of another State depends on a multitude of factors. Examples are: the closeness to the territory of the State of the conduct over which authority is exercise, the nature of the area of law in which the legal measure is taken, the prevailing interpretation of the concept of State sovereignty and the measurability of the impact. With respect to the latter factor: as a rule of thumb it can be assumed that the more measurable the impact of a measure, the easier it will be to accept the extraterritorial effect of a measure.[30]

B. The Differences Between WTO Law and Principles of the Law on Jurisdiction

From the above it is seen that the law on jurisdiction is founded upon three important assumptions. First, State sovereignty and the territory are closely linked. Since the conception of the law on jurisdiction, the stance towards extraterritorial jurisdiction has become less strict. Still, extraterritorial effect of a legal measure is viewed with suspicion. Second, the law on jurisdiction has been shaped by non-legal considerations; especially commercial and economic considerations, which have left a mark on the perceived function of jurisdiction. Finally, the determination of whether the extraterritorial effect of a measure is permissible is a subjective exercise. At its core, the determination comes down to the question whether affected States perceive the extraterritorial effect as overly coercive.

---

[29]PHILIP C. JESSUP, TRANSNATIONAL LAW 70 (1956).

[30]Akehurst, *supra* note 20 at 101*; see*, K. M. Meessen, *Antitrust Jurisdiction under Customary International Law,* 78 AM. J. INT'L L. 783, 799 (1984).

When we compare the central concepts and principles of the law on jurisdiction with those of international trade law, it is apparent that there are important differences. In international trade law, specifically WTO law, the role of the State and the importance of territory are significantly different. WTO law does not equate State sovereignty with the territory of the State. Instead, State sovereignty is demarcated by the market. It is often assumed that the territory and the market of the State are the same. Although geographically they indicate the same area, it is asserted here that they are fundamentally different in scope. First, the market as a concept is used to identify an abstract notion, whereas territory is a tangible notion.[31] Second, the territory forms the basis for all national policies, ranging from the safeguarding of national safety to ensuring the freedom of culture and tradition. The market, in contrast, is a very limited concept. It is only used as a point of reference for the development of economic policy of a State. International trade law regulates how individual markets interact and it prescribes limitations with respect to the design and manner of application of international trade measures. A territorial link does not determine whether the regulating State has a right to develop and enforce an international trade measure. Instead, the economic interest of a State forms the basis for regulatory action.[32] Indeed, it is inherent to international trade measures that they elicit extraterritorial effect in some form. Conditioning market access by definition has effect outside the territory of the regulating State, and in this sense can be qualified 'extra-territorial'. Put in jurisdictional terminology: the main purpose of WTO law is to mitigate the perceived coercive effect of international trade measures.

---

[31]THE OXFORD DICTIONARY OF ENGLISH (3rd ed., 2015) (the term 'market' is limited to commercial activities. The Oxford dictionary describes the market as: "An area or arena in which commercial dealings are conducted"). The term 'territory is defined as: "An area of land under the jurisdiction of a ruler or state").

[32]*See*, Understanding on Rules and Procedures Governing the Settlement of Disputes, arts. 3.7, 4.11 & 10.2, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 U.N.T.S. 401 [hereinafter DSU] (a WTO Member needs to have a 'substantial trade interest' to commence consultations or request for the establishment of a Panel concerning a dispute on WTO law).

Intuitively, whether there exists an unduly coercive effect is determined by assessing whether a sufficient territorial link exists with the market of the regulating State. This link justifies the fact that a State uses its sovereign powers to develop trade policy. This assumption is not entirely correct. Indeed, it is the sovereign prerogative of the State to develop, apply and enforce international trade measures. However, the territorial link is not the starting point of the analysis under WTO law. Instead, the crux of the matter lies with the question whether the manner in which the trade measure conditions market access is in accordance with WTO law.

The coercive effect of international trade measures is not determined based on the extent to which the measure is related to the territory of the regulating State. Instead, the coercive effect is determined by the extent to which the measure has an unforeseeable and unpredictable effect on market access. As long as the extraterritorial effect of trade measures is predictable and foreseeable, a trade measure does not breach WTO law.[33] There is no language in the text of the treaties that suggest measures protecting human, animal and plant life or health are limited to the territory of a WTO Member.[34]

This is an entirely different understanding of coercive effect than the one prevalent in other sub-categories of public international law. WTO Members are not subjected to an international obligation that obliges them to maintain international trade relations.[35] Therefore, it seems straightforward to conclude that trade measures do

---

[33] Marrakesh Agreement Establishing the World Trade Organization, Preamble ¶ 3, Apr. 15, 1994, 1867 U.N.T.S. 154 ("Being desirous of contributing to these objectives by entering into reciprocal and mutually advantageous arrangements directed to the substantial reduction of tariffs and other barriers to trade and the elimination of discriminatory treatment in international trade relations").

[34] This was confirmed in the *US-Tuna II* decision. Report of the Panel, *United States – Restrictions on Imports of Tuna*, ¶ 5.16, DS29/R, (June 16, 1994) [hereinafter "US-Tuna (1994)"]; *see*, M. H. Choo, *An Institutionalist Perspective on Resolving Trade-Environmental Conflicts*, 12 J. ENVIR. L. LITIG. 433, 445 (1997).

[35] Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Merits Judgment, 1986 I.C.J Rep. 14, 138 (June 27) [hereinafter *Nicaragua, Merits*] ("A State is not

not elicit coercive effect. States are always at liberty to stop trading among each other. This is a fundamental difference with other relevant actions that influence international relations among States. For example, it is easier to imagine a (perceived) infringement of State sovereignty in the case of military intervention on humanitarian grounds as the coercive element in such a situation is clearer.

The different perception of the importance of State sovereignty and territory can be explained by the origins and history of what it now known as WTO law. The first attempts to establish a regulatory framework facilitating international trade relations commenced in reaction to the Second World War (WWII). Protectionism and increased impoverishment of Germany were thought to be the main causes of WWII. After the war, it was firmly believed that such 'beggar thy neighbour' policies should in the future be avoided.[36] Negotiations concerning the global international trading system were founded on this fundamental conviction that traditional protectionism should be prevented. Consequently, the bulk of negotiations focused on the lowering of tariffs and other practices that would ensure a more rule-based approach to international trade.[37] International trade rules should prevent this type of protectionism but otherwise should allow States to freely conduct trading relations as they saw fit. The emphasis on regulatory autonomy instead of State sovereignty underlines the economic perspective of the WTO. The drafters of the original text did not foresee the possibility that international trade measures would become important legal instruments in influencing social and environmental standards in other States.[38] It is clear that there exists a significant difference

---

bound to continue particular trade relations longer than it sees fit to do so, in the absence of a treaty commitment or other specific legal obligation").

[36] G. Marceau et al., *Introduction and Overview*, *in* A HISTORY OF LAW AND LAWYERS IN THE GATT/WTO: THE DEVELOPMENT OF THE RULE OF LAW IN THE MULTILATERAL TRADING SYSTEM 308 (Gabrielle Marceau ed., 2015).

[37] P. Williams, *Law and Lawyers in the Multilateral Trading System, in* A HISTORY OF LAW AND LAWYERS IN THE GATT/WTO: THE DEVELOPMENT OF THE RULE OF LAW IN THE MULTILATERAL TRADING SYSTEM 85 (Gabrielle Marceau ed., 2015).

[38] *See*, World Trade Organization, Ministerial Declaration of 29 November 1982, WTO Doc. L/5424 (1982) ("… the contracting parties undertake, individually and jointly: … (7)(iii) to

between the perceived role of the State and State sovereignty between international trade law and the law on jurisdiction. Consequentially, this influences the function of jurisdiction in WTO law and the approach to extraterritorial effect.

