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## Trade Commitments, Legitimate Regulation, and Extraterritoriality: Limits Beyond Non-discrimination?

Geraldo Vidigal\* & Sami Cameron Donoghue\*\*

*The Appellate Body era of international trade law was marked by a major shift in the prevailing understanding of the permissibility of trade-restrictive measures that pursue legitimate objectives outside a state's territory. The Appellate Body took a broad view of legal provisions, such as General Agreement on Tariffs and Trade (GATT) Article XX, that preserve World Trade Organization (WTO) Members' regulatory autonomy, finding that these provisions also permit transnational regulatory action and regulation of production processes taking place abroad, provided that such regulation contributes to fulfilling a legitimate objective and is applied without unjustifiably discriminating against WTO Members. This article reconsiders this jurisprudence, questioning both whether there is a scope in WTO law itself for further limitations – related to territoriality and the non-coercion principle – and whether this reading of trade obligations is now under threat, especially in light of the backlash against the worldwide regulation of production standards through trade policy, in particular by the European Union (EU).*

**Keywords:** Article XX (GATT 1994), Territoriality, Extraterritoriality, Discrimination, Coercion, Jurisdiction, Processes and Production Methods, Production Standards, Rebalancing Mechanisms, Regulatory Autonomy, Trade Commitments, World Trade Organization (WTO)

### I INTRODUCTION

The development of a globalized economy in the 1990s, which coincided with the creation of the World Trade Organization (WTO), highlighted some inherent tensions between international trade and domestic regulatory authority. Through much of the twentieth Century, this tension was kept obscured by significant barriers to trade, both legal (tariffs and quotas) and technical (high costs and inefficiency of communication and transportation). Once these barriers were lowered – technological progress dramatically decreased transport and communications costs, while international trade negotiators worked to reduce border barriers to trade – the tensions between different states' domestic regulations and international trade commitments emerged to the surface of global disputes.

The fact that general recognition of the challenges posed by the interaction between regulatory action and trade commitments is relatively recent is visible from the title of the main provision in the General Agreement on Tariffs and Trade (GATT), drafted in

1947, that safeguards states' right to regulate: 'General Exceptions'. GATT Article XX preserved states' rights to adopt measures to pursue objectives such as preserving life and health, protecting animals and plants, and conserving natural resources. In the pre-WTO era, trade negotiators and panellists largely thought of state regulation as a domestic issue, one that would only occasionally – exceptionally – conflict with international trade commitments. The mental framing they had in mind was a version of John Ruggie's 'embedded liberalism compromise', whereby multilateralism, and the quest for domestic stability were coupled, and even conditioned by one another', so that trade liberalization would not conflict with, but 'would be predicated upon domestic interventionism'.<sup>1</sup>

This idea presupposes that two spheres can be separated relatively clearly: the domestic area, in which each state has the freedom to regulate its economy and society; and the international arena, where international trade takes place. This separation is at the heart of the notion that international trade rules can be negotiated largely without impinging on states' regulatory autonomy. As explained by Paul Krugman, from this perspective trade

### Notes

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<sup>1</sup> J. G. Ruggie, *International Regimes, Transactions, and Change: Embedded Liberalism in the Postwar Economic Order*, 36(2) Int'l Org. 379–415 (1982), doi: 10.1017/S0020818300018993.

negotiations should leave out national regulatory standards, because ‘nations may legitimately have different ideas about what is a reasonable standard’, and ‘advanced-country standards for environmental quality and labor relations may look like expensive luxuries to a very poor nation’.<sup>2</sup>

The development of the global economy, however, made this separation increasingly difficult to maintain. What Krugman posits as the exception to the live-and-let-live approach to regulation – the prospect that otherwise beneficial trade incentivizes practices that ‘hurt the global environment’<sup>3</sup> – has become a staple argument for wide-ranging regulation, especially by the European Union (EU). As discussed below, faced with regulations that pursued objectives extraterritorially, imposing on all WTO Members production standards determined by the importer, the Appellate Body essentially set aside the question of territoriality, reducing the WTO law limits to trade-restrictive regulation, including regulation expressly aimed at extraterritorial effects, to the sole question of whether such regulation is applied with arbitrary or unjustifiable discrimination. In other words, imposing regulatory standards of production globally became *de facto* permitted, provided that WTO Members offered ‘even-handed’ treatment to producers of other Members to comply with the standards.

Grounded on this jurisprudence, over the past few years the EU, in particular, has issued a series of regulations expressly aimed at regulating production transnationally and, grounded on the so-called ‘Brussels Effect’, even globally. These regulations prohibit or restrict access to EU markets for products, whose circumstances of production fail to meet EU-determined requirements, wherever their production takes place.

These regulations – chiefly, the EU Deforestation Regulation and the Carbon Border Adjustment Mechanism (CBAM) regulation – have faced significant backlash, especially from developing countries. Given that production standards cannot be controlled through border checks, compliance requires the setting up, in sites of production around the world, of complex verification and compliance mechanisms, to demonstrate conformity of production with EU standards. Besides bringing the issue before the WTO, many countries are now seeking legal instruments to ensure that their agreed trade benefits cannot be nullified by regulatory policies that require producers to comply with unilaterally determined production standards, setting aside differences in societal preferences

and levels of development and requiring the adoption of costly compliance and verification instruments.

This article surveys these developments, showing how Appellate Body jurisprudence set aside GATT-era concerns with the negotiated balance of trade concessions, as well as with states’ entitlement to regulate production domestically, and inquiring about the prospects for limitations. Section 1 shows how the WTO Appellate Body set aside the concerns expressed by GATT panels regarding domestic regulation that restricted trade with the express aim of producing ‘extraterritorial’ and ‘extra-jurisdictional’ effects. Section 2 examines the recent development of measures linking trade and sustainability, with their WTO legality grounded on the Appellate Body’s jurisprudence, as well as the ‘backlash’ that these measures have engendered, especially among developing countries. Section 3 considers instruments that may be used to challenge the exclusive reliance on non-discrimination as a criterion for permissibility of regulatory measures affecting trade. It considers the challenges involved in assigning a ‘territoriality’ restriction to trade measures, as well as in implementing a non-coercion requirement. It then reviews the ‘rebalancing mechanism’, inserted in the 2024 text of the EU-Mercosur Partnership Agreement (EUMPA) to safeguard the balance of rights and obligations, targeting measures that are legitimate and legally justifiable but substantially affect the trade benefits engendered by the agreement. Section 4 concludes.

