

The EU's conditioning of the 'extraterritorial' carbon footprint: A call for an integrated approach in trade law discourse

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Circumventing the territorial system boundaries of the climate change regime, the European Union continues to regulate foreign production processes contributing to the carbon footprint of goods and services consumed in its market. While it is well established that such measures raise issues of 'extraterritoriality', legal discourse remains divided on the applicable jurisdictional rules. This is particularly evident in the field of trade law, where persistent discussions remain as to the 'true' extraterritoriality of trade measures, and the jurisdictional limitations under the law of the World Trade Organization, particularly the General Agreement on Tariffs and Trade. Turning, however, to the customary international law of State jurisdiction, there are valuable opportunities for clarification that have received insufficient attention to date. This article therefore proposes a more integrated approach to the jurisdictional analysis, advocating a sequential interest-balancing test that further harmonizes customary principles with specific trade law concerns.

1 | INTRODUCTION

The post-Paris ambition gap has confirmed the persistence of climate change as a common concern in need of a more ambitious response.¹ A key part of this response is the reduction of greenhouse gases such as carbon dioxide (CO₂), released into the atmosphere as a result of human activities, in particular the production and consumption of industrialized goods and services. Attempting to reflect their true climate change impact, the notion of the 'carbon footprint' offers a means of calculating the life-cycle emissions of such goods and services, and includes the sourcing, production methods and transport phases, irrespective of their location.² Taking a proactive stance on climate protection, the European Union (EU) has introduced several measures targeting the carbon footprint of goods

and services consumed in the Union. Circumventing the territorial 'system boundary' of the United Nations Framework Convention on Climate Change (UNFCCC), Kyoto Protocol and Paris Agreement, it is not stopping at its own borders, and continues to introduce import requirements regulating elements of the carbon footprint originating abroad.³ Key examples discussed in this article include the Fuel Quality Directive, the Timber Regulation and the Maritime Emissions Regulation.⁴ These measures are directed at the conduct of foreign

¹Paris Agreement (adopted 15 December 2015, entered into force 4 November 2016) 55 ILM 740; United Nations Environment Programme (UNEP), *The Emissions Gap Report 2017: A UN Environment Synthesis Report* (UNEP 2017) (UNEP Emissions Gap Report 2017) <https://wedocs.unep.org/bitstream/handle/20.500.11822/22070/EGR_2017.pdf>.

²M Berners-Lee, *How Bad Are Bananas? The Carbon Footprint of Everything* (Profile Books 2011) 6. See further Section 2.

³United Nations Framework Convention on Climate Change (adopted 9 May 1992, entered into force 21 March 1994) 1771 UNTS 107 (UNFCCC); Kyoto Protocol to the United Nations Framework Convention on Climate Change (adopted 11 December 1997, entered into force 16 February 2005) 2303 UNTS 148. See further on the 'system boundary', J Scott, 'The Geographical Scope of the EU's Climate Responsibilities' (2015) 17 Cambridge Yearbook of European Legal Studies 92, 100.

⁴Directive 98/70/EC of 13 October 1998 relating to the quality of petrol and diesel fuels and amending Council Directive 93/12/EEC [1998] OJ L350/58 (Fuel Quality Directive) (as amended); Regulation 995/2010 of 20 October 2010 laying down the obligations of operators who place timber and timber products on the market [2010] OJ L295/23 (Timber Regulation); Regulation 2015/757 of 29 April 2015 on the monitoring, reporting and verification of carbon dioxide emissions from maritime transport, and amending Directive 2009/16/EC [2015] OJ L123/55 (Maritime Emissions Regulation).

producers outside the EU, raising issues of 'extraterritoriality', a contested topic in international legal discourse.

The EU's extension of its regulatory reach has not been without controversy, its well-known Aviation Directive having led to the 2011 *Air Transport Association of America (ATAA)* dispute, which remains, to date, the only instance in which the territorial scope of climate protection measures has been challenged on the basis of international law.⁵ There the EU Court of Justice (CJEU) found that the Union had 'unlimited jurisdiction' to require the submission of emissions allowances for CO₂ emitted outside its territory from aircraft present in EU aerodromes.⁶ Not only did this finding do little to still the political controversy, its legal reasoning was also heavily criticized, illustrating a lack of clarity in legal discourse on the jurisdictional limitations of trade measures seeking to target greenhouse gases emitted abroad.⁷

This lack of clarity also remains evident within the law of the World Trade Organization (WTO), a key *lex specialis* conditioning the EU's measures. Under WTO law, such production-oriented carbon footprint conditions are known as 'process or production method' (PPM) requirements, the coercive potential of which has long been a source of controversy.⁸ This is particularly true for 'unincorporated PPMs' which leave no physical trace in the end product.⁹ Unincorporated PPMs target costs of production, such as environmental damage, not otherwise reflected in the price of a good or service (i.e., externalities), including those arising abroad.¹⁰ Such measures must be contrasted with 'incorporated PPMs', which do leave a physical trace in the end product. These measures target domestic consumption externalities, and therefore have a stronger connection with the regulating actor.¹¹ While familiar with the issue of PPMs, trade law discourse remains quite fragmented on some fundamental questions regarding the applicable jurisdictional rules. In particular, there remains much discussion on the meaning of 'extraterritoriality', and whether trade measures actually raise jurisdictional issues. Where

such issues are acknowledged, there is also little clarity on the jurisdictional conditions applicable to such 'foreign carbon footprint' measures.

If we turn, however, to the customary international law of State jurisdiction, there are valuable opportunities for clarification that deserve further attention than they have received to date. Customary law is focused on the balancing of States' regulatory competence more generally, serving here as a *lex generalis*.¹² Its conceptual framework helps to identify the problematic elements of expansive trade measures that are formally only triggered at the point of entry. It also provides important interpretative assistance regarding the jurisdictional conditions of the relevant WTO Agreements, particularly the General Agreement on Tariffs and Trade (GATT), which contain no explicit territorial limitations.¹³ This is particularly valuable given the Appellate Body's (AB) deliberate evasion of this issue.¹⁴

Seeking to combine the general customary framework with the specific contextual concerns of the world trade regime, this article therefore proposes a more 'integrated approach' to the jurisdictional analysis of trade measures targeting the foreign carbon footprint. In doing so, it advocates a three-step test that first inquires into the existence of a relevant 'extraterritorial element' based on the interests of *affected* States. Only then are the interests of the *acting* State considered, in order to ascertain the existence of a valid jurisdictional basis under international law. Integrating the general and specific regimes, the customary principles are drawn upon directly to interpret the AB's 'sufficient nexus' requirement under WTO law. Contrary to dominant views in the literature, it is argued that this requirement is not primarily dependent on the location of the objective pursued or the existence of a physical territorial connection. The final assessment then concerns the jurisdictional limitations conditioning States' exercise of their jurisdictional rights.

Importantly, this article uses the term 'extraterritorial' loosely, to denote measures seeking to regulate conduct or circumstances abroad. Stepping away from the concept's pejorative connotation, it does not consider a finding of extraterritoriality to pre-empt a measure's legality under international law.¹⁵ Rather, it seeks to engage with the underlying issue of how to balance the regulatory freedom of equal sovereign States, while also considering the interests of the international community.

Turning first to the EU measures discussed above, Section 2 examines the mechanisms used to regulate extraterritorial aspects of

⁵Case C-366/10, *The Air Transport Association of America, American Airlines, Inc., Continental Airlines, Inc., United Airlines, Inc. v The Secretary of State for Energy and Climate Change*, ECLI: EU:C:2011:864 (ATAA case); see also Directive 2008/101/EC of 19 November 2008 amending Directive 2003/87/EC so as to include aviation activities in the scheme for greenhouse gas emission allowance trading within the Community [2008] OJ L8/3 (Aviation Directive).

⁶*ibid* paras 124–125.

⁷See, e.g., for a pointed critique, B Havel and J Mulligan, 'The Triumph of Politics: Reflections on the Judgment of the Court of Justice of the European Union Validating the Inclusion of Non-EU Airlines in the Emissions Trading Scheme' (2012) 37 *Air and Space Law* 3.

⁸See for the key environmental cases: GATT, *United States – Restrictions on Imports of Tuna* (3 September 1991) DS21/R (US-Tuna 1991) (unadopted); GATT, *United States – Restrictions on Imports of Tuna* (16 June 1994) DS29/R (unadopted) (US-Tuna 1994) (unadopted); and for an older critique, F Francioni, 'Extraterritorial Application of Environment Law' in KM Meessen (ed), *Extraterritorial Jurisdiction in Theory and Practice* (Martinus Nijhoff 1996) 122, 128. See also the more receptive WTO, *United States – Import Prohibition of Certain Shrimp and Shrimp Products* (12 October 1998) WT/DS58/AB/R (US-Shrimp), discussed further in Section 3.

⁹See further, e.g., D Regan, 'How to Think about PPMs (and Climate Change)' in T Cottier, O Nartova and S Bigdeli (eds), *International Trade Regulation and the Mitigation of Climate Change: World Trade Forum* (Cambridge University Press 2009) 97, 102; C Conrad, *Process and Production Measures (PPMs) in WTO Law* (Cambridge University Press 2011).

¹⁰Organisation for Economic Co-operation and Development (OECD), 'Processes and Production Methods (PPMs): Conceptual Framework and Considerations on Use of PPM-Based Trade Measures' (OECD 1997) (OECD Conceptual Framework) 10–11.

¹¹*ibid* 10.

¹²See further B Oxman, 'Jurisdiction of States' in R Wolfrum (ed), *Max Planck Encyclopaedia of Public International Law* (Oxford University Press 2007) para 1. As confirmed by the CJEU in the ATAA case (n 5) 123, the EU is also bound by international law, including therefore, the customary law of State jurisdiction.

¹³General Agreement on Tariffs and Trade 1994 (Marrakesh, 15 April 1994, entered into force 1 January 1995) 1867 UNTS 187 (GATT). See further H Horn and P Mavroidis, 'The Permissible Reach of National Environmental Policies' (2008) 42 *Journal of World Trade* 1107.

¹⁴See in particular WTO, *European Communities – Measures Prohibiting the Importation and Marketing of Seal Products* (18 June 2014) WT/DS400/AB/R, WT/DS401/AB/R (EC-Seals) para 5.173.