C. Decoupling the Relationship between the Intent of a Measure and the Analysis of Extraterritorial effect

The section above discussed the misconception that jurisdictional principles are irrelevant in the analysis of international trade measures. The second, commonly accepted, misconception that should be discussed is the assumption that a jurisdictional analysis is only relevant as a justification for a breach of WTO law. It is commonly understood that if it is accepted that international trade measures have extraterritorial effect; this effect needs to be justified under WTO law. The majority of existing ideas regarding the extraterritorial effect of international trade measures are based on an assumed relationship between the legitimacy of the measure's objective and the permissible extraterritorial effect.[39] Consequently, these theories limit the analysis to international trade measures pursuing a non-trade related objective. Moreover, the analysis is deemed relevant only in the context of those provisions that refer to policy exceptions. It is argued here that the relationship between the objective and the permissible extraterritorial reach of a trade measure is not as direct as often portrayed.

The direct relationship that is often assumed stems from a somewhat muddled understanding of two concepts: unilateralism and extraterritoriality. The terms are often used interchangeable, but they are different concepts.[40] 'Unilateral' means that

---

abstain from taking restrictive trade measures, for reasons of a non-economic character, not consistent with the General Agreement.").

[39] VRANES, *supra* note 5, at 177,; Cooreman, *supra* note 9.

[40] N. F. Coelho & N. L. Dobson, *The Conceptual Paper*, UNIJURIS, 7, http://unijuris.sites.uu.nl/wp-content/uploads/sites/9/2014/12/Unilateral-Jurisdiction-and-the-Protection-of-Global-Values.-The-Conceptual-Paper1.pdf (last visited June 5, 2018) (as opposed to extraterritoriality, unilateralism is not a legal concept).

the measure expresses the policy preference of one State.[41] The measure establishes a standard which is not supported by a multilateral or plurilateral consensus. Distinctive to unilateralism is that a part of the objective of the measure is to further a domestic policy by either some kind of enforcement mechanism or by positive inducement.[42] Unilateral measures are developed to enforce sanctions or to promote an internationally recognized value.[43] In the latter case, it has been argued by some that the importance of the objective could legitimize the absence of multilateral consensus.[44] This type of 'interest-based' unilateralism has become a strategy that is used more often in the area of international environmental law.[45] Still, due to the absence of global consensus unilateralism is not encouraged as a practice.[46] The unilaterally established standards impact the circumstances on other States.[47] Unilaterally established standards do not consider other international obligations or the interest of other States when designing the measure.[48] This is true, even if the measure is developed for the betterment of a global interest.[49] Moreover,

---

[41] Pierre-Marie Dupuy, *The Place and Role of Unilateralism in Contemporary International Law*, 11 EUR. J. INT'L L. 19, 20 (2000).

[42] B. Anderson, *Unilateral Trade Measures and Environmental Protection Policy,* 66 TEMPLE L. REV. 751, 754 (1993).

[43] *E.g.*, U.S. Trade Act § 301, 19 U.S.C. § 2411 (1974).

[44] U. Will, *The Extrajurisdictional Effects of Environmental Measures in the WTO Law Balancing Process*, DISCUSSION PAPER SERIES RECAP 15, at 7 n.39, (2015) (the author acknowledges that the best solution to environmental concerns would be multilateral approaches).

[45] Anderson, *supra* note 42 at 27; *see* Gregory Shaffer & Daniel Bodansky, *Transnationalism and Unilateralism in Environmental Law*, 1(1) TRANSNAT'L ENVTL. L. 31 (2012).

[46] U.N. Conference on Environment and Development, *Rio Declaration on Environment and Development*, Principle 12, U.N. Doc. A/CONF.151/26/Rev.1 (Vol. I), annex I (Aug. 12, 1992).

[47] B. Jansen, *The Limits of Unilateralism from a European Perspective*, 11(2) EUR. J. INT'L L. 309, 311 (2000).

[48] ABDELHAMID EL OUALI, TERRITORIAL INTEGRITY IN A GLOBALIZING WORLD 176 (2012).

[49] J. Scott & L. Rajamani, *EU Climate Change Unilateralism*, 23(2) EUR. J. INT'L L. 469, 479 (2012) (arguing that the Aviation Directive of the EU does not give due regard to the

it is difficult to determine whether a measure truly pursues a global interest or that the objective is supported by self-interest of the regulating State. Often, the objective is based on both global and self-interest. The EU Aviation Directive serves as an example hereof. The Directive aims to counter climate change but also to level the playing field for EU-based producers.[50] This is the reason that unilateralism is not prohibited in public international law, but the exercise hereof is discouraged.[51]

The concept of extraterritoriality is different from unilateralism. As can be seen from the above discussion on the different bases for legislative jurisdiction, the term extraterritoriality refers to the (perceived) legitimacy of the link between the territory of the regulating State and the impact of the measure. As discussed, extraterritorial jurisdiction was considered illegitimate because the sovereignty of the State over its territory was considered to be absolute. In turn, this meant that a measure based on a weak territorial link had to be justifiable in order for a measure to be upheld. Different from extraterritoriality, the qualification 'unilateral' means the extent to which the objective of the measure is supported globally. The less an objective is multilaterally supported, the more likely it is that the measure cannot be maintained. Actions qualified as unilateral and extraterritorial both have a potential to cause conflict among States. Still, it is important to realize the different value of these concepts in public international law.

The interchangeable use of the terms unilateralism and extraterritoriality have shaped the debate on extraterritorial effect of international trade measures in two ways. First, it is in the assertion of influence over affairs perceived as those of third State that the terms extraterritoriality and unilateralism overlap.[52] The reticence stance that is required towards the use of unilateral measures is, therefore, assumed

---

CBDRRC principle).

[50] Directive 2008/101/EC, of the European Parliament and the Council of Nov. 19, 2008 Amending Directive 2003/87/EC so as to Include Aviation Activities in the Scheme for Greenhouse Gas Emission Allowance Trading Within the Community, preamble ¶16, 2009 O.J. (L 8/3).

[51] VRANES, *supra* note 5, at 177 (2009).

[52] *Id.* at 174.

to be extended to the use of trade measures with extraterritorial effect. It is because of this assumption that the qualification 'extraterritorial' is perceived as negative.[53] This explains why the determination of a measure as 'extraterritorial' in itself can be a topic of controversy. In case a trade measure includes an environmental standard aimed at domestic producers addressing a territorial concern and this standard is extended to foreign producers, does this qualify as extraterritorial? It could also be seen as a territorial measure aiming to protect domestic producers who would otherwise be put at a disadvantage vis-à-vis imported products.[54] Some authors have concluded that international trade measures cannot be qualified as having extraterritorial effect. This is evidenced by the absence of references to the jurisdictional principles in WTO law. Moreover, neither Panels and Appellate Body (AB) nor relevant WTO Members have formally emphasized the importance of jurisdictional principles.[55]

Second, the discussion on extraterritoriality in the context of international trade law has often focused on the relationship between the legitimacy of the objective of a measure and the permissible extent of extraterritorial effect.[56] If a measure promotes or protects an objective that can be qualified as a global interest, this may legitimize the coercive effect of the measure.[57] Indeed, a unilateral objective derived from a treaty or customary norm has limited coercive effect.[58] The negative externalities caused by the extraterritorial effect of a measure are mitigated if the

---

[53]Bianchi, *Jurisdiction, supra* note 7 at 87.

[54] M. Hedemann-Robinson, *Defending the Consumer's Right to a Clean Environment in the Face of Globalisation, The Case of Extraterritorial Environmental Protection under European Community*, 23 J. CONSUMER POL'Y 25, 55 (2000).

[55] P. C. Mavroidis, *Reaching Out for Green Policies - National Environmental Policies in the WTO Legal Order*, *in* J. WOUTERS *et al.*, GLOBAL GOVERNANCE THROUGH TRADE, EU POLICIES AND APPROACHES 303 (2015).