## 2 FROM GATT TO THE WTO: THE EROSION OF THE NORM AGAINST EXTRATERRITORIALITY IN INTERNATIONAL TRADE

### 2.1 *The GATT Approach: Preserving Multilateralism and the Balance of Concessions*

The 1947 GATT followed in the path of various inter-war trade agreements, signed in particular by the United States, in which parties sought ‘reciprocal and mutually advantageous arrangements directed to the substantial reduction of tariffs and other barriers to trade’.<sup>4</sup> The GATT contained a strongly-worded obligation to eliminate all trade ‘prohibitions or restrictions other than duties, taxes or other charges’,<sup>5</sup> while featuring a number of exceptions, allowing parties to restrict trade to safeguard the balance of payments,<sup>6</sup> counter subsidies

#### Notes

<sup>2</sup> Paul Krugman, *What Should Trade Negotiators Negotiate About?*, 35 J. Econ. Lit. 113–120, 116 (1997).

<sup>3</sup> *Ibid.*, at 115.

<sup>4</sup> GATT 1947, preamble.

<sup>5</sup> GATT, Art. XI:1.

<sup>6</sup> GATT, Art. XII.

and offset or prevent dumping,<sup>7</sup> pursue legitimate domestic objectives,<sup>8</sup> and protect their essential security interests.<sup>9</sup> This combination, of a principled free trade position and various exceptions permitting economic interventionism and domestic regulatory intervention, underlay the concept of 'embedded liberalism' developed by Ruggie.<sup>10</sup>

The question left unanswered by this concept concerned the extent to which each party was allowed to regulate not only domestically but in ways that impinged on other parties' ability to perform their own domestic regulatory role. The issue would be brought to the fore by the 1952 *Belgian Family Allowances* dispute, concerning what would now be termed a 'level-playing field' provision.<sup>11</sup> Belgian social security law required employers to provide workers' families with social benefits – 'family allowances'. The challenged provision required public bodies purchasing imported goods to levy a 'compensating' charge on foreign goods, unless the exporting country applied a scheme deemed comparable to the Belgian one.<sup>12</sup> Norway and Denmark complained that, contrary to France, Italy, the Netherlands, the United Kingdom (UK) and Sweden, they had not obtained an exemption from the Belgian levy.

The *Belgian Family Allowances* panel found that Belgium's measure was 'not only inconsistent' with its GATT commitments, i.e. to offer other parties' products most-favoured nation treatment and national treatment; it was also 'based on a concept which was difficult to reconcile with the spirit of the General Agreement'.<sup>13</sup> The panel did not spell out what this GATT-incompatible 'concept' was (and Belgium's non-invocation of Article XX may have prevented this debate). As became clear in later disputes, the key issue was an importing country's laws making GATT-negotiated trade benefits conditional upon the domestic regulation of the country of production matching its own.<sup>14</sup>

The *Belgian Family Allowances* assertion of the 'spirit' of the GATT would be challenged again only in the 1990s. Mexico and the European Economic Community (EEC) challenged the United States' prohibition on the importation of Mexican and European tuna, justified on grounds that these

jurisdictions permitted tuna catching methods leading to the excessive killing of dolphins. The United States responded by invoking GATT Article XX, arguing both that its measure aimed at protecting the life or health of animals, under Article XX(b), and that it aimed at the conservation of exhaustible natural resources, under Article XX(g).

The complainants won both disputes, with both panels asserting a version of the 'embedded liberalism' compromise that differentiated between domestic and extraterritorial regulation. The 1991 panel in *US – Tuna (Mexico)* found that Article XX 'allows each contracting party to adopt its own conservation policies', but that 'a contracting party may not restrict imports of a product merely because it originates in a country with environmental policies different from its own'.<sup>15</sup> The panel rejected what it called an 'extrajurisdictional interpretation of Article XX(g)', reasoning that, if accepted, such an interpretation would allow 'each contracting party [to] unilaterally determine the conservation policies from which other contracting parties could not deviate without jeopardizing their rights under the General Agreement'.<sup>16</sup> The panel applied the same logic to Article XX(b), reasoning that, if this interpretation were accepted, the GATT 'would then no longer constitute a multilateral framework for trade among all contracting parties but would provide legal security only in respect of trade between a limited number of contracting parties with identical internal regulations'.<sup>17</sup>

The 1994 panel in *US – Tuna (EEC)* reached a similar conclusion. The panel acknowledged that GATT Article XX(e), which allows restricting trade in products produced with prison labour, shows that the GATT does not prohibit 'in an absolute manner measures that related to things or actions outside the territorial jurisdiction of the party taking the measure'.<sup>18</sup> At the same time, it likened the US's prohibition to a 'trade embargo', aiming not at the circumstances of production of imported products but at 'changes in policies and practices in the exporting countries'.<sup>19</sup> The panel found that 'embargoes on tuna implemented by the United States were taken so as to force other countries to

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<sup>7</sup> GATT, Arts VI:2, VI:3.

<sup>8</sup> GATT, Art. XX.

<sup>9</sup> GATT, Art. XXI.

<sup>10</sup> Ruggie, *supra* n. 1.

<sup>11</sup> Matilda Gillis, *Let's Play?: An Examination of the 'Level Playing Field' in EU Free Trade Agreements*, 55(5) J. World Trade 715–740 (2021), doi: 10.54648/TRAD2021030.

<sup>12</sup> GATT Panel Report, *Belgian Family Allowances*, adopted 7 Nov. 1952, BISD 1S/59, Annex.

<sup>13</sup> *Ibid.*, para. 8.

<sup>14</sup> Another GATT panel considered the right to use trade policy as an instrument of domestic environmental policy. See GATT Panel Report, *Canada – Measures Affecting Exports of Unprocessed Herring and Salmon*, adopted 22 Mar. 1988 (BISD 35S/98).

<sup>15</sup> GATT Panel Report, *US – Tuna (Mexico)*, 5.31, 6.2.

<sup>16</sup> *Ibid.*, para. 5.32.

<sup>17</sup> *Ibid.*, para. 5.27.

<sup>18</sup> GATT Panel Report, *United States – Restrictions on Imports of Tuna*, 16 Jun. 1994, DS29/R (not adopted) (*US – Tuna (EEC)*), para. 5.16.