¹⁵Indeed, according to Ryngaert, 'while "extraterritorial" may ... be useful as shorthand for "not exclusively territorial", the term might best be avoided, because it is tainted by the pejorative connotation it has acquired over the years'. C Ryngaert, *Jurisdiction in International Law* (Oxford University Press 2015) 8.

the carbon footprint. Unpacking the relevant trade law discourse, Section 3 then considers the ongoing discussion on whether such trade measures actually raise jurisdictional issues, and how the WTO Agreements, in particular the GATT, condition States' regulatory competence in this regard. Importantly, while under WTO law discussions on extraterritoriality generally arise in relation to the justification of *prima facie* violations of the Agreements, the limits of State regulatory autonomy are relevant to the WTO regime as a whole, which seeks to guarantee equal trading opportunities between Member States.¹⁶ Turning to customary international law, Section 4 goes on to identify the points of disconnect with current trade law discussions, and the resulting opportunities for clarification. Section 5 then sets out the proposed 'integrated approach', and considers its general application to the EU measures at issue.

2 | THE EU'S CONDITIONING OF THE 'EXTRATERRITORIAL' CARBON FOOTPRINT

When it comes to regulating the carbon footprint, both international environmental law and the climate regime place the primary responsibility for the reduction of greenhouse gas emissions with the State in which the emissions occur. Thus, according to the 'polluter pays' principle, 'the polluter should, in principle, bear the cost of pollution, with due regard to the public interest and without distorting international trade and investment'.¹⁷ The UNFCCC and Paris Agreement also calculate emission reductions according to a territorial 'system boundary', dividing responsibility for greenhouse gas emissions based on the location of production.¹⁸ However, it has been widely acknowledged that the current commitments under the Paris Agreement are insufficient to prevent the global temperature rising above the critical threshold of 2 degrees Celsius, considered to lead to 'dangerous' climate change.¹⁹

Seeking to bridge this 'ambition gap', the EU continues to develop policy measures which circumvent the territorial system boundary by regulating elements of the carbon footprint originating abroad, at a time when the good or service concerned is not (yet) present in the domestic market.²⁰ While there remains some debate in the scientific community on how to measure this, here, the 'carbon footprint' is used as shorthand for a product or service's 'full climate change impact'.²¹ This includes CO₂ as well as other greenhouse gases emitted during the entire life cycle of a product or

service, and also considers the emissions resulting from land-use change.²² Key examples of EU measures conditioning the 'extraterritorial' carbon footprint include the Fuel Quality Directive, the Timber Regulation and the Maritime Emissions Regulation.²³ These will now be examined briefly.

As a first example, the Fuel Quality Directive requires fuel and energy suppliers to monitor and report the 'life-cycle greenhouse gas emissions' per unit of energy for fuel and energy supplied.²⁴ These are defined as: 'net emissions of CO₂, CH₄ [methane] and N₂O [nitrous oxide] that can be assigned to the fuel (including any blended components) or energy supplied. This includes all relevant stages from extraction or cultivation, including land-use changes, transport and distribution, processing and combustion, *irrespective of where those emissions occur*'.²⁵ Suppliers must reduce life-cycle emissions by at least 6 percent by 2020, allowing Member States to introduce 'intermediate targets' along the way.²⁶ Furthermore, 'irrespective of whether the raw materials are cultivated inside or outside the territory of the community', the reductions obtained from biofuels will only count towards these targets where they meet certain 'sustainability criteria', including at least 35 percent greenhouse gas emissions savings for biofuels.²⁷ To avoid harmful land-use change, biofuels may also not be sourced from land with 'high biodiversity value' including primary forest land and grassland.²⁸

As a second example, the Timber Regulation 995/2010 seeks to reduce illegal deforestation abroad, a key benefit of which is the mitigation of climate change.²⁹ The world's vulnerable forestland functions as a carbon sink, holding a great amount of CO₂ while alive, and releasing it back into the atmosphere when harvested.³⁰ The EU measure seeks to reduce the carbon footprint of imported timber by ensuring that its harvesting has not illegally contributed to this process. To place timber on the EU market, suppliers must comply with extensive due diligence requirements, including the provision of information on the type and origin of the timber, as well as a risk assessment and corresponding risk mitigation procedure.³¹ This sets EU parameters for production methods abroad, which are not visible in the final timber or timber products. Notably, timber which conforms with the EU's alternative voluntary Forest Law Enforcement, Governance and Trade (FLEGT) licensing

¹⁶This is reflected in the 'most-favoured nation' and 'national treatment' requirements, discussed further in Section 3.2.1.

¹⁷Rio Declaration on Environment and Development' UN Doc A/CONF.151/26 (Vol. I) (13 June 1992) Annex, Principle 16. See further JF Gerber, 'Polluter Pays Principle' (Environmental Justice, Organisations, Liabilities and Trade 2013) <<http://www.ejolt.org/2013/05/polluter-pays-principle/>>.

¹⁸Intergovernmental Panel on Climate Change (IPCC), 'Guidelines for National Greenhouse Gas Inventories, Volume 1: General Guidance and Reporting' (IPCC 2006) para 1.4. See further Scott (n 3) 100.

¹⁹See further the UNEP Emissions Gap Report 2017 (n 1) xvii.

²⁰See further <ec.europa.eu/clima/policies/strategies/index_en.htm>.

²¹Berners-Lee (n 2) 5–6.

²²International Organization for Standardization (ISO), 'Environmental Management – Life-cycle Assessment: Principles and Framework' (2006) ISO 141040. While land-use change is not explicitly mentioned in the ISO Framework it is consistent with other ISO guidelines, including: 'Carbon Footprint of Products – Requirements and Guidelines for Quantification and Communication' (2013) ISO/TS 14067; and the 2001 Greenhouse Gas Protocol of the World Resources Institute and World Business Council for Sustainable Development; see <https://www.wri.org/sites/default/files/pdf/ghg_protocol_2001.pdf>.

²³Maritime Emissions Regulation (n 4).

²⁴Fuel Quality Directive (n 4) art 7a.

²⁵*Ibid* art 2(6) (emphasis added).

²⁶*Ibid* art 7a.

²⁷*Ibid*.

²⁸*Ibid* art 7b.

²⁹Timber Regulation (n 4) rec 3.

³⁰T Johnson, 'Deforestation and Greenhouse Gas Emissions' (Council on Foreign Relations 21 December 2009) <<https://www.cfr.org/backgrounder/deforestation-and-greenhouse-gas-emissions>>.

³¹Timber Regulation (n 4) art 6.

scheme is presumed to comply with the Timber Regulation (Article 3), incentivizing third countries to conclude Voluntary Partnership Agreements with the EU, to lower the administrative burden for their suppliers.³²

Third, Regulation 2015/757 lays down a monitoring, reporting and verification scheme for CO₂ emitted throughout the entire duration of voyages of large vessels to, from and between EU ports.³³ Not only is this intended to achieve reductions on its own, it is also the first step towards the implementation of a further market-based measure (possibly an emissions trading system (ETS)) to limit emissions from international maritime transport.³⁴ This targets the 'transportation' part of the carbon footprint of goods carried on board. Such measures can also be characterized as unincorporated production requirements for certain services, including tourism and goods transportation.

These measures are key examples of the mechanisms used by the EU to condition the carbon footprint of goods and services originating outside of its territory. These trade measures use market access as leverage to impose increased production costs. In examining the jurisdictional basis for such measures under international law, a key *lex specialis* is therefore the law of the WTO, which will now be explored in more detail.

3 | EXTRATERRITORIALITY IN TRADE LAW DISCOURSE

While world trade law is no stranger to the issue of competing regulatory freedoms, the concept of extraterritoriality remains highly contested in scholarly discourse. To understand the jurisdictional questions within their specific trade law context, the following section distils two key discussions. Section 3.1 explores the debate on whether trade measures actually raise issues of extraterritoriality. Section 3.2 then considers scholarly discussion on the extent to which WTO law, in particular the GATT, provides jurisdictional limitations. As will be seen, the latter issue has most explicitly arisen in relation to the justification of *prima facie* GATT violations, where evasive case law continues to fuel academic debate.

3.1 | Do trade measures give rise to issues of extraterritoriality?

In analysing extraterritoriality in trade law discourse, an essential starting point is the lively debate about whether trade measures actually raise issues of extraterritoriality, as several eminent commentators consider that they do not. This latter view is clearly

explained by Howse and Regan, who argue that process-based measures are not extraterritorial as they 'do not directly regulate [i.e., sanction] any behaviour occurring outside the border'.³⁵ Charnovitz follows a similar reasoning, noting that as tariffs or import restrictions are applied at the border, which is within a State's jurisdiction, and only to those who choose to export there, they 'do not constitute extraterritorial application'.³⁶ Notably, the view that import conditions applied at the border fall wholly within a States' sovereign prerogatives is also found outside the narrower realm of WTO discourse. A clear example is the ATAA case where the CJEU held that the EU had 'unlimited jurisdiction' based on the physical presence of aircraft in EU territory.³⁷

While these commentators do not necessarily deny that trade measures may have certain extraterritorial effects, they are not considered to qualify a measure as 'truly' extraterritorial. Thus, Howse and Regan acknowledge that 'whether a particular product may be imported depends on what has previously happened to it outside the border', however, the fact that 'nothing that has happened outside the border attracts, by itself, any criminal or civil sanction', means that the measures are not extraterritorial in the 'core sense'.³⁸ Anderson too, distinguishes between 'extraterritorial' measures, which 'command or compel results beyond a nation State's borders', and trade measures, which 'merely induce or influence results beyond its borders'.³⁹

On the other side of the debate, there are several prominent scholars who consider that trade measures may well raise issues of extraterritoriality. Taking the 'middle ground', Ankersmit, Lawrence and Davies consider that as PPM measures 'incentivize but do not mandate' behaviour occurring 'entirely in other jurisdictions ... it is not clear to what extent these measures should be considered "truly" extraterritorial'.⁴⁰ Seeking to capture this nuance, Scott distinguishes between extraterritorial measures and exercises of 'territorial extension', the latter of which are triggered by a 'territorial connection' such as market access, but 'in applying the measure the

³⁵R Howse and D Regan, 'The Product/Process Distinction – An Illusory Basis for Disciplining "Unilateralism" in Trade Policy' (2011) 11 *European Journal of International Law* 249.

³⁶S Charnovitz, 'Dolphins and Tuna: An Analysis of the Second GATT Panel Report' (1994) 24 *Environmental Law Reporter* 10567.

³⁷ATAA case (n 5) para 124. See also, e.g., HF Chang, 'An Economic Analysis of Trade Measures to Protect the Global Environment' (1993) 83 *Georgetown Law Journal* 2131, 2194, who views such measures as 'an exercise of the traditional sovereign power any nation enjoys over its trade with other nations'. A more detailed literature analysis is provided by L Bartels, 'Article XX of GATT and the Problem of Extraterritorial Jurisdiction – The Case of Trade Measures for the Protection of Human Rights' (2002) 36 *Journal of World Trade* 353, 376.

³⁸ibid 274. See also the Opinion of Advocate General (AG) Kokott in the ATAA case (n 5) ECLI:EU:C:2011:637 para 147, arguing that the 'calculation of emission allowances to be surrendered is based on the whole flight ... does not bestow upon Directive 2008/101/EC any extraterritorial effect' as the measure contained 'no concrete rule' regarding the conduct of foreign aircraft outside of EU airspace.

