Addressing global environmental concerns through trade: extraterritoriality under WTO law from a comparative perspective

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4 Jurisdiction and extraterritoriality: A theoretical framework

4.1 INTRODUCTION

The second part of this thesis engages in a closer study of the concept of extraterritoriality through the analysis of extraterritorial jurisdiction under general public international law as well as two particular fields where extraterritoriality is regularly applied (international human rights law and competition law). These findings will then be applied to a WTO context, leading to the proposal of a decision model for extraterritorial trade measures, building on the lessons learned. The purpose of the comparative analysis is to distil the legal concept of extraterritoriality in different contexts and to analyze under which circumstances states are willing to accept extraterritorial jurisdiction. While there are general guiding principles on extraterritoriality, every field of law may be subject to its own variation of jurisdictional rules. It is submitted that other jurisdictional rules of international law can be of help for the interpretation of the scope of jurisdiction under the WTO Agreements.[1]

As has been discussed in the previous chapters, the WTO agreements are silent on their jurisdictional scope, and no systematic approach to jurisdictional questions has yet been developed in the case law. Two notions of extraterritoriality with regard to npr-PPMs have been identified in chapter 3: firstly, a PPM targets the production process and thus prescribes activities occurring abroad; secondly, a PPM can aim at protecting a non-trade concern abroad. Whereas the former does not seem to be considered problematic in the jurisprudence, the latter element has raised more controversy. As has been explained, a distinction can be made between inward-looking concerns and outward-looking concerns, however, this breakdown has not yet been adopted by panels or the AB. While the AB has relied on a 'sufficient nexus' between the concern and the regulating state to establish jurisdiction, it is not clear when such a nexus could be considered sufficient. The AB has pointed out that determining the jurisdictional limitation of the general exceptions is of systemic importance,[2] but the issue remains unresolved.

Before engaging in the further debate on whether and when extraterritorial jurisdiction should be accepted, it is important to take a closer look at what

1 See chapter 1.3.2.
2 AB Report *EC-Seal Products* 2014, para.5.173.

extraterritoriality actually entails. This chapter serves as an introductory chapter to the subsequent substantive chapters on extraterritoriality in different fields of law. It will enhance the understanding of jurisdiction and extraterritoriality by defining both notions and will discern different degrees of extraterritoriality with regard to their intrusiveness and connection to the regulating state.

The chapter will first look at the historical development of jurisdiction, after which extraterritorial prescriptive jurisdiction and extraterritorial enforcement jurisdiction will be distinguished. It will then elaborate on the difference between extraterritorial measures and measures with an extraterritorial effect in order to determine the legal status of PPMs, not only under WTO law, but also under international law. Lastly, the general principles of jurisdiction under public international law will be discussed; thereby identifying which principle(s) could be of relevance to assess the extraterritorial effect of npr-PPMs. The question is also raised whether these historically developed principles can appropriately address the concerns that states are facing in an ever more interdependent and globalized world, where territorial state boundaries might no longer be the only decisive factors in exercising authority.

4.2 THE DEVELOPMENT OF SOVEREIGN STATES AND JURISDICTION

Sovereign states are the main actors under international law. Under the law of nations, states are equal in legal terms by having uniform legal personality and sovereignty.[3] States have exclusive jurisdiction over their territory and population, while being under a duty of non-intervention with the exclusive jurisdiction of other states.[4] Jurisdiction is a quintessential aspect of sovereignty and refers to a state's competence under international law to regulate the behaviour of its nationals (natural and legal persons) and persons present in its own territory. Only with the consent of another state, can a state intervene on the territory of that other state, outside its own jurisdiction. There can be overlap in jurisdiction, however, when for instance a national of state A breaks the law in country B. In an increasing number of areas, jurisdiction

3 This chapter will focus on the jurisdictional aspect of sovereignty and does not allow an in-depth discussion of what sovereignty as a concept entails today. For interesting contributions on sovereignty see among others Gerard Kreijen and others (eds), *State, Sovereignty, and International Governance* (Oxford University Press 2002).; Michael Ross Fowler and Julie Marie Bunck, *Law, Power and the Sovereign State: The Evolution and Application of the Concept of Sovereignty* (Pennsylvania State University Press 1995).; L. Ali Khan, *The Extinction of Nation-States: A World Without Borders*, vol 21 (Kluwer Law International 1996).; John H. Jackson, 'Sovereignty-Modern: A New Approach to an Outdated Concept' 2003, 97 American Journal of International Law 782.