<sup>19</sup> *Ibid.*, para. 5.37.

change their policies with respect to persons and things within their own jurisdiction'.<sup>20</sup>

To explain why this was prohibited, the *US – Tuna (EEC)* panel used teleological reasoning similar to that of the *US – Tuna (Mexico)* panel. It found that, if Article XX were 'interpreted to permit contracting parties to take trade measures so as to force other contracting parties to change their policies within their jurisdiction', the GATT 'could no longer serve as a multilateral framework for trade among contracting parties'. Allowing this interpretation would 'seriously impair' the 'balance of rights and obligations among contracting parties, in particular the right of access to markets'.<sup>21</sup>

## 2.2 The Appellate Body's Jurisprudence: Focus on Non-discrimination

These pre-WTO panels thus interpreted GATT Article XX as excluding measures conditioning importation on factors not affecting products themselves but the surrounding processes and production methods (PPMs). The WTO Appellate Body saw it differently.<sup>22</sup> It set aside the concerns, expressed by these GATT panels, with the negotiated balance of rights and obligations as well as with the workability of a multilateral trading system and an open-ended Article XX. This became clear in *US – Shrimp*, concerning the United States' requirement that imported shrimp be caught with nets featuring a device to exclude turtles caught as bycatch. The first-instance panel recalled the 'principle' laid down by the GATT panels in *Belgian Family Allowances* and *US – Tuna*, stating that a WTO system that allowed a member to 'condition[] access to its market for a given product upon the adoption by the exporting Members of certain policies ... could no longer serve as a multilateral framework for trade', because 'security and predictability of trade relations under those agreements would be threatened'.<sup>23</sup>

On appeal, the Appellate Body rejected the panel's entire approach. The Appellate Body found that the *US – Shrimp* panel, rather than interpreting the text of Article XX, 'constructed an *a priori* test that purports to define a category of measures which, *ratione materiae*, fall outside the justifying protection of Article XX's chapeau'.<sup>24</sup> Article XX, the Appellate Body reasoned, permits precisely

'conditioning access to a Member's domestic market on whether exporting Members comply with, or adopt, a policy or policies unilaterally prescribed by the importing Member', establishing WTO 'exceptions to substantive obligations' that permit the adoption of 'domestic policies ... recognized as important and legitimate in character'.<sup>25</sup>

In *US – Shrimp* and in the various subsequent disputes in which Article XX was invoked, the Appellate Body largely set aside concerns with the extraterritorial effects of measures, or, more broadly, that allowing policies aimed at regulating production abroad would distort the negotiated balance of rights and obligations and threaten the very mechanism on which the trade regime rests. Instead, it focused the analysis on two elements. First, the contribution of the measure under review to a legitimate objective recognized in GATT Article XX (or in an equivalent provision in another WTO agreement). Second, the existence of arbitrary or unjustifiable discrimination between members in the application of the measure. The Appellate Body restated these criteria in *EC – Seal Products*:

the assessment of a claim of justification under Article XX involves a two-tiered analysis in which a measure must first be provisionally justified under one of the subparagraphs of Article XX, before it is subsequently appraised under the chapeau of Article XX. As the Appellate Body has stated, provisional justification under one of the subparagraphs requires that a challenged measure 'address the particular interest specified in that paragraph' and that 'there be a sufficient nexus between the measure and the interest protected'.<sup>26</sup>

Once this 'sufficient nexus' is established, the chapeau of Article XX provides the controlling criteria for ascertaining the WTO-consistency of measures. In *EC – Seals*, the Appellate Body explained the relevant legal tests:

The chapeau of Article XX imposes additional disciplines on measures that have been found to violate an obligation under the GATT 1994, but that have also been found to be provisionally justified under one of the exceptions set forth in the subparagraphs of Article XX. The chapeau does so by requiring that measures not be 'applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination

### Notes

<sup>20</sup> *Ibid.*, para. 5.24.

<sup>21</sup> *Ibid.*, paras 5.26 and 5.38.

<sup>22</sup> For prior analyses, see Steve Charnovitz, *Exploring the Environmental Exceptions in GATT Article XX*, 25 J. World Trade 37 (1991), doi: 10.54648/TRAD1991028; Lorand Bartels, *The Chapeau of the General Exceptions in the WTO GATT and GATS Agreements: A Reconstruction*, 109 Am. J. Int'l L. 95 (2015), doi: 10.5305/amerjintelaw.109.1.0095; Giulia Claudia Leonelli, *Anti-deforestation npr-PPMs and Carbon Border Measures: Thinking About the Chapeau of Article XX GATT in Times of Climate Crisis*, 26(3) J. Int'l Econ. L. 416–434 (Sep. 2023), doi: 10.1093/jiel/jgad016.

<sup>23</sup> WTO Panel Report, *US – Shrimp*, para. 7.45.

<sup>24</sup> Appellate Body Report, *US – Shrimp*, para. 121.

<sup>25</sup> *Ibid.*, para. 121.

<sup>26</sup> Appellate Body Report, *EC – Seals*, para. 5.169.

between countries where the same conditions prevail, or a disguised restriction on international trade'.<sup>27</sup>

In focusing on these legal tests, this jurisprudence circumvents the question of whether there are territorial or jurisdictional limitations on the policies that can lawfully be defended through trade-restrictive measures. Additionally, although the chapeau in principle features two possibilities for a measure to be GATT-inconsistent – 'arbitrary or unjustifiable discrimination' and 'a disguised restriction on international trade' – in practice the latter possibility has not been examined in substance. The focus on the discrimination analyses relies on the Appellate Body's finding, in *US – Gasoline*, that "disguised restriction", whatever else it covers, may properly be read as embracing restrictions amounting to arbitrary or unjustifiable discrimination in international trade taken under the guise of a measure formally within the terms of an exception listed in Article XX'.<sup>28</sup>

This logic was applied beyond the confines of the GATT. In *US – Tuna II (Mexico)*,<sup>29</sup> the United States' 'dolphin safe' labelling scheme for tuna products was challenged by Mexico under the WTO's Technical Barriers to Trade (TBT) Agreement. The US measure sought to protect dolphins from being harmed during tuna fishing operations, by requiring specific fishing practices for tuna, wherever it was caught, to be marketed in the US with a 'dolphin safe' label – all alternative labels were prohibited. The labelling requirements also imposed stricter conditions on tuna caught in the Eastern Tropical Pacific (ETP), where Mexican fishers predominantly operated, compared to those on tuna caught in other regions. This lack of even-handedness disadvantaged Mexican tuna products in international markets. The Appellate Body found that, while the US measure pursued a legitimate objective, it violated TBT Article 2.1 (non-discrimination) due to its discriminatory effects on Mexican fisherfolk.

On the other hand, the Appellate Body reversed the panel's ruling that the US measure violated Article 2.2 of the TBT Agreement, which prohibits measures that are 'more trade-restrictive than necessary' to attain their objectives. The Appellate Body concluded that, even though the regional system for dolphin protection, proposed by Mexico as an alternative, less trade-restrictive measure, ensured a similar mortality rate to the United States' exclusive system, the United States was allowed to point to an additional objective – the reduction of 'adverse

impact [on dolphins] beyond observed mortalities' – to ensure that its measure could persist lawfully.<sup>30</sup>

The Appellate largely ignored Mexico's contention that the United States' measure 'unilaterally and extraterritorially impose[d] U.S. fishing method requirements' on its fisherfolk, so that the objective itself was a 'coercive objective'.<sup>31</sup> In response, it stated solely that 'what must not be applied in a manner that would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail or a disguised restriction on international trade is a *measure*, and not the objective pursued by the technical regulation'.<sup>32</sup> The Appellate Body thus reinforced the notion that policy measures designed to achieve environmental objectives by introducing process and production method requirements on imports can be consistent with WTO obligations, even if highly trade-restrictive for minor gains, provided that they are applied in a non-discriminatory manner.