³⁹B Anderson, 'Unilateral Trade Measures and Environmental Protection Policy' (1993) 66 *Temple Law Review* 751, 755. See also W Meng, *Extraterritoriale Jurisdiktion Im Öffentlichen Wirtschaftsrecht* (Springer 1994) 86, distinguishing between measures with *coercive* effects (*Persuasionswirkung*) abroad, and PPMs, which he considers have 'mere foreign links' (*Auslandsanknüpfungen*), or other factual effects.

⁴⁰L Ankersmit, J Lawrence and G Davies, 'Diverging EU and WTO Perspectives on Extraterritorial Process Regulation' (2012) 21 *Minnesota Journal of International Law Online* 24.

³²See Regulation 2173/2005/EC of 20 December 2005 on the establishment of a FLEGT licensing scheme for imports of timber into the European Community [2005] OJ L347/1 ('FLEGT Regulation') art 2.

³³Maritime Emissions Regulation (n 4) art 1.

³⁴Commission (EU), 'Integrating Maritime Transport Emissions in the EU's Greenhouse Gas Reduction Policies' (Communication) COM(2013) 479 final, 28 June 2013, 7.

regulator is required, as a matter of law, to take into account conduct or circumstances abroad.⁴¹

Churchill considers a measure to be extraterritorial when its 'primary purpose' is the regulation of extraterritorial circumstances.⁴² These must be distinguished from measures which aim to regulate domestic situations, which are 'purely an exercise in territorial jurisdiction'.⁴³ In his view, 'incentivizing' port entry conditions *could* then be extraterritorial, if these effects are the primary purpose of a measure. This may arguably be the case for some foreign carbon footprint conditions such as the sourcing requirements of the Biofuels Directive.⁴⁴ Cooreman formulates the issue slightly differently, arguing that measures imposed to protect 'outward-looking' physical concerns such as animal welfare abroad may raise jurisdictional tensions.⁴⁵ 'Conversely, inward-looking' measures do not raise such tensions, as they are based upon a strong (territorial) nexus with the regulating State.⁴⁶ This will be discussed in more detail below.

Rather than focusing on a measure's intent, Bartels argues that 'what is relevant is whether the legislation has an impermissible practical effect on persons abroad'.⁴⁷ Importantly, the author points to WTO jurisprudence, in particular the *Tuna-Dolphin* and *US-Shrimp* disputes, in support of the view that 'there is a valid question as to whether a WTO Member has jurisdiction to impose import restrictions with respect to matters outside its territory'.⁴⁸ These cases are indeed essential to understanding the jurisdictional limits of trade measures under WTO law, and will now be explored in more detail. As will be seen however, the AB has remained deliberately evasive on the existence of an implied jurisdictional limitation in the WTO Agreements, particularly the GATT, leaving further room for speculation in scholarly debate.

3.2 | Jurisdictional limitations under WTO law?

WTO jurisprudence reveals a number of situations where States have taken issue with the jurisdictional limits of each other's trade measures. The key cases discussed briefly here are the *Tuna-Dolphin*, *US-Shrimp* and *EC-Seals* disputes, which, as the names suggest, all concern the protection of animal welfare outside the territory of the regulating State.⁴⁹ Context is important here, as under WTO law, questions of jurisdiction generally arise in relation to the justification 'prima facie' violations of the WTO Agreements. This is because, in terms of substantive obligations, trade law is primarily concerned

with preventing discrimination, and there are no explicit territorial limitations on State jurisdiction as such.⁵⁰ As will now be seen however, foreign carbon footprint measures are a category very likely to require justification. To understand precisely how WTO law conditions State competence in this regard, the following section will briefly examine their likely trajectory under a compatibility analysis.

3.2.1 | Foreign carbon footprint measures as *prima facie* GATT violations

Of the WTO Agreements primarily applicable to PPM measures, the GATT, the Technical Barriers to Trade (TBT) Agreement and the General Agreement on Trade in Services (GATS) contain the key regulatory conditions.⁵¹ Notably however, there remains debate as to whether the TBT Agreement applies to unincorporated PPMs, as 'technical regulations' 'laying down product characteristics or their related processes' in the sense of Annex 1.1.⁵² For reasons of space, the present analysis will concentrate on the GATT, as this has been the focus of both scholarly debate and WTO case law.⁵³

In line with its aim of ensuring equal trading opportunities between WTO Members, the GATT draws a categorical distinction between 'country-based' import requirements which condition products based on their origin, and 'process-based' import requirements which condition imports based on how they are produced.⁵⁴ The former constitute 'de jure' discrimination in violation of Article III GATT, immediately requiring justification under Article XX.⁵⁵ By contrast, origin-neutral, process-based conditions are in principle permitted if they meet the core 'national treatment' (NT) and 'most-favoured nation' (MFN) requirements.⁵⁶ Measures like those of the EU that condition the carbon footprint rather than a product's origin, will fall into the latter category. As will now be seen however, the current interpretations of the MFN and NT principles pose intrinsic obstacles to such climate-related PPMs.

According to the NT principle, imports must be granted 'treatment no less favourable' than 'like' domestic products (Article III GATT).⁵⁷

⁵⁰Horn and Mavroidis (n 13) 1113.

⁵¹GATT (n 13) art III:4 ('measures affecting sale ... of products'); Agreement on Technical Barriers to Trade (adopted 15 April 1994, entered into force 1 January 1995) 1868 UNTS 120 (TBT Agreement) Annex 1; General Agreement on Trade and Services (adopted 15 April 1994, entered into force 1 January 1995) 1869 UNTS 183 (GATS) art I:1 ('measures affecting trade in services').

⁵²TBT Agreement (n 51) Annex 1.1 (emphasis added). This was left open in *EC-Seals* (n 14) para 5.12, in which the AB found that whether a measure lays down 'related' PPMs in the sense of Annex 1.1 TBT Agreement, requires an examination of 'whether the processes and production methods prescribed by the measure have a "sufficient nexus" to the characteristics of a product in order to be considered related to those characteristics'.

⁵³Notably, in *US-Gambling* the AB found that Article XX GATT may also be of relevance when interpreting the GATS general exemption provision art XIV. WTO, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services* (7 April 2005) WT/DS285/AB/R (*US-Gambling*) para 291. Article XIV GATS does not contain a paragraph similar to Article XX(g) GATT.

⁵⁴Regan (n 9) 102. Notably, outright 'quantitative restrictions' on imports are also prohibited under Article XI GATT.

⁵⁵*ibid.*

⁵⁶See further S Charnovitz, 'The Law of Environmental "PPMs" in the WTO: Debunking the Myth of Illegality' (2002) 27 *Yale Journal of International Law* 59.

⁵⁷Notably, fiscal measures under Article III:2 GATT (n 13) may not charge internal taxes on 'like' imported goods, 'in excess of' those applied to domestic products. Products in a 'directly competitive or substitutable' relationship may not be taxed 'dissimilarly' (see the GATT Note Ad III).

⁴¹J Scott, 'Extraterritoriality and Territorial Extension in EU Law' (2014) 62 *American Journal of International Law* (2014) 87, 90.

⁴²R Churchill, 'Port State Jurisdiction Relating to the Safety of Shipping and Pollution from Ships – What Degree of Extra-territoriality?' (2016) 31 *International Journal of Marine and Coastal Law* 442, 454.

⁴³*ibid.*

⁴⁴Fuel Quality Directive (n 4) art 7a.

⁴⁵This is particularly true where there are no direct effects in the territory of the regulating State; see B Cooreman, 'Addressing Environmental Concerns through Trade? A Case for Extraterritoriality' (2015) 61 *International and Comparative Law Quarterly* 229, 235.

⁴⁶*ibid.*

⁴⁷Bartels (n 37) 387 (emphasis added).

⁴⁸*ibid.*

⁴⁹See n 8.

The MFN requirement in Article I:1 GATT extends this benefit to all other WTO Members, requiring that all products be granted the 'same advantage', irrespective of their origin.⁵⁸ While in the past there has been some debate on the applicability of the MFN principle to unincorporated PPMs, it is assumed here that this is the case, as such measures 'relate to' the sale of products in the sense of Article III GATT.⁵⁹ The MFN and NT requirements are both expressions of the non-discrimination principle, 'the essence' of which, according to the AB in *EC-Bananas III*, 'is that like products should be treated equally'.⁶⁰ In assessing the general GATT compatibility of foreign carbon footprint measures, two key issues thus stand out. The first is whether products are 'like' irrespective of their carbon footprint, and the second is whether such measures fail to grant equal treatment, despite the fact that differentiation is based on a valid public policy objective.⁶¹ These will now be considered briefly.

Turning first to 'likeness' under the GATT, while its precise meaning differs per provision, according to the AB, this is 'fundamentally, a determination about the nature and extent of a competitive relationship between and among products'.⁶² The Report of the Working Party on Border Tax Adjustments provides general indicators according to which 'likeness' may be judged, namely: (i) physical properties; (ii) end uses; (iii) consumer preferences; and (iv) international tariff classification.⁶³ Based on these criteria, products which are physically identical yet have larger carbon footprints due to their production process will probably be considered 'like', unless consumers are found to treat them differently.⁶⁴ McAusland and Najjar cite some studies in support of consumer 'willingness-to-pay' considerable premiums for low-carbon goods, 'suggesting that tastes for high- and low-carbon goods are distinct (for some consumers at least)'.⁶⁵ However, as things stand, it is difficult to identify concrete consumer preferences in the EU market as a whole.⁶⁶ Importantly here, as noted by Cooreman, individuals' voting preferences may not reflect their consumption preferences.⁶⁷

The second issue is whether carbon footprint conditions grant unequal treatment even though they are based on a valid public policy objective. Despite persuasive arguments to the contrary, in *EC-Seals* the AB clarified that under both Articles I:1 and III:4 GATT there will be less favourable treatment, even where the 'detrimental impact of a measure on competitive opportunities' 'stem[s] exclusively from a legitimate regulatory distinction'.⁶⁸ A measure's objective may only be considered during the justification phase in Article XX GATT.⁶⁹ Measures applying financial incentives (and punishments) and administrative due diligence burdens to certain unincorporated elements of goods' carbon footprint will thus very likely have a 'detrimental impact on competitive opportunities' of 'like' products in violation of the MFN and NT principles. In practice, carbon footprint conditions will often favour certain countries over others, because they relate to circumstances dependent on the environmental or economic characteristics of the place of origin.⁷⁰ A finding of discrimination would make particular sense where the EU is imposing stricter environmental requirements on less developed States that have not had the same opportunities for unchecked industrialization.