[56] Cooreman, *supra* note 9.

[57] Will, *supra* note 44.

[58] V. Rodriguez-Cedeno (Special Rapporteur on Unilateral Acts of State), *First Rep. on Unilateral Acts of States*, ¶ 105-06, UN Doc. A./CN. 4/486 (Mar. 5, 1998).

objective of the measure is supported by a norm acknowledged in positive law.[59] In line with this reasoning, it has been proposed that multilateral support could also be derived from informal law.[60] Such an approach would also be applicable in the context of international trade law.

Both these assumptions are not as straightforward as they seem. The assumption that trade measures cannot have extraterritorial effect is overly extreme. It neglects the fact that trade measures are an eminent way to persuade other States to adapt to the standards of the regulating State. Indeed, as discussed above, countering the unequal coercive effect felt by international trade measures was one of the main reasons for the establishment of an international trading system. Similarly, the assumption that there is a causal relationship between the perceived legitimacy of the objective and the permissible extent of extraterritorial effect cannot automatically be accepted. The objection against unilaterally established objectives is that States are not obliged to consider the interests of other States in developing the measure. Then, there is a considerable difference when the objective is based on a multilateral acknowledged norm. The same reasoning, however, does not apply in the context of international trade law. WTO law is not concerned with the content of the policy pursued by Members. Instead, the regulatory autonomy of Members to determine policy objectives is considered more important. The legal analysis focuses on the application and design of a measure. The determination of what is considered a legitimate regulatory objective is determined based on WTO law. Other public international law can be referred to in order to support the interpretative process, but it is not leading.[61] This limited approach suits the 'legal character' of WTO law. It guarantees the economic perspective of WTO law and the regulatory autonomy of Members. From this it can be derived that the analysis of

---

[59] Bianchi, *supra* note 7 at 174.

[60] C. Ryngaert & M. Koekkoek, *Extraterritorial Regulation of Natural Resources: A Functional Approach*, *in* J. WOUTERS *et al.*, GLOBAL GOVERNANCE THROUGH TRADE, EU POLICIES AND APPROACHES (2015) [hereinafter "C. Ryngaert, M. Koekkoek (2015)"]; *see*, Rodriguez-Cedeno, *supra* note 58.

[61] Appellate Body Report, *United States — Standards for Reformulated and Conventional Gasoline*, 17, WTO Doc. WT/DS2/AB/R (adopted May 20, 1996) [hereinafter US-Gasoline].

extraterritoriality in the context of WTO law should not hinge on the legitimacy of the objective.

This is not to say that existing ideas with respect to the extraterritorial effect of trade measures should be disregarded altogether. In practice, the question of extraterritorial effect is relevant in those cases where the relationship between the objective of the measure and international trade law is not clarified. Currently, this means the category of trade measures that pursue non-trade related interests. This also explains why the jurisdictional analysis is often assumed to take place under Article XX of the General Agreement on Tariffs and Trade (GATT 1994) (or Article XIV of the General Agreement on Trade in Services (GATS)). Still, it is important to clarify that the reason for this focus is not inherent to the objective pursued. WTO Members simply have not (yet) worked-out the details of what the relationship between trade and non-trade related concerns entails. Two recent examples show that the absence of such certainty can lead to conflict among Members which brings the question of extraterritorial effect to the forefront. In reaction to sustainability criteria included in the Renewable Energy Directive (RED) both Brazil and Argentina reacted by requesting the establishment of a Panel.[62] Another example is the much-discussed Seals Regulation which determined the hunting and killing of seals inhumane. In justifying this measure, the EU referred to the moral concerns exception of Article XX(b) GATT 1994. The AB decided that the concern for animal welfare did indeed fall within the scope of the moral concerns exception, in spite of the fact that the hunting of seals did not take place in the EU region.[63] The discussion on the extraterritorial effect of trade measures would become less relevant in practice in the hypothetical situation in which all aspect of the relationship between trade and non-trade related concerns were clarified. It is

---

[62] Eventually the dispute did not proceed to the Panel stage. Request for the Establishment of a Panel by Argentina, *European Union – Anti-dumping Measures on Biodiesel from Argentina*, WT/DS473/5 (Mar. 13, 2014); Request for Consultations, *European Union- Anti-Dumping Measures on Biodiesel from Indonesia*, WT/DS480/1, G/L/1071, G/ADP/D104/1 (17 June, 2014).

[63] Appellate Body Report, *European Communities – Measures Prohibiting the Importation and Marketing of Seal Products*, ¶ 5.167, WT/DS400/AB/R, WT/DS401/AB/R (May, 22 , 2014).

important to clarify the cause and effect in this regard to warrant against overly hasty conclusions regarding the (ir)relevancy of the application of jurisdictional principles in the context of international trade law.

III. FRAMING THE EXTRATERRITORIAL EFFECT OF INTERNATIONAL TRADE MEASURES IN JURISDICTIONAL TERMS

The previous part of this paper has discussed the two main misconceptions and the assumptions that cloud the discussion revolving around international trade measures with extraterritorial effect. These insights provide guidance with respect to the relevant parameters which an appropriate approach to extraterritoriality in international trade law has to consider.

A. The Definition of 'Extraterritoriality' in Relation to International Trade Measures

A first parameter is the adoption of a wide definition of 'extraterritorial'. A strict interpretation of the term 'extra-territorial' would lead to the conclusion that trade measures do not cause significant effect outside the territory of the State.[64] In a globalized world, this interpretation is overly narrow. It ignores the realty that trade measures, although strictly focused on the territory of one State, have the ability to coercively influence affairs in other States. This is especially relevant in those policy areas that are inherently global in outlook, such as international trade. A more suitable threshold for the finding of extraterritorial effect focuses on the actual coercive effect of the measure. The threshold should be formed by the extent to which non-regulating States are induced to act in a certain manner - whether in the form of taking action or to abstain from action - in which they would not have acted in the absence of the measure.[65] Extraterritorial effect becomes a quality of a legal

---

[64] ROSALYN HIGGINS, PROBLEMS AND PROCESS: INTERNATIONAL LAW AND HOW WE USE IT 73 (1994).

[65] L. Bartels, *Article XX Of GATT and the Problem of Extraterritorial Jurisdiction-the Case of Trade Measures for the Protection of Human Rights*, 36(2) J. WORLD TRADE 353, 353-404 (2002) (Referring to US Third Restatement, Bartels defines this as: "…With what under normal circumstances would be available to a State.").

measure rather than a legal qualification. This definition relates the coercive effect of a trade measure to the permissibility of extraterritorial effect. The determination of impermissible extraterritorial effect hinges on whether the application of the measure is triggered by conduct abroad.[66] Such a definition better accommodates the various degrees in which States are impacted by the extraterritorial effect of a measure. The impact of a measure could be seen as a 'gliding scale'.[67] This scale ranges from impermissible extraterritorial effect to the extraterritorial aspect of the measure as effect incidental to the pursuit of the objective.[68]

A broader definition of 'extraterritoriality' also allows for the necessary decoupling of the objective of the measure and its permissible reach. The legal analysis of extraterritoriality should be looked at in relation to the function of the area of law under which the measure falls. In turn, the function of jurisdiction in a particular area of law is related to the role of the State as defined in that area. The concrete role of the State is influenced by the objectives of a particular area of law; those traits that define the 'legal character' of that sub-category of law. Consequentially, the approach to extraterritorial conduct should allow for flexibility sufficient to adapt to different legal context. The analysis of the permissibility of extraterritorial conduct would then not be confined to a generally applicable legal framework. In this approach the objective of a measure is still relevant, albeit in an indirect manner. The objective of a measure represents an expression of legitimate political aspirations of a State. This, in turn, influences the development of norms in public international law and so the perceived role of the State and – consequentially – the manner in which extraterritorial effect is assessed.