In *EC – Seals*, the Appellate Body noted the unresolved issue, remarking that in *US – Shrimp* it had left open the question whether there is 'an implied jurisdictional limitation in Article XX(g), and if so, the nature or extent of that limitation'.<sup>33</sup> This dispute concerned an EU regulation limiting the seal products that could be sold in the EU market to those deriving from seals hunted under very specific conditions, whether within or outside EU territory. Once more, the issue of territoriality was left open, and the dispute settled wholly on the basis of the non-discrimination clause in the chapeau, because the parties 'did not address the issue on appeal'.

The inconclusiveness regarding the territorial scope of Article XX justifications was noted by the 2024 and 2025 panels in *EU – Palm Oil*, two disputes, brought by Indonesia and Malaysia, concerning the restrictive treatment reserved to palm oil in the EU's biofuels programme. The EU justified the exclusion of palm oil from this programme based on the asserted greater role of the underlying agriculture in fostering deforestation, and consequently greenhouse gas (GHG) emissions, when compared to the agriculture involved in producing other biofuels.

The panels in *EU – Palm Oil* noted that the targeted palm oil 'agricultural activities and associated ... GHG emissions in question are mostly expected to occur outside of the territory of the European Union'.<sup>34</sup> Referring to the panel

## Notes

<sup>27</sup> Appellate Body Report, *EC – Seals*, para. 5.196.

<sup>28</sup> Appellate Body Report, *US – Gasoline*, at 25. See Chang-Fa Lo, *The Proper Interpretation of 'Disguised Restriction on International Trade' under the WTO: The Need to Look at the Protective Effect*, 4(1) J. Int'l Disp. Settlement 111–137 (Mar. 2013).

<sup>29</sup> Appellate Body Report, *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products (US – Tuna II (Mexico))*, WT/DS381/AB/R, adopted 13 Jun. 2012.

<sup>30</sup> *Ibid.*, para. 330.

<sup>31</sup> *Ibid.*, paras 61, 96.

<sup>32</sup> *Ibid.*, para. 339.

<sup>33</sup> Appellate Body Report, *EC – Seals*, para. 5.173 (citing Appellate Body Report, *US – Shrimp*, para. 133).

<sup>34</sup> WTO Panel Report, *EU – Palm Oil (Malaysia)*, para. 7.310; WTO Panel Report, *EU – Palm Oil (Indonesia)*, para. 7.319.

and Appellate Body reports discussed above, the panels concluded that these prior rulings ‘suggest that the fact that the interest being protected is situated outside the territory of the Member having adopted the measure is not, in itself, an obstacle to the possible justification of a measure under Article XX of the GATT 1994, or even under the TBT Agreement’.<sup>35</sup> The panels noted that the legal standard applied in *US – Shrimp* and *EC – Seal Products*, though not formulated as a legal test, was whether a ‘sufficient nexus’ existed ‘between the regulating Member and the activities being regulated’.<sup>36</sup> And, since ‘[c]limate change is inherently global in nature’ and GHG emissions ‘are linked to climate change ... there is a nexus between EU territory and the objective of limiting the risk of ... GHG emissions’.<sup>37</sup>

Indonesia argued specifically that the EU’s measure impinged upon its ‘sovereign right to regulate’ activities occurring in Indonesia. The panel highlighted that ‘Indonesia is free to regulate matters falling within Indonesia’s territory and the scope of its jurisdiction’, but concluded that ‘the EU measures govern activities occurring within the territory of the European Union, by entities located in the territory of the European Union’.<sup>38</sup> As a result, these panels concluded, the EU measures sought not to regulate extraterritorially but to ‘regulate EU demand’, by establishing ‘whether and to what extent products supplying the EU transport fuel market can be counted towards the EU renewable energy targets’.<sup>39</sup>

### 3 THE BACKLASH AGAINST EXTRATERRITORIAL-FOCUSED REGULATION

Over the past few years, a number of WTO Members have rolled out what can be termed a ‘trade-sustainability’ arsenal,

imposing sometimes far-reaching requirements and verification obligations to production, wherever in the world it takes place, in the pursuit of environmental and social goals. The EU has established itself as the leader in this regard, implementing various pieces of legislation that address environmental and human rights concerns.<sup>40</sup> Thus, the 2023 CBAM regulation<sup>41</sup> imposes payment obligations on imports of certain carbon-intensive goods, depending on their ‘embedded carbon’ content, either as measured by the producer or as presumed by the EU. The European Deforestation Regulation (EUDR)<sup>42</sup> prohibits the sale within the EU of products associated with deforestation and forest degradation, requiring evidence that targeted products comply both with domestic laws, within the country of production, and a non-deforestation requirement set by the EU.

Targeting trade less directly, the EU Corporate Sustainability Due Diligence Directive (CSDDD)<sup>43</sup> obliges EU-based and EU-related companies to identify and address human rights abuses and environmental harms across their value chains. Complementing these efforts, the EU Taxonomy Regulation<sup>44</sup> establishes a classification system for environmentally sustainable economic activities, providing definitions to guide companies, investors, and policymakers in identifying which activities align with environmental objectives. Following the EU’s lead, the UK is introducing its own Forest Risk Commodity Regulation (UKFRC)<sup>45</sup> as well as a UK CBAM.<sup>46</sup>

The EU measures seem designed to comply with the Appellate Body jurisprudence on Article XX permissibility, which permits regulation to have highly impactful extraterritorial effects, provided that it is non-discriminatory.<sup>47</sup> Questions have been raised regarding this compliance *de facto*, in light of (i) the requirement

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<sup>35</sup> WTO Panel Report, *EU – Palm Oil (Malaysia)*, para. 7.312; WTO Panel Report, *EU – Palm Oil (Indonesia)*, para. 7.321.

<sup>36</sup> WTO Panel Report, *EU – Palm Oil (Malaysia)*, para. 7.313; WTO Panel Report, *EU – Palm Oil (Indonesia)*, para. 7.322.

<sup>37</sup> WTO Panel Report, *EU – Palm Oil (Malaysia)*, para. 7.315; WTO Panel Report, *EU – Palm Oil (Indonesia)*, para. 7.326.