The justification opportunities of Article XX GATT heavily condition State competence to regulate the foreign carbon footprint. The two most relevant subparagraphs under which climate protection measures could be defended are Article XX(b) as 'necessary' for the 'protection of human, plant and animal life and health', and Article XX(g) as 'related to' the 'conservation of exhaustible resources'.⁷¹ The detailed application of these environmental exemptions to (EU) climate protection measures has been analysed by numerous commentators, and will not be repeated here.⁷² In brief, it is argued that such measures could, in principle, provisionally qualify under Article XX(b), as climate change poses an immediate risk to 'human, plant and animal life and health', falling within the scope of this objective.⁷³ Measures reducing embodied carbon are also 'necessary' in the sense that they make a 'material contribution' to the achievement of a truly 'vital' community objective.⁷⁴ In concrete cases, it must be established that there is no less trade-restrictive alternative.⁷⁵ While not determinative, scientifically grounded environmental and economic impact assessments may offer strong evidence that

⁵⁸This includes *de jure* and *de facto* discrimination; see WTO, *Canada – Certain Measures Affecting the Automotive Industry* (31 May 2000) WT/DS139/AB/R, WT/DS142/AB/R para 78.

⁵⁹See for more extensive analyses, e.g.: Conrad (n 9); C McAusland and N Najjar, 'The WTO Consistency of Carbon Footprint Taxes' (2014) 46 *Georgetown Journal of International Law* 765, 767; Charnovitz (n 56) 59; J Potts, 'The Legality of PPMs under the GATT' (International Institute for Sustainable Development 2008); Ankersmit et al (n 40) 14.

⁶⁰WTO, *European Communities – Regime for the Importation, Sale and Distribution of Bananas* (9 September 1997) WT/DS27/AB/R.

⁶¹Conrad (n 9) 163.

⁶²Notably, 'likeness' in Article III:4 is broader in scope than in Article III:2, first sentence, yet not broader than the 'directly competitive and substitutable' threshold in Article III:2, second sentence. WTO, *Japan-Taxes on Alcoholic Beverages* (AB 4 October 1996) WT/DS8/AB/R; WT/DS10/AB/R; WT/DS11/AB/R 24. See for Article III:4 GATT, WTO, *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products* (12 March 2001) WT/DS135/AB/R (*EC-Asbestos*).

⁶³GATT, 'Report of the Working Party on Border Tax Adjustments' (2 December 1970) BISD 18S/97. See, e.g., *EC-Asbestos* (n 62) para 101.

⁶⁴In *EC-Asbestos* (n 62) para 102, the AB found that 'consumer perceptions may similarly influence – modify or even render obsolete – traditional uses of the products'.

⁶⁵McAusland and Najjar (n 59) 777.

⁶⁶See in the context of aviation emissions, R Jou and T Chen, 'Willingness to Pay of Air Passengers for Carbon-Offset' (2015) 7 *Sustainability* 3071.

⁶⁷B Cooreman, *Addressing Global Environmental Concerns through Trade Measures: Extraterritoriality under WTO Law from a Comparative Perspective* (Doctoral Dissertation Leiden University, 2016) 41.

⁶⁸*EC-Seals* (n 14) paras 5.90, 5.115.

⁶⁹*ibid.*

⁷⁰While the Maritime Emissions Regulation does not yet impose costs relative to the distance travelled, this is likely to be incorporated into the final market-based measure, and would almost certainly be problematic. See COM(2013) 479 (n 34) 4.

⁷¹Though after *EC-Seals* (n 14), it is not inconceivable that such measures be defended under the 'public morals' exemption of Article XX(a) GATT.

⁷²See, e.g., Bartels (n 37); Charnovitz (n 56); F Erixon, 'Green Protectionism in the European Union: How Europe's Biofuels Policy and the Renewable Energy Directive Violate WTO Commitments' (European Centre for International Political Economy 2009); Cooreman (n 45); NL Dobson and C Ryngaert, 'Provocative Climate Protection – EU "Extraterritorial" Regulation of Maritime Emissions' (2017) 66 *International and Comparative Law Quarterly* 295.

⁷³On the scope of Article XX(b) GATT, see WTO, *United States – Standards for Reformulated and Conventional Gasoline* (20 May 1996) WT/DS2/AB/R (*US-Gasoline*) para 6.21.

⁷⁴WTO, *Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef* (10 January 2001) WT/DS161/AB/R (*Korea-Beef*) para 162; WTO, *Brazil – Measures Affecting Imports of Retreaded Tyres* (17 December 2007) WT/DS332/AB/R (*Brazil-Retreaded Tyres*) para 151.

⁷⁵*Brazil-Retreaded Tyres* (n 74) para 151. See also *EC-Asbestos* (n 62) paras 169–175.

a measure is capable of passing this requirement.⁷⁶ Such impact assessments are a standard part of the EU regulatory process.⁷⁷

Article XX(g) also provides a justification opportunity, particularly as the term 'exhaustible natural resources' must be read 'in light of contemporary concerns of the community of nations about the protection and conservation of the environment'.⁷⁸ As climate change indirectly threatens the conservation of several such resources, in particular freshwater, climate protection falls under this objective.⁷⁹ Furthermore, it has been argued that a stable climate could itself be considered an exhaustible natural resource in an analogous manner to clean air, which has been recognized by the AB as falling under Article XX(g).⁸⁰ Carbon reduction measures are also 'related to' such conservation, bearing 'a close and genuine relationship' to the mitigation of anthropogenic climate change.⁸¹

Measures provisionally qualifying under the subparagraphs of Article XX remain subject to the requirement of the chapeau that they 'are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination ... or a disguised restriction on international trade'. As the chapeau is concerned with a measure's *application*, its requirements will be discussed further in Section 5.3, which considers the limitations on how States exercise their prescriptive rights.

Given the interconnected nature of the world's ecosystems, it is perhaps unsurprising that over time, a number of unilateral environmental policy measures have given rise to trade law disputes on the jurisdictional limitations of Article XX GATT. However, despite recognizing its 'systemic importance', to date, the AB has explicitly refused to rule on the issue. To help understand the persistent uncertainties, the following section will briefly analyse the relevant case law and consider the resulting scholarly debate on the jurisdictional limitations of Article XX GATT.

3.2.2 | An implied jurisdictional limitation for *prima facie* violations?

A key starting point for this brief case law analysis is the well-known 1994 *Tuna–Dolphin* dispute.⁸² At issue was a United States (US) import ban on tuna caught by suppliers in countries listed as failing to require the use of dolphin-friendly fishing nets, as well as 'intermediary' countries in which the tuna was subsequently processed.⁸³

This led to objections from the European Communities (EC) and the Netherlands, raising the question whether the measure could be defended under Article XX GATT. The GATT Panel confirmed that neither paragraphs (b) or (g) were clear on the 'nature and precise scope of the policy area' covered.⁸⁴ Based on a contextual analysis it concluded that the GATT did not 'proscribe ... in an absolute manner' measures 'taken with respect to things located, or actions occurring, outside the territorial jurisdiction of the party taking the measure'.⁸⁵ However, the Panel found that 'measures taken so as to force other countries to change their policies, and that were effective only if such changes occurred, could not be considered "necessary" for the protection of animal life or health in the sense of Article XX (b)'.⁸⁶ Nor could they be considered 'primarily aimed either at the conservation of an exhaustible natural resource, or at rendering effective restrictions on domestic production or consumption, in the meaning of Article XX (g)'.⁸⁷

The last part of this finding was, however, overturned in the 1998 *US–Shrimp* case, which concerned the permissibility of a similar US measure banning shrimp from countries which did not use turtle-friendly fishing nets.⁸⁸ In interpreting the general exemptions provision, the AB found that 'requiring from exporting countries compliance with ... certain policies' does not render a measure 'a priori incapable of justification under article XX', as this would render 'most, if not all, of the specific exceptions of article XX, inutile'.⁸⁹ The AB then found that as the 'highly migratory' turtles were known to occur within US territorial waters, there was a 'sufficient nexus' between the endangered population and the US. It thereby implied that a 'sufficient nexus' is needed between regulating State and the objective pursued by the measure, in order for that State to claim jurisdiction. That being said, the AB explicitly restricted its findings to the specific circumstances of the case, declining 'to pass upon the question of whether there is an implied jurisdictional limitation in article XX(g)'.⁹⁰

In *EC–Seals*, the AB did come tantalizingly close to answering this question in the more controversial context of public morals under Article XX(a).⁹¹ This case concerned an EU ban on seals and seal products, with certain exemptions which appellants claimed violated the GATT.⁹² Considering, on its own accord, the issue of jurisdiction, the AB referred to *US–Shrimp*, and the 'sufficient nexus' found in the 'specific circumstances' of that case. Without explicitly linking the cases together, it then considered the facts of the case before it, noting that the EU seal regime was 'designed to address seal hunting

⁷⁶The ISO Guidelines (n 22) provide such an internationally recognized life-cycle assessment methodology (ISO14040:2006 'Principles and Framework' and ISO14044:2006 'Requirements and Guidelines').

⁷⁷See <https://ec.europa.eu/info/law-making-process/planning-and-proposing-law/impact-assessments_en>.

⁷⁸*US–Shrimp* (n 8) para 129.

⁷⁹IPCC, *Climate Change 2014 Synthesis Report Summary for Policymakers: Future Risks and Impacts Caused by a Changing Climate* (2014) <https://www.ipcc.ch/pdf/assessment-report/ar5/syr/AR5_SYR_FINAL_SPM.pdf> (IPCC AR5 SPM).

⁸⁰See, e.g., G. Marceau, 'The Interface Between Trade Rules and Climate Change' in DY Park (ed), *Legal Issues on Climate Change and International Trade Law* (Springer 2016) 3, 18.

⁸¹See interpreting Article XX(g), *US–Shrimp* (n 8) para 137. Support for this relationship is found in the IPCC AR5 SPM (n 79) 8.

⁸²*US–Tuna* (1994) (n 8).

⁸³ibid para 2.7.

⁸⁴ibid paras 5.15, 5.31.

⁸⁵ibid paras 5.16, 5.32. In doing so it notably disagreed with the Panel in the earlier case *US–Tuna* (1991) (n 8) para 5.26–7.

⁸⁶ibid 5.39.

⁸⁷ibid para 5.27.

⁸⁸*US–Shrimp* (n 8) para 98.

⁸⁹ibid para 121.

⁹⁰ibid.

⁹¹*EC–Seals* (n 14).