B. Integrating the Principles of the Law on Jurisdiction in WTO Law

---

[66] *Id.* at 381-382.

[67] C. Ryngaert, M. Koekkoek (2015), *supra* note 60.

[68] J. Scott, *Extraterritoriality and Territorial Extension in EU Law*, 62 AM. J. COMP. L. 87, 90 (2014) (the objective of the measure would be undermined if the extraterritorial effect was deemed impermissible. This 'type' of extraterritorial effect has also been coined 'extraterritorial extension').

Once it is accepted that international trade measures indeed have extraterritorial effect, the second parameter is clear. The approach to extraterritorial effect in international trade law should be based on the application of jurisdictional principles as they exist in customary international law (CIL). There is no legal objection against adopting this practice. It is inherent to principles of CIL that they apply generally in public international law. Moreover, in the *US- Shrimp* decision, the Appellate Body (AB) seemed to imply that the rules of CIL apply when trade measures are subjected to the test of Article XX GATT.[69]

Note that in this approach CIL is not referred to as evidence of a particular norm relating to the protection of international human rights or the environment. Instead, the regulatory objective of a trade measure and the extraterritorial effect thereof are made subject to existing jurisdictional principles as they are be found in CIL.[70] On the few occasions this idea has been discussed, it has been in the context of the appropriate application of Article XX GATT.[71] For example, the EU referred to the importance of the law on jurisdiction in the *US- Shrimp* case. According to the EU, the general principles of public international law guide determination of the permissible extraterritorial effect of trade measures protecting a global environmental resource.[72] This applies to any provision of WTO law which requires an analysis that is not purely based on economic considerations. An obvious example is Article XIV GATS, the equivalent of Article XX GATT related to trade in services.

---

[69] P. Sands, *"Unilateralism", Values, and International Law*, 11(2) EUR. J. INT'L L. 291, 297-98 (2000).

[70] Bartels, *supra* note 65 at 365.

[71] P. Manzini, *Environmental Exceptions of Art XX GATT 1994 Revisited in the Light of the Rules of Interpretation of General International Law*, *in* INTERNATIONAL TRADE LAW ON THE 50TH ANNIVERSARY OF THE MULTILATERAL TRADE SYSTEM 839-40 (P. Mengozzi ed., 1999); *see* B. Jansen & M. Lugard, *Some Considerations on Trade Barriers Erected for Non-Economic Reasons and WTO Obligations*, 2(3) J. INT'L ECON. L. 530, 533 (1999) (the latter authors argue that the absence of an explicit reference to a jurisdictional limitation in Article XX GATT is missing because it was assumed that its application builds on the general principles of public international law).

[72] US-Shrimp, *supra* note 2, at ¶73.

Other relevant examples might be Article 2.1 of the TBT Agreement and Article 5.7 of the SPS Agreement. Less obvious - but still probable - are Article I GATT, Article II GATS (specifically because consumer preferences are relevant under the likeness requirement) and the likeness analysis of Article III:4 GATT. These provisions are singled out because it is here that the legal analysis possibly allows for involving more than economic considerations.[73]

The transposition of jurisdictional principles is not a process of simple parallel application. Referral to the principles of the law on jurisdiction is only possible if these are embedded by the legal characteristics WTO law. Such is inherent to the law on jurisdiction and the assessment of extraterritoriality. The different theories on the assessment of extraterritorial effect all require a genuine and substantial connection between the regulating State and the regulated subject.[74] The territorial link is necessary to justify that one State regulates a matter at the expense of another State.[75] Such a genuine and substantial connection cannot be found on the basis of mere political, economic, commercial or social interests.[76]

The crux of the matter, then, becomes clear. One the one hand, according to the principles of the law on jurisdiction it is implied that the objective pursued is in some form limited to the territory of the regulating State. On the other hand, the legal character of WTO law allows for regulatory autonomy precisely on matters that are purely political or social. This brings the law on jurisdiction and WTO law in a "Catch-22 situation". The only way out of this situation seems to be to adjust the

---

[73] It is questionable which provisions still allow for other than economic considerations. *See*, EC-Seals, *supra* note 3 at ¶ 5.90, 5.111 ("less favourable treatment under I:1 and III:4 GATT even if the impact of a measure on competitive opportunities stems exclusively from a legitimate distinction").

[74] Rep. of the Study Group of the Int'l Law Comm'n on Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, 521, UN Doc. A/CN.4/L.682/Corr.1 (Aug. 11, 2006).

[75] OPPENHEIM'S INTERNATIONAL LAW 456-58 (Robert Jennings & Arthur Watts eds., 2008).

[76] F. A. MANN, THE DOCTRINE OF INTERNATIONAL JURISDICTION REVISITED AFTER TWENTY YEARS 28 (1985).

criterion of genuine and substantial connection in such a way that it allows for political and social considerations to play a role. Put in the context of WTO law, the question then becomes: under what conditions is a genuine and substantial connection established between the regulating WTO Member and the objective pursued, if under WTO law no explicit jurisdictional limitation is identified?

It has been proposed to replace the 'substantial connection test' and adopt 'legitimate State interest' as alternative criterion. In this approach, the legitimacy of the State interest would be determined on the basis of the rules of public international law.[77] This would indeed better fit the legal character of WTO law because it does not rely on the territorial link with the regulating Member. Moreover, it leaves sufficient room for WTO Members to exercise regulatory autonomy in developing trade policy objectives. Important to note is that the interests here refer not to the objective pursued. It is not the relative importance of the objective from a public international law perspective that is determinative whether or not the State has a legitimate interest. One of the fundamental principles of WTO law is protecting the regulatory autonomy of Members. WTO law allows to a great extent for regulatory diversity. The interests of Members are protected by principles protecting against arbitrary discrimination, such as National Treatment (NT) and the Most-Favoured Nations (MFN) obligation. From this it can be derived that there is no legal requirement for non-trade related concerns represented in the form of other international obligations of Members to be interpreted in the same manner.[78] This means that WTO Members, for example, will have to respect *erga omnes* obligations to not damage the global commons. But in the exact delineation of this obligation, there can be no harmonized interpretation applicable to each individual WTO Member.[79] The proposal to focus on the legitimate interest of the regulating

---

[77] Bartels, *supra* note 65 at 374; *see* Natalie L. Dobson, *The EU's Conditioning of the 'Extraterritorial' Carbon Footprint: A Call for an Integrated Approach in Trade Law Discourse*, REV. EUR. COMP. & INT'L ENVTL. L. 14-15 (2017).

[78] Bartels, *supra* note 65 at 361.

[79] J. Peel, *New State Responsibility Rules and Compliance with Multilateral Environmental Obligations: Some Case Studies of How the New Rules Might Apply in the International Environmental Context*, 10(1) REV. EUR. CMTY. & INT'L ENVTL. L. 82, 92 (2002).

States, thus, does not refer to the relative importance of the objective. The determinative factor is whether the State has a recognizable interest in protecting or pursuing the objective from the perspective of WTO law.

It is questionable that sufficient state practice and *opinio juris* exist to identify such a new rule of CIL.[80] Absent such a rule, the principle of normative integration should be relied on in determining the legitimate interest of a State. The principle assumes that public international law should be seen as a whole which, consequently, means that conflict of norms between different sub-areas of international law should be avoided.[81] Reference to the principle of integration is not a new idea. It has been discussed in determining the applicable law when defining the relationship between trade and non-trade interests. In a case concerning a prohibition by Chile to unload swordfish in Chilean ports, the EC requested the establishment of a WTO Panel arguing that Chile violated Article V and XI of the GATT 1994. Seeing that the subject of the dispute concerned fisheries the case was also brought by Chile to the International Tribunal for the Law of the Sea (ITLOS). Although the case was settled by mutual agreement before it progressed in either of the two dispute settlement fora, it made the relevance of the question of applicable law apparent. The simultaneous request for dispute settlement could have led to a situation which allowed for the same facts to be assessed under different applicable law (which would have considerably influenced the outcome of the dispute).[82] Despite the fact

---

[80]W. MENG, EXTRATERRITORIALE JURISDIKTION IM OFFENTLICHEN WIRTSCHAFTSRECHT 542-44 (1994).