4 James Crawford, *Brownlie's Principles of Public International Law* (8th edn, Oxford University Press 2012) 447.

is being exercised extra-territorially because it is required by the subject matter.[5] The fact that jurisdiction is so closely associated with sovereign authority infuses it with conflict-generative potential.[6] States have the highest power within their territory, but where their actions affect other states international law comes into play. Wherever its international implications are concerned, jurisdiction is limited by rules of international law.[7] Public international law provides the principles under which states can exercise jurisdiction, whereas private international law will fill in the limits of jurisdiction and determine through conflict rules which forum is most appropriate and which law will apply.[8] The relevant international bodies can scrutinize state actions in breach with international obligations.[9]

The model of sovereign co-equal actors with a territorial basis has not always shaped conceptions of world order.[10] The Treaty of Westphalia in 1648 is usually seen as the turning point from the vertical imperial to the horizontal inter-State model. The Westphalian model system consisted of competing and interacting sovereign entities whose discourse and interaction was to be regulated by law.[11] Ever since, state sovereignty and territorial integrity have been the foundations of the international legal system and also the cause of numerous diplomatic standoffs, military confrontations and legal disputes.[12] Not all states have always been considered to possess the same degree of sovereignty, though. Historically the notion of sovereignty is linked to colonial notions of cultural, racial and economic sovereignty. European states respected the territorial limits of those states they chose to recognize as 'fully sovereign', while they categorically resisted the application of local laws to their nationals in Africa and Asia, instead imposing their own national laws extraterritorially in support of their own interests.[13] While today all states

5 For instance, criminal law, data protection and internet law, anti-fraud rules, competition law, international human rights law. See Ryngaert(2015).

6 Dan E. Stigall, 'International Law and Limitations on the Exercise of Extraterritorial Jurisdiction in US Domestic Law' 2012, 35 Hastings International and Comparative Law Review 323, 328.

7 Frederick A.P. Mann, 'The Doctrine of Jurisdiction in International Law' 1964, 111 Recueil des Cours of The Hague Academy of International Law 1, 17.

8 Ibid 19.

9 Crawford(2012), 449.

10 Christoph Schreuer, 'The Waning of the Sovereign State: Towards a New Paradigm for International Law?' 1993, 4 European Journal of International Law 447, 447.; James Gordley, 'Extra-Territorial Legal Problems In A World Without Nations: What The Medieval Jurists Could Teach Us' in Günther Handl, Joachim Zekoll and Peer Zumbansen (eds), *Beyond Territoriality: Transnational Legal Authority in an Age of Globalization* (Martinus Nijhoff 2012).

11 Daniel Betlehem, 'The End of Geography: The Changing Nature of the International System and the Challenge to International Law' 2014, 25 European Journal of International Law 9, 13.

12 Debora L Spar, 'Developments in the law: Extraterritoriality' 2011, 124 Harvard Law Review 1226, 1228.

13 Gemkow 3.

are recognized as sovereign equals,[14] surely there still are large *de facto* discrepancies in the political, economic and military superiority of some states over others. With the legacy of colonization in mind,[15] many states are concerned about neo-imperialism through, for instance, extraterritorial action, particularly when designed to influence states' internal policy choices.[16]

The theory of jurisdiction as it is known today emerged only in the 17th century, but its origin can be found in the conflict of laws that was based upon sovereignty and the territorially and personally limited scope of legislation.[17] Even though there have been earlier recognitions of a territorial application of, for instance, civil jurisdiction by the Roman judiciary, the idea of conflicts of laws and laws being limited territorially was only articulated in Italy in 1200, apparently for the first time, when it was said that the legislation of the forum applied to subjects within the territory, but did not necessarily bind aliens.[18] Questions on domestic and extraterritorial effects of laws, on state sovereignty and possible limitations formed the subject of scholarly study from then on.[19] In the 17th century, Ulricus Huber wrote an authoritative work on conflict of laws and jurisdiction, which had far-reaching influence. Huber stated that