<sup>38</sup> WTO Panel Report, *EU – Palm Oil (Indonesia)*, para. 7.324.

<sup>39</sup> WTO Panel Report, *EU – Palm Oil (Malaysia)*, para. 7.314; WTO Panel Report, *EU – Palm Oil (Indonesia)*, para. 7.327.

<sup>40</sup> For a full account of the measures, see Alessandra Lehmen & Geraldo Vidigal, *Trade and Environment in EU-Mercosur Relations: Negotiating in the Shadow of Unilateralism*, 30(SI) Eur. Foreign Aff. Rev. 87–114 (2025), doi: 10.54648/EERR2025004.

<sup>41</sup> Regulation (EU) 2023/956 of the European Parliament and of the Council of 10 May 2023 establishing a carbon border adjustment mechanism [2023] OJ L130/52.

<sup>42</sup> Regulation (EU) 2023/1115 of the European Parliament and of the Council of 31 May 2023 on the making available on the Union market and the export from the Union of certain commodities and products associated with deforestation and forest degradation [2023] OJ L150/206, amended by Regulation (EU) 2024/3234 of 19 Dec. 2024.

<sup>43</sup> Directive (EU) 2024/1760 of the European Parliament and of the Council of 5 Jul. 2024 on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937 [2024] OJ L176/1.

<sup>44</sup> Regulation (EU) 2020/852 of the European Parliament and of the Council of 18 Jun. 2020 on the establishment of a framework to facilitate sustainable investment, and amending Regulation (EU) 2019/2088 [2020] OJ L198/13.

<sup>45</sup> For reference, see UK Government, *Use of Forest Risk Commodities in Commercial Activity* (9 Dec. 2023), <https://www.legislation.gov.uk/ukpga/2021/30/notes/division/23/index.htm> (accessed 8 Apr. 2025).

<sup>46</sup> For reference, see HM Treasury and Department for Energy Security and Net Zero, *Introduction of a UK Carbon Border Adjustment Mechanism from January 2027* (Consultation Outcome 30 Oct. 2024), <https://www.gov.uk/government/consultations/addressing-carbon-leakage-risk-to-support-decarbonisation/outcome/factsheet-uk-carbon-border-adjustment-mechanism> (accessed 8 Apr. 2025).

<sup>47</sup> United States (US) have been far less concerned with a *de jure* respect for the non-discrimination principle. The Uyghur Forced Labour Prevention Act (UFLPA) amends US anti-forced labour legislation to create a ‘rebuttable presumption’ that manufacturing in China’s Xinjiang Uyghur Autonomous Region involves forced labour. (Public Law 117–78, s. 3). And the Inflation Reduction Act, which in principle incentivizes clean energy projects through tax credits, incorporating domestic content requirements that carry implications for international trade (Inflation Reduction Act of 2022, Pub L No 117–169, 136 Stat 1818 (2022)).

that assessment of discrimination should take place ‘between countries where the same conditions prevail’,<sup>48</sup> and (ii) the legal context offered by international environmental law, in particular the principle of common but differentiated responsibilities and respective capabilities.<sup>49</sup> While these are significant issues to raise, it is an open question whether the chapeau’s phrasing, which *permits* measures that distinguish between countries where different conditions prevail, can be interpreted as a *requirement* that such discrimination take place between countries and producers facing different conditions.<sup>50</sup> An origin-blind measure may possibly run counter to agreed principles of international environmental law, without necessarily falling foul of the Article XX requirements.

Not all those involved in trade debates have been contented with assessing these measures under the Article XX criteria as interpreted by the Appellate Body, i.e., as excluding considerations regarding the extraterritorial effects. Indonesia, for one, insisted in the *EU – Palm Oil* dispute that singling out palm oil, among all biofuels, as not sufficiently environment-friendly due to underlying deforestation risks, was not solely discriminatory but also an attempt to impose on Indonesia the EU’s regulatory preferences. And, in the wake of the adoption of the EUDR, representatives of seventeen developing countries signed an open letter to the EU institutions questioning the lawfulness of the EUDR. They stated:

this legislation disregards local circumstances and capabilities, national legislations and certification mechanisms of developing producer countries, their efforts to fight deforestation, and multilateral commitments, including the principle of common but differentiated responsibilities. It also establishes a unilateral benchmarking system that is inherently discriminatory and punitive, which is potentially inconsistent with WTO obligations.<sup>51</sup>

The concerns expressed in this statement, then, go beyond the non-discrimination and even the allegation of action in contravention to multilateral commitments. They focus on (1) the measure’s disregard for local environmental legislation and verification apparatus; (2) the ‘inherently

discriminatory and punitive’ unilateral benchmarking system established by the EUDR. Point (1) focuses, although obliquely, on the alleged disregard for the environmental regime in the country that has jurisdiction to implement conservation measures. Point (2) refers to a specific feature of EUDR: the European Commission’s power, and indeed obligation, to classify countries into ‘low risk’, ‘high risk’ and ‘standard risk’.<sup>52</sup> Compliance and verification regimes vary widely depending on which regime is chosen, potentially subjecting countries that the EU believes are not doing enough to meet EU-determined standards to increased verification and compliance costs.

The backlash against extraterritorial regulation has come not only in diplomatic discussions before the WTO but also in states’ negotiations of new trade agreements. In preparation for EU-Mercosur negotiations, Mercosur countries stated that the final agreement ‘should be equipped with a mechanism to rebalance trade concessions negotiated under the AA if these concessions are suspended or nullified as a result of domestic EU legislation’.<sup>53</sup> Indonesian negotiators termed the EUDR ‘regulatory imperialism’ and stated that, at the same time as ‘discussing trade facilitation ... in parallel, they’re building walls’.<sup>54</sup>

The next section considers the possible alternatives to the Appellate Body’s interpretation of Article XX as essentially indifferent to the extraterritorial effects of measures. As we show, the main possibilities – the application of the international law rules on jurisdiction and the prohibition of coercion – present their own challenges. The possibility to secure a rebalancing mechanism, as the one included in the EU-Mercosur Agreement, may appear to developing countries to be a more favourable alternative.

#### 4 NEGLECTED RESTRICTIONS ON EXTRATERRITORIALLY-FOCUSED REGULATION: JURISDICTIONAL LIMITATIONS AND NON-COERCION

The openness of Article XX to extraterritorial regulation may be understood in light of, on the one hand, the difficulties faced by adjudicators in ‘drawing a line’

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<sup>48</sup> Gracia Marín-Durán, *Securing Compatibility of Carbon Border Adjustments with the Multilateral Climate and Trade Regimes*, 72 *Int’l & Comp. L.Q.* 73 (2023), doi: 10.1017/S0020589322000501.