⁹²ibid para 1.4. As the EU had defended its measures based on the animal welfare concerns of its citizens, and 'never submitted that the protection of seal welfare as such was an objective of the seal regime', it had failed to establish an additional *prima facie* case under Article XX(b); ibid para 5.183.

activities occurring “within and outside the Community” and the seal welfare concerns of “citizens and consumers” in EU Member States.⁹³ However, while ‘recognizing the systemic importance of the question of whether there is an implied jurisdictional limitation in Article XX(a), and, if so, the nature or extent of that limitation’, the AB once again decided not to examine this question.⁹⁴ Still, this appears to imply that the presence of certain activities regulated within the EU, together with the seal welfare concerns of EU citizens in EU Member States would be enough to constitute a ‘sufficient nexus’ to support jurisdiction.

Amidst the continuing uncertainty, commentators have explained these cryptic findings in somewhat different ways. One approach is to interpret the ‘sufficient nexus’ requirement as a *physical* territorial connection between the regulated subject matter and the acting State. This appears supported, for example, by Van den Bossche, Schrijver and Faber, who interpreted *US-Shrimp* as suggesting that if a sufficient nexus exists between the protection of ‘societal values’ on the one hand, and a State’s territory on the other, ‘Article XX may be applied’.⁹⁵ This nexus ‘definitely exists’ when the measure concerns unincorporated PPMs affecting a global situation (e.g., climate change), and also possibly those affecting a transboundary situation or a situation in ‘undetermined national territories’ such as the protection of migratory species.⁹⁶ However, it ‘clearly does not exist’ where the measure concerns unincorporated PPMs affecting a ‘purely national situation in the country of production’, such as local environment and animal welfare.⁹⁷ Writing in 2007, before *EC-Seals*, the authors conclude that the ‘Appellate Body has still to rule on whether measures of this kind, when otherwise GATT inconsistent, can be justified under the Article XX of the GATT 1994’.⁹⁸

The subsequent finding in *EC-Seals* may well indicate that the sufficient nexus requirement is not limited to measures *physically* affecting the territory of the legislating State. Notably, the AB’s vague reference to seal hunting activities ‘occurring within the community’ leaves uncertainty here.⁹⁹ Still, the AB’s acceptance of measures protecting public morals primarily concerned with situations outside the regulating State raises questions regarding an interpretation based purely on a physical territorial connection. The judgement may therefore have great implications for the interpretation of the jurisdictional limitations in Article XX GATT as a whole, including the environmental exemptions.

Shifting the emphasis away from the physical connection, other commentators consider the location of a measure’s *focus* of primary relevance from a jurisdictional perspective. A key example is Charnovitz,

who provides an in-depth exploration of the permissibility of ‘inwardly’ and ‘outwardly-directed’ measures protecting public morals under Article XX(a) GATT.¹⁰⁰ ‘Outwardly-directed’ measures are those ‘used to protect the morals of foreigners residing outside one’s own country’, while ‘inwardly-directed’ measures are those which ‘protect morals of persons in one’s own country’.¹⁰¹ While these terms are ‘somewhat arbitrary’ given that they are ‘two sides of a transaction’, the defining factor is *who* the measure is primarily trying to protect.¹⁰² In interpreting Article XX(a), the underlying assumption is that ‘[i]mport measures to safeguard the morals of a domestic population would probably receive the lightest scrutiny’, while ‘outwardly-directed’ measures might ‘receive more intense scrutiny’.¹⁰³ According to Charnovitz, the point at which this scrutiny occurs is not, however, in relation to the scope of ‘public morals’ under Article XX(a), but rather in relation to whether a measure is ‘necessary’ to achieve the stated objective.¹⁰⁴

Cooreman builds on this approach, applying a similar reasoning to the physical environmental objectives of Article XX(b) and (g) GATT.¹⁰⁵ In doing so, she proposes a ‘decision tree’ to assess the acceptability of PPMs regulating extraterritorial conduct more generally.¹⁰⁶ Step 1 of the decision tree requires an identification of the ‘location of the concern’, where ‘inward-looking’ measures focus on environmental issues located within the territory of the regulating State, while ‘outward-looking’ measures seek to regulate concerns located outside the State.¹⁰⁷ Measures may also look both inward and outward, as is the case for climate protection which is both a domestic and global concern. Similarly to Charnovitz, Cooreman reasons that ‘[p]urely inward-looking measures, even when non-product-related, will have a much stronger (territorial) connection or nexus than purely outward-looking measures’.¹⁰⁸ In fact, she argues that for inward-looking measures ‘no problems arise from a jurisdictional perspective as those concerns fall within the territorial jurisdiction and sovereign rights of the regulating State’, despite possible extraterritorial effects.¹⁰⁹ Conversely, ‘outward-looking’ measures without any substantial territorial effects do raise jurisdictional issues. Ultimately the jurisdictional limitation under Article XX(b) or (g) would then appear to come back down to physical territorial effects, as these may bolster the legality of outward-looking

⁹³ibid para 5.173.

⁹⁴ibid.

⁹⁵P Van den Bossche, N Schrijver and G Faber, ‘Unilateral Measures Addressing Non-trade Concerns: A Study on WTO Consistency, Relevance of Other International Agreements, Economic Effectiveness and Impact on Developing Countries of Measures Concerning Non-product-Related Processes and Production Methods’ (The Ministry of Foreign Affairs of the Netherlands 2007) 94. See also Potts (n 59) 23, referring to ‘domestic effect’.

⁹⁶Van den Bossche et al (n 95) 94.

⁹⁷ibid 95.

⁹⁸ibid 96.

⁹⁹*EC-Seals* (n 14) para 5.173.

¹⁰⁰S Charnovitz, ‘The Moral Exemption in Trade Policy’ (1998) 38 *Virginia Journal of International Law* 698, 695.

¹⁰¹ibid, noting that ‘[o]ther terms that have been employed to describe laws that seek to promote values in foreign countries are “extrajurisdictional” and “extraterritorial”’. Charnovitz also refers to R Hudec, ‘GATT Legal Restraints on the Use of Trade Measures against Foreign Environmental Practices’ in J Bhagwati and R Hudec (eds), *Fair Trade and Harmonization* (MIT Press 1996) 116, who ‘uses the term “externally-directed” for the same phenomenon’. *ibid*.

¹⁰²ibid. Notably, Charnovitz suggests that this may be a point of contention between States in concrete cases. *ibid* 737.

¹⁰³ibid 730.

¹⁰⁴ibid 730–731. With regard to scope, the only question is whether the subject matter of the measure ‘falls within the range of policies covered by article XX(a)’; *ibid* 737.

¹⁰⁵Cooreman (n 45).

¹⁰⁶ibid 235.

¹⁰⁷ibid 234–235, arguing that ‘distinguishing between measures with an inward- or outward-looking purpose allows for a better assessment of the acceptability of PPMs that address activities occurring outside the territory of the regulating country’.

¹⁰⁸ibid.

¹⁰⁹Cooreman (n 67) 65.

measures, and are assumed to exist for inward-looking 'physical' environmental concerns.

According to Cooreman, 'moral concerns or effects' need to be assessed under Article XX(a) GATT, and in their absence, 'it is very unlikely that a PPM addressing a fully demarcated foreign harm with no, or indirect, environmental impact would be accepted under Article XX GATT'.¹¹⁰ Implicitly then, qualifying measures as protecting 'inward-looking' moral concerns to be assessed under Article XX(a), may overcome the absence of a (direct) physical territorial connection necessary for justification under Article XX(b) and (g).

As a second step in her decision tree, Cooreman then suggests an inquiry into the degree of international support, which may buttress otherwise weaker claims of jurisdiction over outward-looking concerns.¹¹¹ This resembles the approach taken by Petersmann, who also argues that measures 'may not be justifiable under Article XX if they are not necessary to protect the domestic environment of the importing country' or 'for the multilaterally agreed protection of global commons'.¹¹²

The above section illustrates the continuing uncertainty on quite fundamental jurisdictional questions regarding process-based trade measures under WTO law. However, as will now be seen, the discussions also appear quite disconnected from the classical jurisdictional doctrine under customary international law, which may in fact be able to lend some clarity. The following section will now explore customary doctrine, highlighting the key points of disconnection and opportunities for clarification.

4 | EXTRATERRITORIALITY UNDER CUSTOMARY INTERNATIONAL LAW: OPPORTUNITIES FOR CLARIFICATION

4.1 | Jurisdiction and extraterritoriality under customary international law

Supplementing WTO law as a *lex generalis*, the customary international law of State jurisdiction conditions State regulatory competence more broadly. Premised on the Westphalian conception of independent sovereign States, its aim is to preserve sovereign equality through balancing State power, where jurisdiction is an expression of sovereignty itself.¹¹³ As noted by Oxman, today the law of jurisdiction also serves both to recognize *interdependence* by 'ensuring effective jurisdiction exists to achieve common goals', and to harmonize the rights of States with concurrent jurisdiction.¹¹⁴

To this end, customary international law distinguishes between different 'types' of jurisdiction which have different degrees of

invasiveness on the regulatory competence of other States.¹¹⁵ Importantly, each jurisdictional act must have its own independent legal basis in international law.¹¹⁶ To start with, a State's 'enforcement' jurisdiction 'to ensure compliance with its laws' interferes greatly with the sovereignty of other States, and may only be exercised within its own territory.¹¹⁷ The situation is similar for a State's 'adjudicative jurisdiction' to subject cases to be tried and determined by its courts.¹¹⁸ By contrast, a State's 'legislative' or 'prescriptive' jurisdiction to 'adopt legislation governing persons, property and conduct' is considered comparatively less intrusive, and in addition to territory, may be based on a number of recognized 'extraterritorial principles'.¹¹⁹ Notably, it is a prerequisite for the validity of both adjudicative and enforcement jurisdiction that are also based on a valid act of prescriptive jurisdiction.¹²⁰ The most well-recognized 'extraterritorial' prescriptive principle is that of nationality, according to which States may exercise jurisdiction over their citizens (and sometimes residents).¹²¹ The 'protective principle' may support the regulation of foreigners' extraterritorial conduct when it threatens 'vital state interests'.¹²² The universality principle requires no specific connection with the regulating State and has traditionally been based on the gravity of certain crimes violating fundamental values of the international community.¹²³ Finally, the 'effects-doctrine' provides a basis for jurisdiction over foreign conduct that produces direct and substantial effects within a State's territory.¹²⁴

Importantly, these principles are not equally well-recognized in practice, and their application varies across different fields of law.¹²⁵ Rather than serving as delineated rules, it is therefore generally

¹¹⁵M Kamminga, 'Extraterritoriality', in Wolfrum (n 12) para 1: 'these distinctions are important because some methods of exercising extraterritorial jurisdiction of States are more likely to conflict with the competence of other States and therefore more likely to raise questions as to their compatibility with international law'. According to Kamminga, this is also what the Permanent Court of International Justice wished to point out in the seminal *Lotus* case, with its finding that extraterritorial enforcement jurisdiction was forbidden in the absence of a permissive rule, while extraterritorial prescriptive (and adjudicative) jurisdiction was permitted in the absence of a prohibitive rule. See *The Case of the S.S. 'Lotus' (France v Turkey)*, Judgment No 9 of 7 September 1927, PCIJ. Reports 1928, Series A, No 10, 18–19. State practice now indicates that valid assertions of prescriptive jurisdiction require States to be able to demonstrate a 'substantial connection' to the regulated subject matter.