[81] G. Marceau, *Conflicts of Norms and Conflicts of Jurisdiction: The Relationship between the WTO Agreement and MEAs and other Treaties*, 35(6) J. WORLD TRADE 1081, 1083 (2001) [hereinafter "Marceau (2001)"].

[82]*See*, Request for Consultations, *Chile - Measures Affecting the Transit and Importation of Swordfish*, WTO Doc. WT/DS193/1 (2000); *see also*, Conservation and Sustainable Exploitation of Swordfish Stocks in the South-Eastern Pacific Ocean(Chile v. European Union), Case No. 7, Order of Dec. 20, 2000, ITLOS Rep. 148; see also, for a discussion on applicable law in disputes in WTO law context, J. Pauwelyn, *The Application of non-WTO Rules of International Law in WTO Dispute Settlement, in* THE WORLD TRADE ORGANIZATION: LEGAL, ECONOMIC AND POLITICAL ANALYSIS (P. F. J. Macrory *et al.* eds., 2005); *see also*, G. Marceau, *A Call for*

that the principle of normative integration has been much discussed, it has been difficult to establish a fully coherent approach to the application of the principle.[83]

References in WTO law to the principle of normative integration in relation to substantive norms are plentiful. Not only was the principle of normative integration famously relied on in the *US-Shrimp* decision, it was also referred to by the Committee on Trade and Environment.[84]

Still, the principle of normative integration is conservatively relied on.[85] Instead of directly referring to norms from other sub-areas of international law when interpreting WTO law, this has been done only indirectly by reference to general principles of treaty interpretation.[86] It is this reticence stance that has on occasion been criticized for creating an unrealistically high threshold for the applicability of

---

Coherence in International Law: Praise for the Prohibition Against Clinical Isolation in WTO Dispute Settlement, 33(5) J. WORLD TRADE L. 87 (1999).

[83] T. Broude, *Principles of Normative integration and the Allocation of International Authority: the WTO, the Vienna Convention on the Law of Treaties, and the Rio Declaration*, 6 LOYOLA U. CHI. INT'L L. REV. 173 (2007-2008); *see*, J. Pauwelyn, *Bridging Fragmentation and Unity: International Law as Universe as Inter-Connected Islands*, 25(4) MICH. J. INT'L L. 903 (2004); RULING THE WORLD? CONSTITUTIONALISM, INTERNATIONAL LAW, AND GLOBAL GOVERNANCE (J. L. Dunoff & J. P. Trachtman eds., 2009); A. Evans & D. Steven, *Sustainable Development Goals – a useful outcome from Rio+20*, 4, NYU, CTR. INT'L COOPERATION (Jan.2012).

[84] US-Shrimp, *supra* note 2, at ¶ 159. World Trade Organization, Ministerial Decision of 14 April 1994, Annex II, WTO Doc. WT/ MTN.TNC/45(MIN), 33 ILM 1267, 1267 (1994) (noteworthy to highlight is the phrase: "the avoidance of protectionist trade measures and the adherence to effective multilateral disciplines to ensure responsiveness of the multilateral trading system to environmental objectives set forth in Agenda 21 and the Rio Declaration, in particular Principle 12").

[85] *See*, Panel Report, *European Communities - Measures Affecting the Approval and Marketing of Biotech Products*, ¶ 7.67-7.71,WTO Doc. WT/DS291/R, WT/DS292/R, WT/DS293/R (adopted Sep. 29, 2006) [hereinafter *EC- Approval and Marketing of Biotech Products*].

[86] Campbell McLachlan, *The Principle of Systemic Integration and Article 31(3)(c) of the Vienna Convention*, 54(2) INT'L COMP. L. Q. 279, 295 (2005).

non-trade related norms.[87] Still, the cautious approach is understandable in light of the characteristics of WTO law. Here again, a balance has to be found between the regulatory autonomy of Members on the one hand and a sufficiently responsive approach to relevant developments in other areas of public international law. Reliance on interpretative techniques instead of direct incorporation of norms provides the appearance of neutrality.[88]

Applying the principle of normative integration is intrusive and reliance on interpretative techniques in article 31 VCLT should be evaluated in that respect. In principle, the adoption of a different meaning of any word is likely to be the cause of conflict.[89] For example, the interpretation of the term 'exhaustible natural resources' in Article XX(g) to include biological or renewable resources (as opposed to being limited to finite natural resources).[90] The same is true for the inclusion of clean air as exhaustible natural resource.[91] Due consideration of the fact that interpretation has normative consequences would go a long way in preventing a norm from being coercively applied. In addition, it increases the likelihood that the integration of norms is accepted by all relevant parties.[92] The proposed approach here is different from existing approaches because the principle of normative integration will be relied upon to integrate the general principles of the law on jurisdiction with those in international trade law. Concretely, this would mean to

---

[87] M. Young, *The WTO's Use of Relevant Rules of International Law: An Analysis of the Biotech Case*, 56 INT'L COMP. L. Q. 907, 916 (2007); *see* L. Bartels, *Article XX of GATT and the Problem of Extraterritorial Jurisdiction*, 36 J. WORLD TRADE 353, 360-61 (2002).

[88] A. Lindroos & M. Mehling, *Dispelling the Chimera of 'Self-Contained' Regimes in International Law and the WTO*, 16(5) EUR. J. INT'L L. 857 (2006).

[89] H. LAUTERPACHT, THE DEVELOPMENT OF INTERNATIONAL LAW BY THE INTERNATIONAL COURT 52-60 (1982).

[90] US-Shrimp, *supra* note 2, at ¶ 127-134 (In the Shrimp/Turtle case, the evolutionary approach to interpretation as taken by the Panel was argued against India, Pakistan, Thailand and Malaysia.).

[91] US-Gasoline, *supra* note 61, at 10 (Venezuela and Brazil argued that clean air could not be interpreted as an exhaustible natural resource.).

[92] Broude, *supra* note 83.

interpret existing principles such as sovereign equality, good faith, non-intervention, proportionality in light of WTO law.[93] This approach does not raise concerns of overly relying on the authority of norms developed outside international trade law. On the contrary, it is here that WTO law and the principle of the law on jurisdiction are overlapping: legal principles such as the principle of proportionality and good faith are already prominently established in WTO law.[94] Reliance on the principle of normative integration in such a manner duly considers the questions of authority allocation and should, therefore, lead to more effective outcomes.

C. The Definition of a Conflict of Norms in WTO Law and the Relationship with the Principle of Normative Integration

A third and final parameter that has to be considered is a precondition for relying on the principle of normative integration in the manner proposed above. Generally, it is understood that a conflict of norms exists when one State is not able to simultaneously comply with two obligations that are derived from different formal international law sources.[95] The absence of conflict is assumed when a prohibitive norm prevents the enjoyment of the prescriptive norm.[96] A strict definition of a conflict of norms supports the assumption that international law should be viewed as a whole and conflict between different sub-branches of law should be avoided.

In WTO law, the narrow definition of a conflict of norms prevails. Both in *Indonesia-Automobiles* and in the *Turkey-Textiles* a conflict of norms was deemed to

---

[93] J. Trachtman, *Externalities and Extraterritoriality: The Law and Economics of Prescriptive Jurisdiction*, *in* ECONOMIC DIMENSIONS IN INTERNATIONAL LAW: COMPARATIVE AND EMPIRICAL PERSPECTIVES (J. Bhandari, A. Sykes eds., 1997) (such legal principles have long been identified as limiting principles that are part of the law on jurisdiction).