<sup>49</sup> I. Venzke & G. Vidigal, *Are Unilateral Trade Measures in the Climate Crisis the End of Differentiated Responsibilities? The Case of the EU Carbon Border Adjustment Mechanism (CBAM)*, 51 *Neth. Y.B. Int’l L.* 187–225 (2022), doi: 10.1007/978-94-6265-527-0\_7. Sarah Davidson Ladly, *Border Carbon Adjustments, WTO-Law and the Principle of Common but Differentiated Responsibilities*, 12 *Int’l Envtl. Agreements: Pol. L. & Econ.* 63 (2012), doi: 10.1007/s10784-011-9153-y; Guilherme Magacho, Etienne Espagne and Antoine Godin, *Impacts of the CBAM on EU Trade Partners: Consequences for Developing Countries*, 24 *Climate Pol’y* 243 (2024), doi: 10.1080/14693062.2023.2200758.

<sup>50</sup> See Emily Lydgate, *Do the Same Conditions Ever Prevail? Globalizing National Regulation for International Trade*, 50 *J. World Trade* 972 (2016), doi: 10.54648/TRAD2016039.

<sup>51</sup> WTO Committee on Agriculture, Submission by Indonesia, Brazil, Malaysia, and Thailand, *Joint Letter – European Union’s Regulation on Deforestation-Free Products (EUDR)*, Doc. G/AG/GEN/223/Rev.1, at 2.

<sup>52</sup> EUDR, Art. 29(3).

<sup>53</sup> Assis Moreira, *Exclusivo: A Integra da Resposta do Mercosul à UE para Concluir o Acordo*, Valor Econômico (16 Sep. 2023), <https://valor.globo.com/opiniao/assis-moreira/coluna/a-integra-da-resposta-do-mercossul-a-ue-para-concluir-o-acordo.ghtml> (accessed 3 Oct. 2024). See a translated version in *EU-Mercosur FTA: Mercosur’s Response to the EU Joint Instrument*, <https://www.bilaterals.org/?eu-mercossur-fta-mercossur-s> (accessed 3 Oct. 2024).

<sup>54</sup> Gayatri Suroyo, Stefano Sulaiman & Ananda Teresia, *Indonesia Accuses EU of ‘Regulatory Imperialism’ With Deforestation Law* (Reuters 8 Jun. 2023).

between legitimate and illegitimate extraterritorial effects, and on the other hand by their unwillingness to appear to constitute obstacles to the ability of WTO Members to pursue legitimate objectives. Voicing this teleological element in its interpretation of Article XX exceptions, the Appellate Body in *US – Shrimp* stated that ‘it is too late in the day to suppose that Article XX(g) of the GATT 1994 may be read as referring only to the conservation of exhaustible mineral or other non-living natural resources’.<sup>55</sup>

There is little disagreement that trade agreements must allow states to adopt regulations. The 1988 GATT panel in *Canada – Herring and Salmon* described the purpose of Article XX as ‘to ensure that the commitments under the General Agreement do not hinder the pursuit of policies’ for legitimate objectives.<sup>56</sup> At the same time, if *any* allegedly legitimate policy permitted deviating from trade commitments, there would be no relevance to these commitments in the first place. In *US – Shrimp*, the Appellate Body noted that the chapeau of the GATT expresses the ‘principle of good faith [which] prohibits the abusive exercise of a state’s rights’.<sup>57</sup>

This section explores the legal concepts and instruments, besides non-discrimination, that can be used to avoid abuse of exceptions. Three such limits are discussed: the application of jurisdictional and territorial limitations, the prohibition on coercive action, and the duty to preserve the balance of concessions.

#### 4.1 Jurisdictional Limitations

A key element invoked by Members dissatisfied with regulation that they deem to have unwarranted extraterritorial effects involves the ensuing restriction on their sovereignty and right to regulate – their jurisdiction. While state sovereignty refers to a state’s supreme authority to govern itself independently, jurisdiction may be understood as a practical manifestation of this sovereignty. It refers to the specific legal power of a state to exercise control over people, property, and acts within its territory and in accordance with international law. By defining the territorial limits of jurisdiction, states are kept from encroaching on each other’s sovereignty,

thereby reducing the likelihood of conflicts. As Cedric Ryngaert put it, rules on jurisdiction function as the ‘traffic rules’ of the international legal order,<sup>58</sup> allocating legislative and enforcement powers among states based on their respective territories and precluding interference in the domestic affairs of other states.

The territorial dimension of jurisdiction came to the fore, before the Permanent Court of Justice (PCIJ), in the 1927 *Lotus* case, involving a collision between a French vessel (the ‘S.S. Lotus’) and a Turkish vessel (the ‘S.S. Boz-Kourt’) on the high seas. Lieutenant Demons, the officer of the watch on board of the Lotus at the time of collision, was apprehended immediately upon the vessel’s arrival at its Constantinople destination, and later sentenced to eighty days’ imprisonment and a fine of twenty-two pounds. Pending appeal by the public prosecutor, execution of the sentence was suspended, and the conflict was eventually referred to the PCIJ. The PCIJ considered whether Türkiye had contravened the principles of international law by exercising criminal jurisdiction over a French officer for an incident that had occurred on the high seas – outside Turkish territory.

In its judgment, the PCIJ stated that, in the absence of a permissive rule to the contrary, a state is not permitted ‘to exercise its power in any form in the territory of another state’.<sup>59</sup> This would seem to be a strict prohibition on the extraterritorial application of domestic laws. However, the Court also noted that – as in the case of *Lotus* – a state may seek to exercise jurisdiction, within its own borders, with respect to acts that occurred outside its territory. There is therefore, in general international law, a distinction between the extraterritorial enforcement of domestic laws and the intraterritorial application of laws with respect to conduct that took place abroad.<sup>60</sup> As the PCIJ noted, it does not follow from the prohibition on extraterritorial law enforcement ‘that international law prohibits a State from exercising jurisdiction in its own territory, in respect of any case which relates to acts which have taken place abroad, and in which it cannot rely on some permissive rule of international law’. In such an instance, the Court found, states are given ‘a wide measure of discretion which is only limited in certain cases by prohibitive rules’.<sup>61</sup>

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<sup>55</sup> Appellate Body Report, *US – Shrimp*, para. 131.

<sup>56</sup> GATT Panel Report, *Canada – Measures Affecting Exports of Unprocessed Herring and Salmon*, adopted 22 Mar. 1988 (L/6268 – 35S/98), para. 4.6. Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline*, 29 Apr. 1996, WT/DS2/AB/R, at 18.

<sup>57</sup> Appellate Body Report, *US – Shrimp*, para. 158.