¹¹⁶2006 ILC Report (n 113) 521.

¹¹⁷*ibid* 518; Kamminga (n 115) para 8.

¹¹⁸2006 ILC Report (n 113) 518.

¹¹⁹See further on the prescriptive principles: FA Mann, 'The Doctrine of Jurisdiction in International Law' (1964) 111 *Recueil des Cours* 9; V Lowe and C Staker, 'Jurisdiction' in MD Evans (ed), *International Law* (Oxford University Press 2010) 317; J Crawford, *Brownlie's Principles of Public International Law* (Oxford University Press 2012) 447; Ryngaert (n 15) 101; International Bar Association, 'Report of the Taskforce on Extraterritorial Jurisdiction' (2009) <<http://tinyurl.com/taskforce-etj-pdf>> (2009 IBA Report).

¹²⁰2006 ILC Report (n 113) 518.

¹²¹Oxman (n 12) para 18.

¹²²2006 ILC Report (n 113) 522.

¹²³S Yee, 'Universal Jurisdiction: Concept, Logic, and Reality' (2011) 10 *Chinese Journal of International Law* 503, 505, noting: 'Behind the "absence" façade however, rests the basis for such an assertion of jurisdiction, normally formulated this way: The alleged crime is an attack on the fundamental values of the international community as a whole.'

¹²⁴See Restatement (Third) of the Foreign Relation Law of the United States, Volume 1 (1986) (US Third Restatement) §402(1)c. Note also that the Draft Fourth Restatement, approved by Membership in 2017, addresses the effects-doctrine in a separate section §213, which it considers 'reflects the evolution of the effects principle into a distinct basis for jurisdiction to prescribe under customary international law' (§213 Reporters Notes 5) <<https://www.ali.org/projects/show/foreign-relations-law-united-states/>>.

¹²⁵Kamminga (n 115) para 10.

¹¹⁰Cooreman (n 45) 238.

¹¹¹*ibid* 233.

¹¹²EU Petersmann, 'International Trade Law and International Environmental Law: Prevention and Settlement of International Environmental Disputes in the GATT' (1993) 27 *Journal of World Trade* 69, 71.

¹¹³Report of the International Law Commission on the Work of its 58th Session' UN Doc A/61/10 (2006) Annex E: Extraterritorial Jurisdiction (2006 ILC Report) 517.

¹¹⁴Oxman (n 12) para 9.

accepted that the classical bases are initial indicators with which to evidence the overarching requirement of a 'significant connection' or 'nexus' between the State and the regulated subject matter.¹²⁶ According to the International Law Commission (ILC) Report on Extraterritoriality, this entails a 'sufficient connection' between the State and the 'persons, property or acts concerned', and can be seen as the 'common element underlying the various principles'.¹²⁷ Also authoritative is *Oppenheim's International Law*, which defines this requirement as a 'sufficiently close connection to justify that State in regulating the matter and perhaps also to override any competing rights of other States'.¹²⁸ Other commentators, including Bianchi, Bartels and Kopela focus more on State practice as evidencing a 'significant connection'.¹²⁹ How this requirement may apply to the EU's carbon footprint conditions will be discussed further in Section 5.

4.2 | Opportunities for clarification in customary international law

Looking at this basic conceptual framework, two key points emerge where trade law discourse appears somewhat disconnected from customary theory.

The first point of disconnect is the argument that import requirements do not actually raise issues of extraterritoriality, as they are only applied at the border, without directly addressing or sanctioning foreign conduct. This appears to blur the distinction between prescriptive and enforcement jurisdiction under customary law. As noted by Ryngaert and Ringbom, the fact that measures are only enforced territorially will 'not normally assist in the justification of assertions of prescriptive jurisdiction over activities that bear no relation to a state's territory'.¹³⁰ Rather, a State must be able to demonstrate a 'substantial connection' with the regulated subject matter to justify the trade measure itself. In terms of clarification, customary law thus suggests that process-based trade measures may well raise issues of extraterritoriality. While prescriptive measures may certainly be less intrusive than enforcement measures, there remains a 'potential interference' with the sovereignty of other States that requires its own independent justification.¹³¹

The second point of disconnect between trade discourse and customary theory is their approaches to the requisite link between the State and the regulated subject matter. Specifically, under customary law, the permissibility of prescriptive measures is not

primarily determined based on the existence of a territorial connection, be it physical or in the form of a measure's 'inward' focus. Rather it is concerned with the strength of a State's *interest* in the regulated subject matter, irrespective of where this may be. These points will now be elaborated further.

To start with, it is argued that an interpretation of Article XX GATT as requiring a physical territorial connection appears too narrow an approach. This is because it fails to reflect all of the permissive bases open to States under customary law, which have not, to date, been ruled out by the AB. Even assuming that the connection is based on both territorial presence and effects, States may still wish to rely on elements of the protective or even the universality principles to support their jurisdictional assertions. This is not implausible for climate protection measures which aim to mitigate severe domestic harm as well as negative extraterritorial externalities contributing to a common concern of mankind, and will be considered in Section 5.2 below.

The inward/outward focus approach also diverges from customary law, as the overarching 'substantial connection' requirement is not primarily defined in terms of the location of the concern protected. In this regard, a distinction must be drawn between a measure's public policy *objective*, such as those enumerated in Article XX GATT, and the strength of a State's *interest* in the objective. The latter is what forms the substantial connection, and it is essentially location-neutral.

Methodologically speaking, there are good reasons for not relying too heavily on a measure's stated focus. As noted by Young, the categories of 'domestic, foreign, transboundary or global' for the possible framing of environmental concerns, are 'political and changeable'.¹³² Others too have noted that 'a given measure can invariably be recast as "outwardly-directed" or "inwardly-directed", depending on the interests emphasized'.¹³³ Ultimately, the characterization is simply not dispositive for common environmental concerns like climate change, located both inside and outside all States' territories. International support is relevant, but may weigh in irrespective of a concern's location. Furthermore, tying morality to territory regardless of where the physical harm occurs seems conceptually flawed. As noted by Howse and Regan, it 'requires we assign a physical location to an essentially non-physical effect'.¹³⁴ Indeed, as territory is intrinsically physical, it is questionable whether such non-physical effects can really be considered a 'territorial' connection. It is further submitted that such an interpretation does not necessarily follow from *EC-Seals*, which was very vague in its comments relating to the 'sufficient nexus'.

Seeking to further incorporate customary theory into the legality assessment, the following section will now propose a possible, more

¹²⁶*Ibid*, noting that 'it should immediately be pointed out that these principles must be employed with great caution'.

¹²⁷2006 ILC Report (n 113) 521.

¹²⁸R Jennings and A Watts, *Oppenheim's International Law* (Oxford University Press 1992) 456–458. See also Lowe and Staker (n 119) 313, referring to a 'clear connecting factor, of a kind whose use is approved by international law, between the legislating State and the conduct that it seeks to regulate'.

¹²⁹A Bianchi, 'Jurisdictional Rules in Customary International Law', in Meessen (n 8) 90; Bartels (n 37) 372; S Kopela, 'Port-State Jurisdiction, Extraterritoriality, and the Protection of Global Commons' (2016) 47 *Ocean Development and International Law* 89.

¹³⁰C Ryngaert and H Ringbom, 'Port State Jurisdiction, Challenges and Potential' (2016) 31 *International Journal of Marine and Coastal Law* 379, 383.

¹³¹2006 ILC Report (n 113) 518. 'The potential interference resulting from the extraterritorial exercise of prescriptive jurisdiction is less than that resulting from either adjudicative or enforcement jurisdiction.'

¹³²M Young, 'Trade Measures to Address Environmental Concerns in Faraway Places: Jurisdictional Issues' (2014) 23 *Review of European, Comparative and International Environmental Law* 302, 306.

¹³³Ankersmit et al (n 40) 28.

¹³⁴Howse and Regan (n 35) 279. This, the authors note, is 'not our preferred way of analysing it'.

'integrated, approach' to the jurisdictional analysis of trade measures regulating the foreign carbon footprint under international law.

5 | AN 'INTEGRATED APPROACH' TO THE JURISDICTIONAL ANALYSIS OF FOREIGN CARBON FOOTPRINT MEASURES

The previous sections have considered the ongoing discussions on extraterritoriality in trade law discourse and the opportunities for clarification offered by customary jurisdictional theory. Given the simultaneous applicability of the two regimes, it would seem desirable to seek a greater degree of harmonization. This section therefore proposes a more 'integrated' approach to the jurisdictional analysis.

To start with, a key element of the proposed approach is the division of the jurisdictional test into three distinct inquiries, each focusing on a different aspect of the overall interest-balancing analysis. This provides a more structured means of recognizing and addressing the complex web of interests at stake in the context of unilateral 'extraterritorial' measures pursuing national and global interests. The first question is at what point a measure contains a relevant 'extraterritorial element' so as to raise jurisdictional tensions. It is submitted that this should be determined based on the interests of the *effected* States. The second step is then whether the *acting* State can demonstrate jurisdictional basis to regulate subject matter in order to justify its potential interference with the independence of other States. Finally, as a third step, jurisdictional limitations must be considered. These condition the way a State actually exercises its jurisdiction, and the extent to which it respects the interests of effected States. These three steps will now be explored in more detail.

5.1 | Step 1: Identification of a relevant 'extraterritorial element'

In examining the jurisdictional conditions on States' regulatory competence, it is submitted that one first needs to establish whether a measure can be considered 'relevantly extraterritorial' so as to raise jurisdictional questions.¹³⁵ For the sake of clarity, this article will phrase this as whether a measure has a relevant 'extraterritorial element'. Importantly, this characterization does not pre-empt a measure's legality, it merely signals that there is a 'potential interference' with the balance of powers between equal sovereign States.

As we have seen in Section 3.1, one view is that a measure is only relevantly extraterritorial when it is 'coercive' in nature. This, however, is very difficult to measure, and will likely come down to the use of sanctions, which as noted by Bartels, 'steers dangerously close' to the assumption that an extraterritorial measure is 'only problematic when it is enforced (or at least enforceable) by civil or

criminal sanctions'.¹³⁶ As we have seen in Section 4, this is not consistent with the requirement that legislation itself has a valid jurisdictional basis under international law.¹³⁷

The alternative approaches focusing on a measure's 'primary objective' or the location of its 'focus' are arguably also problematic. This is because a measure's objective is simply the wrong indicator of an extraterritorial element. As mentioned, the law of State jurisdiction is concerned with preserving the balance of regulatory influence between States as equal sovereigns. Whether or not this balance is disturbed does not depend on the objective of the acting State, but rather on the effects on *other* States, and may occur even when a measure is 'inwardly-focused'.