[94] N. L. Dobson, *The EU's Conditioning of the 'Extraterritorial' Carbon Footprint: A Call for an Integrated Approach in Trade Law Discourse*, REV. EUR. COMP. & INT'L ENVTL. L. 14 (2017).

[95] *See*, Marceau (2001), *supra* note 81 at 1082-86.

[96] *See*, E. Vranes, *The Definition of 'Norm Conflict' in International Law and Legal Theory*, 17(2) EUR. J. INT'L L. 395, 402 (2006) (for an overview of different authors on the conflict of norms).

exist in the case of two "mutually exclusive obligations".[97] In contrast, the existence of two obligations where one obligation is stricter than the other was not defined as a conflict of norms. Compliance with one norm did not automatically mean that the other norm was breached.[98] A side-effect of the adoption of such a narrow definition is that implicitly the normative decision is taken to prefer the application of the strictest obligation.[99] This potentially has great implications. Despite the absence of a *stare decisis* rule in WTO law, previous decisions of both Panels and AB are recognized as greatly influential. Indeed, the narrow definition of a conflict of norms was reiterated by the AB in *Guatemala – Cement*.[100] Equally, in the *EC-Bananas* decision a conflict of norms was defined as two simultaneous obligations that are mutually exclusive.[101] In interpreting a specific case, the adjudicators established a new norm in WTO law to prefer the strictest obligation.

The narrow definition on a conflict of norms is chosen purposively to avoid a normative assessment. Instead, the technical aspects of law-making are focused on in deciding which norm prevails. However, accepting such a narrow definition of a conflict of norms is in itself a normative decision.[102] The narrow interpretation of a conflict of norms should be revisited in order to allow for a more suitable weighing and balancing of interest involved.

---

[97] Panel Report, *Indonesia - Certain Measures Affecting the Automobile Industry*, ¶649, WTO Doc. WT/DS54/R, WT/DS59/R, WT/DS64/R (adopted on July 23, 1998) [hereinafter *Indonesia-Automobiles*].

[98] Appellate Body Report, *Turkey - Restrictions on Imports of Textile and Clothing Products*, ¶ 9.92, WTO Doc. WT/DS34/AB/R (adopted Oct. 22, 1999) [hereinafter *Turkey-Textiles*].

[99] *Id,* at 401.

[100] Appellate Body Report, *Guatemala - Anti-Dumping Investigation Regarding Portland Cement from Mexico*, ¶ 65, WTO Doc. WT/DS60/AB/R (adopted 2 November 1998) [hereinafter Guatemala-Cement I].

[101] Appellate Body Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, ¶ 7.159, WTO Doc. WT/DS27/AB/R (adopted Sep. 25, 1997) [hereinafter EC-Bananas III].

[102] R. Michaels & J. Pauwelyn, *Conflict of Laws?: Different Techniques in the Fragmentation of Public International Law*, 22(3) DUKE J. COMP. & INT'L L. 349, 350, 357 (2011-2012).

IV. THE USE OF COMITY AND A *DE FACTO* CONFLICT OF LAWS APPROACH TO ACCOMMODATE THE INTEGRATION OF PRINCIPLES OF JURISDICTION IN WTO LAW

The previous section has outlined all the different parameters that have to be considered when applying the jurisdictional principles of CIL as normative framework in WTO law. The principle of normative integration provides the legal basis for such an exercise, as long as the allocation of authority of norms as a consequence of applying this principle is duly considered. Three necessary parameters were identified. First, the definition of 'extraterritorial effect' has to be based on the coercive effect of a measure instead of the territorial link with the regulating State. Second, the principle of normative integration should form the legal basis for the integration of principles of CIL in WTO law. Third, for this approach to succeed a broader definition of a conflict of norms has to be accepted. Accommodating all three parameters is possible by applying comity as a principle of jurisdiction in WTO law. Comity is understood as the political and legal conviction that both foreign and national interests have to be included in the decision making process.[103] Comity is ordinarily discussed in the context of the law-making procedure. It is often referred to as a justification for limiting the reach of domestic policies.[104] Here it is proposed to use comity as a basis in the assessment of the extraterritorial effect of international trade measures. The section below will discuss the development of comity as a legal concept. The suitability to WTO law will be addressed, as well as the manner in which comity could be applied to international trade measures.

A. The Development of Comity as Legal Concept

Comity was first introduced as a concept in Roman law. By then, it was used to emphasize the common legal culture between two relatively independent entities.[105]

---

[103] J. R. Paul, *Comity in International Law*, 32 HARV. INT'L L. J. 1, 2 (1991).

[104] *Id.* at 7.

[105] E. D'Alterio, *From Judicial Comity to Legal Comity: A Judicial Solution to Global Disorder?*, 9(2) INT'L J. CONST. L. 394, 398 (2011).

Comity was understood to be a value, not a legal principle in the strict sense, which motivated entities to act on the basis of courtesy and respect towards each other.[106] Applying comity was considered to stem from a pragmatic consideration. The application of a norm developed in one entity at the expense of the freedom of another entity would cause inconvenience. Any entity was expected to voluntarily endeavour avoiding such inconvenience.[107] Efforts to develop comity as a legal obligation were first made by Dutch scholars in the 17th century.[108] The doctrine was deemed especially useful in the facilitation of international trade.[109] A conflict of laws approach was proposed which would allow for diverse regulations between different entities to simultaneously exist. Comity was introduced as a theoretical basis mitigating the negative effects of a strict application of the principle of territoriality. [110] Reciprocity, utility and moral grounds were considered as justification for limiting the reach of domestic law.[111] As a justification for accepting comity as a legal obligation, reference was made to natural law.[112] Comity was seen as a legal representation derived from natural law of the moral conviction to act with courtesy and respect in international relations among States.[113]

The status of comity as a legal or political concept remained ambiguous. It was never widely accepted as a legal obligation, but it was never rejected as such either. The Third Restatement does not mention comity as a legal obligation. However, reference is made to the principle of reasonableness as a legal enumeration of

---

[106]JOSEPH STORY, COMMENTARIES ON THE CONFLICT OF LAWS ¶ 29 (2010).

[107]T. Schultz, N. Ridi, *Comity: The American Development of a Transnational Concept*, 2017(28) KING'S COLL. LONDON DICKSON POON SCH. OF LAW, LEGAL STUD. RES. PAPER SERIES 218 (2017) [hereinafter "Schultz, Ridi (2017)"].

[108] See for an overview, Paul, *supra* note 103 at 14-24.

[109] Yntema, *supra* note 28.

[110]Schultz, Ridi (2017), *supra* note 107.

[111]Paul, *supra* note 103 at 19..

[112]E. VATTEL, THE LAW OF NATIONS ¶16 (C. Fenwick trans., 1916).

[113] A. Nussbaum, *Rise and Decline of the Law of Nations Doctrine in the Conflict of Law*, 42 COLUM. L. REV. 189 (1942).

comity.[114] This choice was made because reasonableness was deemed a more predictable legal obligation compared to comity.[115] Still, the concept of reasonableness has been criticized for lack of clarity and for not providing a comprehensive alternative to the principle of comity.[116] Comity remains a difficult concept to grasp. It has been criticized for including an overly diverse set of considerations which would lead to unpredictable outcomes. Its modern application in US based courts is no longer based on the original conflict of laws approach.[117] Yet, often enough a comity-based reasoning is relied on which may be considered as a confirmation of its importance as a principle of jurisdiction.[118] The rationale behind comity can often be identified in judgments and decisions.[119]

A territorial link is no longer a sufficient basis to exclusively rely upon in deciding whether a norm can legitimately be applied. Instead, the allocation of authority

---

[114] W.S. Dodge, *Jurisdiction in the Fourth Restatement of Foreign Relations Law*, 18 Y.B. PVT. INT'L L. 145 (2016-2017) (Third Restatement, ¶ 403(2). The Third Restatement provides in detail a number of factors that should be included in the balancing of interests involved. It focuses on the nexus with the territory, the connection between the parties and the state, the importance of the regulation, the justified expectations of the parties, the extent to which the regulation is consistent with the traditions of the international system and the extent of the interest of other states and the likelihood of conflict with other regulations. The current draft of the Fourth Restatement focuses on comity instead of the principle of reasonableness: "Deference to foreign states that international law does not mandate", paragraph 402 Fourth Restatement).