> '1. The laws of every sovereign authority have force within the boundaries of its state and bind all subject to it, but not beyond.
> 2. Those are held to be subject to a sovereign authority who are found within its boundaries, whether they be there permanently or temporarily.
> 3. Those who exercise sovereign authority so act from comity that the laws of each nation, having been applied within its own boundaries, should retain their effect everywhere so far as they do not prejudice the power or rights of another state or its subjects.'[20]

While the third point relates to conflict of laws *stricto sensu* the first two elements are of particular importance to the law of jurisdiction. This territorial point of view of jurisdiction was reiterated in Joseph Story's Commentaries

14 E.g. through membership to the UN. States are recognized as such by other states and governments, through criteria as laid down in the Montevideo Convention on the Rights and Duties of States, being a) a permanent population; b) a defined territory; c) government; and d) capacity to enter into relations with the other states.

15 For an interesting legal perspective on the decolonization process, see Gerard Kreijen, 'The Transformation of Sovereignty and African Independence: No Shortcuts to Statehood' in Gerard Kreijen and others (eds), *State, Sovereignty, and International Governance* (Oxford University Press 2002).

16 Ankersmit, Lawrence and Davies (2012), 24.

17 Mann (1964), 24.

18 By Karolus de Tocco. Ibid 25.

19 Ibid.

20 Ulricus Huber, *De conflictu legum diversarum in diversis imperiis*, 1689. Translation by D.J. Llewelyn Davies.

on Conflict of Laws in 1834.[21] Referring to 'general maxims of international jurisprudence' he argued that firstly, every nation possessed an exclusive sovereignty and jurisdiction within its own territory, affecting all persons and property within it. Secondly, no state can, by its laws, directly affect or bind persons or property not within its territory, except where it concerns its own nationals.[22] Story's maxims to this day dominate the doctrine of international jurisdiction.

Trade measures, including npr-PPMs, are imposed within the importing market and thus fall within the sovereignty of the imposing state. It is unclear to what extent the fact that processes outside the state territory are subject to certain requirements affects this observation. Even though PPM measures affect persons and/or property outside a state's territory, the rule only has effect once the good has entered/is about the enter the territory. Even though there might be an extended effect of what is prescribed, that rule must be activated through a clear territorial link. Furthermore, the rules can only be enforced within the territory of the regulating Member, likely at the border. The maxims of Huber and Story do not distinguish between prescribing rules and enforcing rules. Rules that are prescribed, but cannot be enforced in any way, have little 'impact'. It is therefore important to distinguish between different types of jurisdiction, and determine to what extent acts of enforcement are more intrusive into the sovereignty of other states, than the mere act of prescribing a rule.

4.3 TYPES OF JURISDICTION

Different types of jurisdiction can be identified. Firstly, the power to make laws or rules or *prescriptive* jurisdiction (also termed legislative jurisdiction or *compétence normative)*; secondly, the power to enforce those rules or *enforcement* jurisdiction (executive jurisdiction or *compétence d'exécution)*; and thirdly, *judicial* jurisdiction (adjudicatory jurisdiction): the power to hear and decide on matters that have occurred in the territory and abroad. This latter form of jurisdiction is often designated as part of one or both of the former categories.[23] Judicial jurisdiction can be categorized as prescriptive when courts

21 Joseph Story, *Commentaries on Conflict of Laws, Foreign and Domestic, In Regard to Contracts, Rights and Remedies and Especially In Regard To Marriages, Divorces, Wills, Successions, and Judgments* (Boston: Hilliard, Gray and company, 1834).