At what point then do a measure's effects 'interfere' with the independence of other States? Clearly, it cannot encompass all factual extraterritorial effects, as this would render the threshold redundant. Focusing more on how a measure functions, Bartels suggests that the extraterritorial element should be defined according to the 'legal connection between the legislation and the extraterritorial subject-matter', and whether this amounts to a 'denial of opportunities normally open to the person against whom enforcement is directed'.¹³⁸ With regard to the first criterion, Bartels argues that there is a legal connection not only when legislation 'specifically applies to a particular action or thing, but also when that action or thing is an essential element in the *definition* of some other action or thing to which the legislation applies'.¹³⁹ With regard to the second aspect, while admitting that there is no right to trade under customary international law, Bartels notes that such a right does exist within the established framework of WTO law, whereby denial of the opportunity to trade would constitute a 'denial of opportunities normally open' to foreign actors.¹⁴⁰

It is argued that, while the first element of this reasoning appears key to determining when jurisdictional questions arise, the second is perhaps less helpful here. The 'denial of opportunities' criterion does offer one reason why a measure's extraterritoriality may be *problematic*, and is certainly relevant from a WTO perspective. However, a measure may interfere with other States' regulatory competence whether or not it denies actors certain rights in other areas of law. These two questions are then arguably conceptually distinct, and only the former is relevant from a jurisdictional perspective.

That being said, the 'legal connection' criterion certainly provides a clear indication of when a measure is engaging foreign actors so as to raise questions of jurisdiction. It notably resembles the threshold used by Scott to identify exercises of 'territorial extension', which occur when the 'relevant regulatory determination' is formed, 'as a matter of law, by conduct or circumstances abroad'.¹⁴¹ From an evidentiary perspective, this approach is preferable because it can be

¹³⁶ibid 380.

¹³⁷ibid, quoting Mann (n 119) 14.

¹³⁸ibid 381. This latter aspect is based on the commentary to the US Third Restatement (n 124) §431, comment (c).

¹³⁹Bartels (n 37) 381.

¹⁴⁰ibid 382–383.

¹⁴¹Scott (n 41) 90 (emphasis added).

¹³⁵See for similar terminology, Bartels (n 37) 380.

identified quite easily with less of a discretionary margin than thresholds such as 'coercion' or whether a measure 'commands and compels' foreign conduct. Importantly, it also cannot be sidestepped by 'territorializing' a rule so as only to address domestic conduct, for example, a failure to produce the required certificate of conformity.¹⁴²

More importantly perhaps is the substantive argument that implicit economic 'incentives' may seriously affect the independence of States upon whose territories compliance is dependent. As noted by Ankersmit and colleagues, economic "incentives" can skirt very close to coercion where the regulating state or trade bloc is a large and powerful economic force.¹⁴³ This appears reflected in the Panel's finding in the 1994 *Tuna-Dolphin* dispute that Article XX GATT could not be interpreted 'to permit contracting parties to take trade measures so as force other contracting parties to change their policies within their jurisdiction'.¹⁴⁴ In practice, the economic cost of denied market access, or even administrative compliance conditions,¹⁴⁵ may then greatly resemble that of financial sanctions, and can be just as 'compelling' as physical pressure in shaping the behaviour of foreign actors.

Based on the arguments above, it is therefore submitted that the first step of the jurisdictional analysis requires an inquiry into whether a measure's application is *de facto* dependent on conduct or circumstances abroad. This is the point at which there is 'potential interference' with the interests of effected States for which the acting State must then be able to demonstrate a prescriptive jurisdictional basis under international law. Importantly, such a basis need not be difficult to prove, and should not be an issue for incorporated PPMs, where the domestic consumption externalities provide a clear jurisdictional link. Unincorporated PPMs will, however, face a higher evidentiary burden.

5.2 | Step 2: Determination of a prescriptive jurisdictional basis

In determining whether the acting State has jurisdiction under international law, the first step is to identify the applicable legal regimes.¹⁴⁶ As we have seen in Section 3, as a key *lex specialis* WTO law poses no explicit territorial limits on State jurisdiction, meaning that measures *prima facie* compliant with the WTO Agreements face no specific conditions.¹⁴⁷ Nonetheless, it is submitted that they remain subject to the

'substantial connection' requirement under customary international law which supplements these Agreements. Foreign carbon footprint measures constituting *prima facie* violations of the WTO Agreements must pass the hurdles of the general exemption provisions, in particular Article XX GATT, the interpretation of which remains debated. According to Article 3.2 of the Dispute Settlement Understanding, such interpretation must occur 'in accordance with customary rules of interpretation of public international law', which, as codified in Article 31(3) of the Vienna Convention on the Law of Treaties includes relevant international principles and custom.¹⁴⁸ This implies that measures under Article XX GATT also remain subject to the customary international law of State jurisdiction as the relevant *lex generalis*.¹⁴⁹ As argued in Section 4, this should inform the interpretation of this provision to a greater extent than has been the case in WTO discourse to date.

Essentially, it is submitted that one should interpret the AB's 'sufficient nexus' considerations as a reference to the 'substantial connection' requirement – which the terminology arguably hints at already. Applied to Article XX(b) and (g) GATT, this would mean that a State could regulate matters threatening 'human and animal life and health' or the 'conservation of exhaustible resources' when the subject matter it regulates is, for example, physically present in its territory, or causes substantial territorial effects. With regards to foreign carbon footprint measures, while greenhouse gas emitting activities have a non-linear causal link with the specific territorial effects, this need not rule out the effects-doctrine's applicability.¹⁵⁰ Jurisdiction under the effects-doctrine is based on the premise that States, as sovereigns over their territory, are competent to respond to activities causing substantial and foreseeable harm.¹⁵¹ It seems inconsistent with this functional rationale that States are not competent to respond to known, indirect causes of domestic harm simply because no linear relationship can be established.¹⁵² An alternative causality threshold better suited to complex environmental harms is the

¹⁴⁸Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 31. See further Conrad (n 9) 250.

¹⁴⁹Bartels (n 37) 360.

¹⁵⁰See for varying analyses of the effects-doctrine in an environmental context, Ringbom (n 146) 630; Kopela (n 129) 107; Cooreman (n 45) 236–238; Opinion of AG Kokott in the ATAA case (n 37) para 4.

¹⁵¹See for an interesting example in an environmental context, the US dispute concerning a challenge by the Pacific Merchant Shipping Association of the constitutionality of a Californian regulation on clean fuel requirements, applicable beyond its territorial waters. The Court of Appeal found that California had jurisdiction to 'regulate and control extraterritorial conduct substantially effecting its territory'. Notably, this was caused by conduct 'immediately adjacent' to US territorial waters. *PMSA v Goldstene*, 639 F.3d 1154, 1170, 1172–3 (9th Cir. 2011).

¹⁵²See, for recognition of the grave harm, the Dutch *Urgenda* case, in which the District Court of The Hague considered it an 'established fact that the current global emissions and reduction targets of the signatories to the UN Climate Change Convention are insufficient to realise the 2° [Celsius] target and therefore the chances of dangerous climate change should be considered as very high – and this with serious consequences for man and the environment, both in the Netherlands and abroad'. *Urgenda Foundation v Kingdom of the Netherlands* [2015] C/09/456689/HAZA 131396 (English translation) para 4.65. Notably, at the time of writing cases are also pending in Belgium: *VZW Klimaatzaak v Kingdom of Belgium*, Summons, available (in Dutch) at: <<http://www.klimaatzaak.eu/wpcontent/uploads/2015/04/Dagvaarding.pdf>>; and New Zealand: *Thomson v Minister for Climate Change* (High Court of New Zealand, Wellington, filed 10 November 2015), Statement of Claim <http://web.law.columbia.edu/sites/default/files/microsites/climate-change/files/Resources/Non-US-Climate-Change-Litigation-Chart/nz_case_statement_of_claim.pdf>.

¹⁴²See Ryngaert and Ringbom (n 130) 384, noting that 'port states have found ingenious ways to territorialize extraterritorial offenses'.

¹⁴³*Ibid.*

¹⁴⁴*US-Tuna 1994* (n 8) para 5.26.

¹⁴⁵See further WTO, *US – Certain Country of Origin Labelling (COOL) Requirements* (23 July 2012) WT/DS384/AB/R, WT/DS386/AB/R, where the administrative burden on upstream producers not visible in the required labelling, was considered 'less favourable treatment' under Article 2(1) of the TBT Agreement.

¹⁴⁶Other regimes are also applicable however; see for further analysis of EU measures under the law of the sea, Kopela (n 129) 89; H Ringbom, 'Global Problem – Regional Solution? International Law Reflections on an EU CO₂ Emissions Trading Scheme for Ships' (2011) 26 *International Journal of Marine and Coastal Law* 613; Dobson and Ryngaert (n 72). See in the field of international aviation law, B Havel and G Sanchez, *The Principles and Practice of International Aviation Law* (Cambridge University Press 2014) 217.

¹⁴⁷Horn and Mavroidis (n 13) 1113.