[115] A. F. Lowenfeld, *Conflict, Balancing of Interests, and the Exercise of Jurisdiction to Prescribe: Reflections on the Insurance Antitrust Case*, 89 AM. J. INT'L L. 42, 52 (1995).

[116] A. F. Lowenfeld, *Harold Maier, Comity, and the Foreign Relations Restatement*, 39 VANDERBILT J. TRANSNAT'L L. 1415, 1416 (2006).

[117] Timberlane Lumber Co. v. Bank of America, 549 F. 2d 597, ¶ 613 (N.D. Cal. 1983).

[118] Schultz, Ridi (2017), *supra* note 107 at 238.

[119] *See*, Kiobel v. Royal Dutch Petroleum Co., 133 S. Ct. 1659, 1664 (2013) [hereinafter "Kiobel case"] (in order to reach a decision, the court considered the evolution of the Alien Tort Statute and recognized the foreign policy implications of the extraterritorial reach of the Statute by looking at the extent of interference with the policy of other sovereign states.).

should be the focus of any analysis related to the pursuit of certain policy objectives or norms.[120] This is not only true in the context of WTO law, but is increasingly true for other sub-categories of public international law. A global trend can be identified towards increased institutionalized cooperation, as opposed to a system based on independent and individual States. [121] Such a shift towards institutionalized cooperation as the basis for public international law calls for a principle of jurisdiction that accommodates several different norms at the same time.[122] The co-existence of different norms should be possible, even in the absence of multilateral formal provisions. This is better accommodated by an approach to legislative jurisdiction and extraterritoriality that supports a flexible adaptation of legal provisions.[123] It is this general development that warrants a revisiting of comity as a principle of the law on jurisdiction.

B. Comity as a Principle of the Law on Jurisdiction and its Compatibility with WTO Law

Applying the principle of comity in the context of WTO law fits the legal character of the WTO. The underlying value of deference that forms the rationale for the principle of comity is compatible with the institutional objective of the WTO to be a Member-driven organization.[124] Comity was originally intended to strike the rights balance between the adherence to the law and a level of pragmatism needed to maintain a friendly relationship among trading parties. [125] The influence of pragmatism and a diplomatic approach to rule-making is still a driving factor behind

---

[120] J. H. Jackson, *Sovereignty-Modern: A New Approach to an Outdated Concept*, 97(4) AM. J. INT'L L. 782, 800 (2003).

[121] *Id.* at 802.

[122] D'Alterio ,*supra* note 105 at 405.

[123] Jackson, *supra* note 120 at 802.

[124] *Understanding the WTO: The Organization, "Whose WTO is it Anyway?*, WTO, https://www.wto.org/english/thewto_e/whatis_e/tif_e/org1_e.htm (last visited June 5, 2018).

[125] P. Marsden, *The Curious Incident of Positive Comity –The Dog that didn't Bark (and the Trade Dog that Might Just Bite), in* A. T. GUZMAN, COOPERATION, COMITY, AND COMPETITION POLICY 311 (2010).

the WTO as international organization. Moreover, the application of the principle comity on the basis of a *de facto* conflict of laws approach accepts the simultaneous existence of several legal systems that are equally legitimate and in which several solutions to the same problem can occur.[126] This fits well with the principle of regulatory autonomy and the limited mandate of the WTO. In addition, the principle of comity considers the allocation of authority that is inherent to the integration of norms from different areas of international law.[127]

C. Practical Aspects of Applying Comity as a Principle of Jurisdiction in WTO Law

It can be concluded that comity as a principle of jurisdiction is compatible with WTO law. How would the application of comity as a principle of jurisdiction in WTO law be realized? The experience of the application of comity in antitrust law provides a good comparison. In this context, legislative comity has been applied to the procedural aspects of antitrust law. As a consequence hereof, the perceived infringement of sovereignty was minimal.[128] In addition, the impact of antitrust law on relevant actors is direct and measurable. When this approach is transposed to the context of WTO law the relevant actors are State, or rather WTO Members. This is inherent to the fact that WTO law is only applicable to State actors that are Members to the organization. However, the real impact of international trade measures with extraterritorial effect is felt by exporters and consumers in the affected WTO Member.[129] Therefore, it is reasonable to look at the impact on relevant private parties as measurement when analysing to what extent a Member was negatively impacted by the infringement of the extraterritorial effect of an international trade measure. Recall that in the context of antitrust law, the determinative factor is a territorial connection: the effect of the foreign action on the territory of the affected State is assessed. In the proposed approach here, the determinative factor is formed by the coercive effect of a trade measure. In other words, the assessment

---

[126] A. Slaughter, *A Global Community of Courts*, 44(1) HARV. INT'L L. J. 217 (2003).

[127] Yntema, *supra* note 28 at 399 n.25.

[128] A. Steinbach, *The Trend towards Non-Consensualism in Public International Law: A (Behavioural) Law and Economics Perspective*, 27(3) EUR. J. INT'L L. 643, 652 (2016).

[129] *Id.* at 656.

focuses on the extent to which non-regulating WTO Members (or, the relevant private parties that fall within the sovereign State power of these Members) were not able to continue to enjoy the benefits and obligations they could legitimately expect to enjoy under the legal framework of the WTO.

As mentioned, an important argument against a comity-based approach to extraterritorial effect is the uncertainty that is inherent to the application of the principle. Interest-balancing appears to be a more predicable way of applying comity. However, this is somewhat misleading. In its core, interest-balancing comes down to a politically tainted test determining the relative importance of the public policy at stake. [130] The appearance of objectivity of interest-balancing could even be counter-productive in pursuing predictability and stability. A pre-defined list of interests does not allow for sufficient flexibility in order to respond to new developments relevant in the assessment of permissible extraterritorial effect.[131] The view on comity expressed in the Third Restatement provides guidance in this respect. The application of comity would include consideration not only of the States involved, but also those of the international system.[132] This is a form of enlightened self-interest similar to that seen in "effects doctrine"; a way to balance the different interests of states in antitrust cases.[133]

The enlightened self-interest corresponds to the principle of reciprocity in WTO law. Reciprocity should then be defined as identifying the legitimate expectations of relevant parties. The legitimate expectations include not only those related to economic considerations, but also those related to societal and political considerations. In identifying all legitimate expectations, informal law should be referred in addition to formal law sources. Informal law reflects the political preferences of a State. Despite the fact that informal law is not legally binding, the norms contained in informal law are often perceived as legitimate.[134] Thus, it can

---

[130]STORY, *supra* note 106 at 62.

[131]STORY, *supra* note 106 at 63.

[132]Kiobel case, *supra* note 119 at 1020.

[133]D'Alterio ,*supra* note 105 at 401.

[134]STORY, *supra* note 106 at 645.

legitimately be expected that States will see the pursuit of these political preferences as a legitimate use of their sovereign power.[135] This includes the pursuit of these political preferences by means of international trade measures. As such, informal law is an important source to identify the role of State and in interpreting the concept of sovereignty, which in turn is needed to determine the exact application of comity in WTO law in a specific case.