<sup>58</sup> Cedric Ryngaert, *The Concept of Jurisdiction in International Law*, in *Research Handbook on Jurisdiction and Immunities in International Law* 51 (A. Orakelashvili ed., Edward Elgar 2015).

<sup>59</sup> *S.S. Lotus (France v. Turkey)* PCIJ (1927) Series A, No. 10, at 18.

<sup>60</sup> Joann Scott, *Extraterritoriality and Extraterritorial Extension in EU Law*, 62(1) *Am. J. Comp. L.* 87–126 (2014).

<sup>61</sup> *S.S. Lotus*, *supra* n. 59, at 19.

The *Lotus* case thus stands for the right of states to exercise their jurisdiction, internally, in relation to acts that occurred outside their territory, in the absence of prohibitive rules to the contrary. In the case of trade policy, similarly, this is not a particularly helpful distinction. The enforcement of trade rules always takes place domestically. The key element is not where enforcement takes place, but what is being enforced. The relevant question, more specifically, is whether international trade agreements include a 'prohibitive rule' that would prevent parties from enforcing domestic regulations with respect to production processes taking place abroad, without consequences for the ensuing product or the importer's territory. Setting aside the general understanding that such regulation is unwelcome – or, as the *Belgian Family Allowances* panel put it, 'difficult to reconcile with the spirit of a trade agreement'<sup>62</sup> – another candidate distinction is the one prohibiting action that is coercive against trade partners or their producers.

#### 4.2 The Prohibition of Coercion

In its jurisprudence on Article XX, the Appellate Body shifted focus from territorial limits to non-discrimination in assessing trade measures. However, if non-discrimination were to become the sole relevant criterion, countries could impose all sorts of requirements on other states and their producers, provided that the requirement was applied in an even-handed manner to domestic producers (over which the regulating country has jurisdiction) and to international producers (over which it doesn't). Harnessing their market power, countries could coerce their trade partners into adopting their preferred policies in all fields. It seems logical, then to interpret the limitations in Article XX as including some limitation on what can be demanded extrajurisdictionally.

As a matter of general international law, the prohibition on coercion derives from the broader prohibition on intervention. In *Military and Paramilitary Activities*, the International Court of Justice (ICJ) stated that the principle of non-intervention 'forbids all States or groups of States to intervene directly or indirectly in internal or external affairs of other States'. At the same time, the ICJ differentiated between general exertion of influence and unlawful intervention, finding that 'Intervention is

wrongful when it uses methods of coercion' with regard to core choices of states.<sup>63</sup>

Applying the concept of coercion to economic relations taking place under trade agreements is not self-evident. In the ICJ's understanding, the 'element of coercion' is present in 'intervention that uses force', directly through military involvement or indirectly through support for armed activities.<sup>64</sup> However, the Court rejected the claim that US 'action on the economic plane' – cessation of aid, reduction in sugar import quotas, and even a trade embargo – could be seen 'as a breach of the customary-law principle of non-intervention'.<sup>65</sup> The Court later clarified that '[a] State is not bound to continue particular trade relations longer than it sees fit to do so, in the absence of a treaty commitment or other specific legal obligation'.<sup>66</sup>

In *Military and Paramilitary Activities*, the ICJ did find that the United States had, through its trade conduct vis-à-vis Nicaragua, violated the prohibition on coercive action and therefore their Friendship, Commerce and Navigation Treaty. The ICJ stated that 'an abrupt act of termination of commercial intercourse as the general trade embargo ... will normally constitute a violation of the obligation not to defeat the object and purpose of the treaty'. At the same time, the ICJ kept the bar for such a violation extremely high. In contrast to the general embargo, the United States' '90% cut in [Nicaragua's] sugar import quota of 23 September 1983 does not ... go so far as to constitute an act calculated to defeat the object and purpose of the Treaty'.<sup>67</sup>

In the analysis under Article XX, coercion emerges not as a self-standing violation of a legal provision but as a feature of a measure, in principle fulfilling a legitimate objective, that prevents this measure from being justifiable. An undercurrent of the jurisprudence on Article XX is that resort to general exceptions cannot be used to justify coercive measures.

The Appellate Body found in *US – Gasoline* that 'the purpose and object of the introductory clauses of Article XX is generally the prevention of "abuse of the exceptions"'.<sup>68</sup> The chapeau serves to safeguard the GATT's integrity by preventing misuse of the general exceptions, preventing exceptions from enabling Members to undermine their own treaty commitments.

In *US – Shrimp*, the Appellate Body found unreasonable the US requirement that shrimp be caught either within countries holding a nation-wide US certification or by

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<sup>62</sup> See GATT Panel Report, *supra* n. 13.

<sup>63</sup> *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Judgment, Merits, ICJ Reports 1986, at 14, 108.

<sup>64</sup> *Ibid.*

<sup>65</sup> *Ibid.*, at 126.

<sup>66</sup> *Ibid.*, at 138.

<sup>67</sup> *Ibid.*

<sup>68</sup> *Ibid.*, para. 37.

producers that could prove that they employed a specific technology to exclude turtles. The Appellate Body found that this measure had a ‘coercive effect’, conditioning the ability of Members to exercise their GATT rights upon their adoption of policies and enforcement programmes virtually identical to those imposed by the US on its domestic shrimp trawlers.<sup>69</sup> It stated that ‘[p]erhaps the most conspicuous flaw in this measure’s application relates to its intended and actual coercive effect on the specific policy decisions made by foreign governments, Members of the WTO’.<sup>70</sup>

The Appellate Body held that, while a state can apply uniform standards within its territory, economic embargoes to coerce other WTO Members into adopting specific regulations are, though not entirely prohibited, only permitted under certain conditions. Such measures cannot be adopted ‘without taking into consideration different conditions which may occur in the territories of those other Members’.<sup>71</sup> Additionally, the United States had adopted the measure without serious efforts toward multilateral negotiation with the states concerned.<sup>72</sup>

The concern about the coercive element in the measure was also visible from the outcome of the case. Subsequent to the Appellate Body report, the US changed its measure so as to allow third countries to adopt measures not identical, but ‘comparable in effectiveness’ to those used in the US. This revised approach recognized local conditions while maintaining high standards for sea turtle protection. Malaysia challenged the amended measure, arguing that ‘the United States, by imposing a unilaterally defined standard of protection, violates the sovereign right of Malaysia to determine its own sea turtles protection and conservation policy’.<sup>73</sup> However, pointing to the negotiations and the nominally more flexible standards, both the panel and Appellate Body upheld the revised US measure as being consistent with WTO rules.<sup>74</sup>

In *US – Shrimp*, the Appellate Body chose to integrate the issue of extraterritoriality into its discussion of unjustifiable discrimination. This approach allowed it to address underlying concerns about sovereignty and regulatory overreach by focussing on the issue of unjustifiable discrimination, but it avoided direct confrontation with the issue of extraterritoriality. Similarly, in *US – Tuna II*,

discussed above, the Appellate Body addressed the allegation of coercion by focussing on whether the measures were unnecessarily trade-restrictive and whether they led to arbitrary or unjustifiable discrimination. It emphasized that ‘the mere fact that a WTO Member adopts a measure that entails a burden on trade in order to pursue a particular objective cannot *per se* provide a sufficient basis to conclude that the objective that is being pursued is not a “legitimate objective”’.<sup>75</sup> Once more, the Appellate Body avoided a direct confrontation not only with the issue of extraterritoriality, but also with Mexico’s argument regarding the coercive nature of the measure. Instead, it assessed whether the measures were discriminatory and unnecessarily restrictive of trade.