'material contribution' test developed in the field of liability law.¹⁵³ This has been applied in a climate change context in the US case *Massachusetts v EPA*, where the Supreme Court held that as the US, based on its transport emissions alone, would still be the world's third largest CO₂ emitter, 'US motor-vehicle emissions make a *meaningful contribution* to greenhouse gas concentrations and hence, according to petitioners, to global warming'.¹⁵⁴ Where it is established that the effects in question are in turn the result of global warming, this may then pass the causation threshold for the effects-doctrine.¹⁵⁵

One could also argue that as climate change threatens vital national interests such as territorial integrity and national security, support may be drawn from the protective principle.¹⁵⁶ Going a step further, it is suggested that there is also a doctrinal window within the universality principle for application to climate protection measures. Traditionally applied in a criminal law context, universality endows a State with the requisite regulatory competence to fulfil its role as an 'agent of the international community' to protect fundamental community values.¹⁵⁷ As climate change threatens the same or equally fundamental community values as those harmed by the traditional 'core crimes', the argument could be made that States may also be competent to legislate environmental harm prevention measures. While commentators have observed a 'trending down' of the universality principle in a criminal law context, it is argued that this is not necessarily applicable in the environmental field. This is because State practice does not face the same political obstacles as sensitive assertions of criminal jurisdiction over crimes often committed by another State's own 'machinery'.¹⁵⁸ Although there is currently insufficient State practice to reach a definitive conclusion here, the possibility should not be excluded. The common interest rationale further aligns with arguments of Cooreman and Petersmann that international support for a measure's objective may buttress jurisdictional assertions under Article XX GATT.¹⁵⁹

Notably, this approach can also be applied to Article XX(a), though the intangible nature of public morals does not fit as intuitively with most of the classical customary bases. As moral concerns are convictions held by a State's citizens (and consumers), it would seem that a State is inherently connected to its own 'internal' public morals.¹⁶⁰ Once we establish that a concern constitutes a public moral, we thus establish a connection with that State. Notably, as discussed above, it is argued that this is not a *territorial* connection but rather an abstract moral interest, recognized by WTO Members as giving rise to regulatory competence under the GATT. Customary international law then demands a further link between the State and the 'persons, property or acts' regulated.¹⁶¹ This will arguably exist when the conduct or circumstances regulated actively exacerbate or offend the public moral in question. Trade measures stemming national demand that would otherwise stimulate such conduct would then meet this requirement. Clearly there remains a risk that States attempt to expand their regulatory reach by claiming that a vast array of issues offend public morals. As noted by Cooreman, the primary safeguard for abuse of this competence then lies in maintaining a high threshold for which concerns truly constitute 'morals of a state's public'.¹⁶²

5.3 | Step 3: Assessment of applicable jurisdictional limitations

Where a valid prescriptive basis is established, the final step of the proposed approach is to examine the applicable jurisdictional limitations. While there is very little clarity on their precise application, it is generally accepted that these limitations can be found in general principles of international law, in particular good faith, non-intervention and sovereign equality.¹⁶³

While several commentators consider this issue as part of whether States have *prima facie* jurisdiction, this article advocates a separation of these two questions, which, it is submitted pertain to different legal inquiries.¹⁶⁴ As discussed in Section 5.2, the substantial connection requirement bears upon the right of the acting State to regulate certain conduct beyond its territory. Jurisdictional limitations bear upon a State's choice of whether and how to exercise its right. This is particularly relevant for common concerns like climate change, where tensions do not so much arise out of disagreements as to the objective, but rather from the fact that one State seeks to

¹⁵³Dobson and Ryngaert (n 72) 328.

¹⁵⁴*Massachusetts v EPA*, 549 US 497 (2007) 525.

¹⁵⁵As noted by Verheyen, this is highly dependent on the circumstances of the case, being much easier to prove for well-accepted trends such as rising sea levels, than for isolated incidents such as Hurricane Katrina. See R Verheyen, *Climate Change Damage and International Law: Prevention, Duties and State Responsibility* (Brill 2005) 279.

¹⁵⁶As noted by Paul, this is derived from the ancient right of self-defence. See L Paul, 'Using the Protective Principle to Unilaterally Enforce Transnational Marine Pollution Standards' in Proceedings of the Second International Conference on Marine Debris (1989) 1048. See also, the Harvard Draft Convention on Jurisdiction with Respect to Crime, 'Article 7. Protection – Security of the State' (1935) 29 *American Journal of International Law Supplement: Research in International Law* 543; 'The basis of such jurisdiction is the nature of the interest injured rather than the place of the act or the nationality of the offender.'

¹⁵⁷See Judge ad hoc van den Wyngaert in his Dissenting Opinion to the *Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium)* ICJ Rep 2002, 141, noting that the fundamental question was 'about what international law requires or allows States to do as "agents" of the international community when they are confronted with complaints of victims of heinous crimes'.

¹⁵⁸L Reydams, *Universal Jurisdiction: International and Municipal Legal Perspectives* (Cambridge University Press 2003) 38; A Zimmerman, 'Violations of Fundamental Norms of International Law and the Exercise of Universal Jurisdiction in Criminal Matters' in JM Thouvenin and C Tomuschat (eds), *The Fundamental Rules of the International Legal Order – Jus Cogens and Erga Omnes Violations* (Martinus Nijhoff 2006) 352; Ryngaert (n 15) 129.

¹⁵⁹See Section 3.2.

¹⁶⁰The same does not hold for morals of another State, considered by Charnovitz (n 100) 695, as 'outwardly-directed' measures.

¹⁶¹2006 ILC Report (n 113) 521.

¹⁶²Cooreman (n 45) 235, referring to the risks of an 'uncontainable' exception; *EC-Seals* (n 14) para 5.138.

¹⁶³See further 2006 ILC Report (n 113) 535; Ryngaert (n 15) 148; J Trachtman, 'Externalities and Extraterritoriality, the Law and Economics of Prescriptive Jurisdiction' in JS Bhandari and AO Sykes (eds), *Economic Dimensions in International Law: Comparative and Empirical Perspectives* (Cambridge University Press 1997) 642; US Third Restatement (n 124) §403.

¹⁶⁴See, e.g., Crawford (n 119) 456–457; see also FA Mann, 'The Doctrine of International Jurisdiction Revisited after Twenty Years' (1984) 186 *Recueil de Cours* 29; Jennings and Watts (n 128) 456.

impose the design of its 'solution' on foreign actors who also have an interest in the situation.¹⁶⁵

This separation aligns well with the jurisdictional analysis under the GATT, where the chapeau of Article XX GATT necessitates an independent inquiry into the *application* of a measure. Specifically, measures may not be applied so as to constitute 'arbitrary or unjustifiable discrimination' or disguised protectionism. As noted in *US-Shrimp*, these are expressions of the principle of good faith, also appearing in Article XIV GATS and the preamble of the TBT Agreement.¹⁶⁶ In practice, the chapeau has proven the most difficult hurdle to pass for environmental trade measures.¹⁶⁷

A clear example of how the chapeau seeks to protect sovereign equality is the requirement that the acting State negotiate and seek a multilateral solution prior to the implementation of a unilateral measure.¹⁶⁸ Measures must also be sufficiently flexible so as not to effectively require 'all other exporting Members ... to adopt essentially the same policy', allowing for 'comparably effective third country measures', and taking into account 'the specific conditions prevailing in its territory'.¹⁶⁹ This maximizes States' respective regulatory freedom in line with the principle of sovereign equality. The prohibition of disguised protectionism should further prevent more developed States from using stringent environmental standards as a means to preserve an unfair economic advantage over less developed nations.¹⁷⁰ Applied to the EU measures, this may be of relevance for the setting of specific carbon footprint standards. A key example is the 35 percent greenhouse gas emission savings threshold for sustainable biofuels, which in 2013 was contested by Argentina as neither 'scientifically justified' nor 'based on a recognized international norm or standard'.¹⁷¹

In a GATT context, the third step of this analysis is thus largely already incorporated in the requirements of the chapeau. One could further argue that the necessity and proportionality criteria

in the subparagraphs of Article XX GATT also serve to maximize relative regulatory freedom, where States are autonomous in choosing their desired level of protection, but must do so in the least intrusive manner reasonably available. This illustrates that trade law is no stranger to interest-balancing, and has long developed legal tools with which to preserve States' relative regulatory freedom.

6 | CONCLUSION

The climate change dilemma raises important questions about the territorial limits of State (and EU) competence to regulate the foreign carbon footprint of goods and services consumed at home. Under WTO law as a central *lex specialis*, issues of extraterritoriality have most explicitly arisen in relation to justification of 'discriminatory' measures under Article XX GATT. This is of particular relevance for foreign carbon footprint measures which, it has been demonstrated, are likely to violate States' primary GATT obligations. While WTO case law has done little to settle the persistent uncertainties, this article has argued that the customary international law of State jurisdiction offers opportunities for clarification which have received insufficient attention in trade law discourse to date.

Proposing a more 'integrated approach' to the jurisdictional analysis, this article has sought to further harmonize customary jurisdictional theory with the specific concerns of WTO law. The protection of sovereign equality plays a central role here, as a core function of both the law of jurisdiction and the international trading system, the latter of which is premised upon equal trading opportunities for all Member States. To this end, the integrated approach starts with a conceptualization of 'extraterritoriality' premised upon adequate recognition for the interests of effected States, who may not have the same economic advantages as the EU. Only as a second step does it consider the objectives of the acting State, proposing an interpretation of the 'sufficient nexus' requirement that relies more directly on accepted customary theory. In doing so, it seeks to acknowledge the opportunities for proactive States to take independent action in pursuit of valid public policy objectives, particularly where this also serves the interests of the wider international community. The final consideration of jurisdictional limitations pertains to the way in which States exercise their jurisdictional rights. In the context of the GATT, this would appear largely addressed by the chapeau of Article XX, which clearly recognizes the importance of a measure's concrete application for the regulatory freedom of other States. In addition to offering clarity to persistent uncertainties in trade law discourse, it is hoped that this approach may allow for a more structured test with which to balance the different interests underlying the regulatory dilemma of extraterritoriality in the context of climate change.

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¹⁶⁵See *Barcelona Traction, Light and Power Co, Ltd (Belgium v Spain)* [1970] ICJ Rep 3, 105, Separate Opinion of Judge Fitzmaurice: 'under present conditions, international law does not impose hard and fast rules on States delimiting spheres of national jurisdiction... It does however ... involve for every State an obligation to exercise moderation and restraint as to the extent of the jurisdiction assumed by its courts in cases having a foreign element, and to avoid undue encroachment on a jurisdiction more properly appertaining to, or more appropriately exercisable by another State.'

¹⁶⁶*US-Shrimp* (n 8) para 158.

¹⁶⁷See further S Hartmann, 'Comparing the National Treatment Obligations of the GATT and the TBT: Lessons Learned from the EC-Seal Products Dispute' (2014) 40 *North Carolina Journal of International Law and Commercial Regulation* 629, 661.

¹⁶⁸WTO, *United States – Import Prohibition of Certain Shrimp and Shrimp Products – Recourse to Article 21.5 of the DSU by Malaysia* (21 November 2001) WT/DS58/AB/RW para 124.

¹⁶⁹*US-Shrimp* (n 8) paras 144 and 161. See also Scott and Rajamani, who argue that the principle of common but differentiated responsibility may also have a role to play here, mandating against the inclusion of 'equivalent protection' standards in unilateral measures; J Scott and L Rajamani, 'EU Climate Change Unilateralism' (2012) 23 *European Journal of International Law* 469.

¹⁷⁰See further, e.g., F Erixon, 'Green Protectionism in the European Union: How Europe's Biofuels Policy and the Renewable Energy Directive Violate WTO Commitments' (European Centre for International Political Economy 2009).

¹⁷¹The 35 percent threshold, which was just enough to bar Argentinian produced soybean diesel; see WTO, *Request for Consultations by Argentina, European Union and Certain Member States – Certain Measures on the Importation and Marketing of Biodiesel and Measures Supporting the Biodiesel Industry* (23 May 2013) WT/DS459/1, G/L/1027, G/SCM/D97/1, G/TRIMS/D/36, G/TBT/D/44 3.

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