A question that remains is: which actor can apply the principle of comity in the proposed manner? In WTO law three important norm-makers that are identified: the individual WTO Members, the Dispute Settlement Body (DSB) and the individual Committees. Naturally, comity could be applied by individual Members during the law-making process, which would in its entirety solve the question of extraterritorial effect in the context of WTO law. However, it is unlikely that this would happen. It is difficult to imagine all individual WTO Members at all time sufficiently realizing which interests are involved and act upon this realization.

This leaves the need for the application of comity by the WTO Committees and the DSB. An application of comity by the WTO Committees would be similar to applying legislative comity. Naturally, the Committees do not have legislative power in the strict sense of the word. However, they do have the mandate to clarify the meaning of legal provisions included in the WTO covered agreements. For example, the Committee on Trade and Environment could clarify the permissible extent of extraterritorial effect of trade measures pursuing an environmental related standard. This could, in turn, lead to the adoption of a waiver or the adoption of a Reference Paper.[136] Admittedly, this has not happened in the context of clarifying the relationship between substantive trade norms and environmental standards.

---

[135]Int'l Law Comm'n Rep., *supra* note 25.

[136]*Understanding in Respect of Waivers of Obligations under the General Agreement on Tariffs and Trade 1994*, WTO, http://www.wto.org/english/docs_e/legal_e/11-25_e.htm (last visited May 31, 2018); *see*, *Telecommunications Services: Reference Paper*, WTO, Apr. 24, 1996, https://www.wto.org/english/tratop_e/serv_e/telecom_e/tel23_e.htm (last visited June 5, 2018) (a Reference Paper could take a similar form as the Reference Paper on Telecommunications).

Therefore, it is justifiable to question whether this it is feasible to expect a clarification on the permissible extraterritorial effect of trade measures. However, non-trade related norms have been of influence in interpreting the scope of a waiver.[137] While of course it is not possible to make any scientifically supported statements in this respect, it is argued here that there is potential for agreement. By shifting the focus of attention from substantive provisions to the application of principles of jurisdiction, the perceived infringement of sovereignty will be less.[138] The discussion is not focused on incorporating the norms developed by other Members directly into the domestic legal system. The discussion would only focus on the exact extent of the application of principles of the jurisdiction in relation to trade measures. As such, applying comity could even counter the somewhat paralyzing effect caused by the strength of the dispute settlement system on the negotiating branch of the WTO.[139] The application of comity by WTO Committees could be the stepping stone for increasing coherency among different legal systems.[140]

Transposing the traits of judicial comity to the context of WTO law would entail that adjudicators place informal law as indications of political preferences central to their assessment. The active role of the adjudicator has also been coined "judicial comity".[141] Judicial comity is characterized by much discretion left to the adjudicator, a focus on solving conflicts and the absence of pre-established criteria for the solution of a conflict.[142] Central to judicial comity is the placing at the forefront of individual rights and the important role of the adjudicator in protecting those rights.[143] To award this much power to the adjudicator might seem at odds with the

---

[137] *See*, EC-Bananas III*, supra* note 101, at ¶ 167, 169.

[138] D'Alterio *,supra* note 105 at 397.

[139] J. H. Jackson, *International Economic Law: Complexity and Puzzles*, 10(1) J. INT'L ECON. L. 3, 7 (2007).

[140] Pauwelyn, *supra* note 83.

[141] A. Slaughter, *Court to Court*, 92(4) AM. J. INT'L L. 708 (1998).

[142] D'Alterio *,supra* note 105 at 395.

[143] Steinbach, *supra* note 128 at 206; *see*, F. A. Mann, *The Proper Law in the Conflict of Laws*, 46 INT'L & COMP. L. Q. 437-38 (1987).

WTO as Member-driven organization. This proposal might even be criticized for opening the door to 'judicial activism'. However, the DSB has already played a relatively active role in determining the relationship between non-trade related concerns and WTO law and the permissible extraterritorial effect of a trade measure.[144] Furthermore, applying adjudicative comity in the adjudicative process of the WTO causes lesser loss of sovereignty compared to the application of legislative comity. In the absence of a rule of *stare decisis* in WTO law, the risk of irreversible decision-making is also mitigated. Instead, the application of adjudicative comity could help indicate and clarify legitimate policy preferences which could benefit multilateral agreements.[145]

More generally, it is arguable that the legal character of WTO law warrants a more active role of the adjudicator. In the absence of an identifiable division between legislator, adjudicator and executive power it cannot be assumed that the interests of all stakeholders (other WTO Members) have been appropriately considered in the legislative process. In other words, it cannot be assumed that legislative comity has already been exercised.[146] In such a context, it is justifiable that the adjudicator plays a more active role. In addition, the nature of public international law and the corresponding changing concept of sovereignty may permit an active role of the adjudicator. As discussed, it is all too often assumed that public international law is an integrated system. Consequentially, it is assumed that deference and respect for norms from other legal system has been awarded.[147] If this fiction were true, adjudicators could only fulfil a limited role as norm-makers. However, by now it is more realistic to accept that public international law is composed of diverse and technically specific sub-branches. This reality allows for a more influential role of adjudicators in ensuring that all interests are appropriately considered. To some

---

[144] *See*, for example, US-Tuna (1994), *supra* note 34 at ¶ 5.17, 5.27, 5.38–9; Report of the Panel, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WTO Doc. WT /DS58/RW (15 June 2001) *US—Shrimp (Panel)*, ¶ 3.36 & 7.53.

[145] STORY, *supra* note 106 at 665.

[146] Schultz, Ridi (2017), *supra* note 107 at 239.

[147] Steinbach, *supra* note 128 at 205.

extent, this is already recognized in the WTO.[148] In line with this new perspective on the nature of public international law, the concept of sovereignty has changed. Sovereign power is now understood as a justifiable basis to protect the security and moral considerations of a State. The use of State power to persuade other States of the legitimacy of certain norms is increasingly acceptable, even when such persuasion goes beyond the territory of the regulating State. This reality requires an active adjudicator that determines the legitimate interests of the relevant States.

V. CONCLUSION

This paper has discussed the assessment of permissible extraterritorial effect of international trade measures on the basis of the principles of jurisdiction as they exist in CIL. The misconception that principles of jurisdiction are irrelevant has been discussed and put in perspective. Similarly, the misconception that the jurisdictional analysis is only relevant when justifying a breach of WTO law has been discussed. It was shown that the definition of 'extraterritorial effect' should be adapted. The determination of extraterritorial effect should pivot around the coercive effect of a measure, instead of the territorial link with the regulating State. Furthermore, the principle of normative integration should be referred to when integrating the principles of jurisdiction in WTO law. Finally, for this approach to work in practice, a broader definition of a conflict of norms has to be accepted. Applying comity on the basis of a *de facto* conflict of laws approach is suggested here as a principle of jurisdiction accommodating all identified parameters. Comity requires deference to State interests and allows for a level of pragmatism that suits the legal character of the WTO. Three different norm-makers were identified to apply comity in WTO law: individual WTO Members, the WTO Committees and the DSB. The feasibility and the consequences of the application of legislative and adjudicative comity were discussed. Further, it was shown that the proposed approach regarding the assessment of extraterritorial effect of trade measures would benefit the discussion on the relationship between trade and non-trade related concerns in WTO law. The application of legislative and adjudicative comity is a logical consequence of the increasingly complex sub-branches of international law

[148]Weiss, *supra* note 11 at 187.

that exist simultaneously. States as norm-makers cannot govern effectively by taking self-interest alone as a basis for regulatory action.[149]This is true also in the context of the WTO. The application of comity in WTO law can, under certain conditions, clarify the relationship between trade and non-trade related concerns while preserving the legitimacy of the WTO as an international organization.

[149] S. D. Krasner, *The Durability of Organized Hypocrisy*, *in* SOVEREIGNTY IN FRAGMENTS: THE PAST, PRESENT AND FUTURE OF A CONTESTED CONCEPT 112 (Hent Kalmo & Quentin Skinner eds., 2010).