Thus, by offering a broad reading of general exceptions to substantive trade commitments, the Appellate Body has shifted away from the issues of extraterritoriality as well as coercion, instead finding that transnational regulatory action and regulation of PPMs is permitted, if it fulfils a legitimate policy objective and is applied without unjustifiably discriminating against WTO Members. The inclusion of an element of ‘coercion’ or ‘extraterritorial regulation’ within the meaning of a ‘disguised restriction on international trade’ might be useful to address the issue of trade restriction that, though applied even-handedly, allow a state to become the *de facto* regulator of production standards within another state. At the same time, at least if the Appellate Body jurisprudence continues to prevail, this is not a likely prospect – the notion of ‘arbitrary or unjustifiable discrimination’ will continue to provide the controlling criteria for the lawfulness of trade measures pursuing legitimate objectives.

### 4.3 The Balance of Concessions and ‘Rebalancing’ Mechanisms

A final possible criterion is to recover the concern expressed by GATT panels and refocus the debate on the balance of concessions, rather than the overall desirability of certain measures. This implies, on the one hand, accepting as the criteria for the *lawfulness* of a measure its ability to fulfil a legitimate objective, on the one hand, and its non-discriminatory application, on the other. At the same time, it involves dissociating the

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<sup>69</sup> *Ibid.*, para. 161.

<sup>70</sup> *Ibid.*

<sup>71</sup> *Ibid.*, para. 164.

<sup>72</sup> *Ibid.*, paras 166 et seq.

<sup>73</sup> Panel Report, *US – Shrimp (Art. 21.5)*, WT/DS58/RW (21 Nov. 2001), para. 5.103.

<sup>74</sup> Appellate Body Report, *US – Shrimp (Art. 21.5)*, WT/DS58/AB/RW.

<sup>75</sup> Appellate Body Report, *US – Tuna II*, para. 338.

acceptance of lawfulness of the measure from the acceptance of its consequences over the trade bargain between the parties. A mechanism for this purpose was included in the 2024 version of EU-Mercosur Partnership Agreement. This ‘rebalancing mechanism’ consists in a provision in the EUMPA Dispute Settlement chapter expressly permitting parties to invoke dispute settlement concerning measures that are *lawful* under the agreement, if those measures nullify or substantially impair benefits under the agreement.

The rebalancing mechanism shifts the focus away from the lawfulness of measures and instead focuses on their impact on the benefits that parties agreed to grant each other through negotiations. In this sense, the mechanism emphasizes the preservation of mutually agreed concessions while allowing parties to address imbalances caused by lawful measures. Notably, EU law does not expressly incorporate principles such as comity, which encourages states to consider extraterritorial interests when exercising jurisdiction.<sup>76</sup> In the absence of provisions that encourage weighing competing interests or coordinating enforcement among states, mechanisms like the EUMPA rebalancing mechanism provide an alternative, and perhaps more effective, means to address potential conflicts arising from lawful measures with extraterritorial effects.

## 5 CONCLUSION

Any agreement for mutual reduction of tariffs and other trade barriers logically implies a prohibition on measures that contravene these commitments. However, measures that pursue legitimate objectives may, intentionally or incidentally, constitute barriers to trade, eliminating or restricting economic opportunities fostered by the trade agreement. Drawing the line between legitimate regulation that has incidental trade effects and prohibited barriers to trade thus becomes a matter of necessity for the parties – and, in the absence of agreement, for adjudicators entrusted with interpreting the agreement.

During the GATT years, the prevailing understanding – reflected in a number of GATT panel reports – was that regulation was legitimate if it protected values within the territory of the regulating state, but impermissible if it imposed on other contracting parties, or on their produ-

cers, a duty to produce according to the regulating state’s standards. This understanding shifted during the WTO years. Following the jurisprudence of the Appellate Body, WTO law was interpreted to permit trade restrictions fulfilling legitimate objectives, including by determining production processes abroad, provided that such regulation is applied non-discriminatorily. A WTO Member is entitled to apply regulations to limit its demand for imported products, on the basis of an objective that has a connection with the territory of the restricting Members. The *EU – Palm Oil* panels drew from this jurisprudence the logical conclusion: under this approach, for objectives that are ‘global in nature’, every WTO Member is entitled to impose restrictions or limitations to trade with its partners, constrained solely by the non-discrimination requirement in the chapeau of Article XX.

Attempts to go beyond the non-discrimination requirement run into difficulties. The prohibition on extraterritorial regulation in public international law is not necessarily triggered, since a trade measure is generally speaking a domestic regulation, enforced domestically, even if it may refer to events that take place extraterritorially. In this case, only a prohibitive rule would make it unlawful to enforce this regulation vis-à-vis imported products. The notion that trade cannot take place under coercion sounds attractive in principle, but is difficult to apply in practice. Surely a country with a trade agreement cannot lawfully condition all trade with one of its partners to the adoption of a specific policy it favours. But, when the product itself or its production are connected to a harm to a legitimate objective, calling related restrictions ‘coercive’ seems to miss the point. A possible solution, followed in the EUMPA, is to dissociate entirely the idea that a measure is lawful from the obligation to ensure compensation to a trade partner for its negative trade effects. This, it seems, is what the EUMPA seeks to do with its ‘rebalancing mechanism’. Whether this will be fruitful will depend on the parties, and in case of dispute a panel, agreeing to accept this dissociation. The idea that a lawful measure, which fulfils a legitimate objective, could entail an obligation to compensate losers, seems counter-intuitive, and it may take significant convincing to make it acceptable to adjudicators and the public at large.

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### Notes

<sup>76</sup> L. Hornkohl, *The Extraterritorial Application of Statutes and Regulations in EU Law*, Max Planck Institute Luxembourg for Procedural Law, Research Paper Series, n. 2022 (1) (2002).