22 Summarized by Mann (1964), 28.

23 *International Bar Association – Legal Practice Division: Report of the Task Force on Extraterritorial Jurisdiction* (2008) 8. Authorities differ over whether judicial jurisdiction represents a separate form of jurisdiction. Brownlie for instance distinguishes prescriptive and enforcement jurisdiction (Crawford(2012).) whereas Shaw distinguishes legislative, executive and judicial jurisdiction (Malcolm N. Shaw, *International Law* (6th edn, Cambridge University Press

interpret the jurisdictional scope of legal acts, or as part of enforcement jurisdiction, when laws are given effect through courts.[24] Where a court convicts, sentences and punishes, it is also exercising enforcement jurisdiction.[25] The fact that a court can deal with a matter that has occurred abroad does not necessarily mean that domestic law will be applied to that matter. Private international law regulates the appropriate forum as well as the law to be applied in civil and commercial matters.[26]

The different types of jurisdiction lead to different degrees of intrusiveness when exercised extraterritorially.[27] The exercise of enforcement jurisdiction outside a state's territory is the most problematic: absent consent of the territorial state, enforcement abroad is clearly intruding on the sovereign domain of other states. Enforcement abroad can take different forms, including physical force by state organs or investigations in another country in light of for instance criminal, administrative or fiscal procedures.[28] In the case of investigations, the purpose of the act is of importance: if an investigation is carried out for the purpose of enforcing its laws, then consent of the territorial state must be asked.[29] An act by a state in the territory of another state is prohibited under international law when that act can only be performed by state officials, as opposed to an act by private individuals.[30]

Prescriptive jurisdiction strictly speaking is a less obvious intrusion. States may prescribe norms governing persons, property or conduct outside its territory. The mere act of prescribing rules to subjects outside a state's territory does not necessarily need to have an impact on other states, if there is no attempt to enforce these rules outside that territory. Nevertheless, it is legitimate to expect that a state wants to give effect to its rules prescribed. Such enforcement of rules can very well happen *within* the territory of a state, and would thus be territorial. PPMs illustrate this well: even though a PPM might prescribe standards for a production process abroad, the rules will only be

2008)). The Third Restatement on Foreign Relations Law also distinguishes jurisdiction to prescribe, adjudicate and enforce.

24 In criminal law legislative jurisdiction and judicial jurisdiction are one and the same: if a court has jurisdiction, it applies its own law; if the *lex fori* applies, then the court has jurisdiction. In civil law, these two do not necessarily coincide: a court may have jurisdiction and yet apply foreign law, while a state may legislate for cases which fall beyond the jurisdiction of its courts. (Michael Akehurst, 'Jurisdiction in International Law' 1972-1973, 46 British Yearbook of International Law 145, 179.)

25 (2008), 10.

26 For instance under Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels I – Regulation).

27 Andrea Bianchi, 'Comment on Harold G. Maier – Jurisdictional Rules in Customary International Law' in Karl M. Meessen (ed), *Extraterritorial Jurisdiction in Theory and Practice* (Kluwer Law International 1996) 78.

28 Mann (1964), 138.

29 Akehurst (1972-1973), 147.

30 Ibid 146.

enforced within the territory (or at the border by denying access to the territory). Without market access, the prescribed standards will remain without effect for foreign producers. The rules prescribed extraterritorially are then rules intending to have an extraterritorial effect that will become effective only once a territorial link has been established (in other words where the application of rules has been 'activated' through a territorial connection, for instance entering the market). If the rules are not enforced through a territorial link within the territory or outside the territory, the rules will remain without effect, even though they might have been prescribed extraterritorially.[31]

Npr-PPMs are applied to goods that enter a market, but they prescribe processes that have occurred outside that market (extraterritorial prescriptive jurisdiction). While they thus certainly have an extraterritorial reach, the measures need to be activated through market access. Enforcement of those rules is fully territorial as first at the border can rules be enforced. The enforcement of trade rules is thus not overstepping any limitations of international law. The extraterritorial character of npr-PPMs thus refers to an exercise of *prescriptive* jurisdiction. The analysis in the rest of this thesis will hence focus on prescriptive jurisdiction. The circumstances in which prescriptive jurisdiction can be permitted will be elaborated upon below, but first a closer look will be taken at the concept of extraterritoriality to help define the extraterritorial character of npr-PPMs.

4.4 Defining extraterritorial jurisdiction

States have the power to exercise jurisdiction within their sovereign territory. *Extra-territorial* jurisdiction implies that a state is exercising jurisdiction outside its territory, or without any territorial link. If one is semantically accurate, extraterritorial jurisdiction could thus only refer to assertions of jurisdiction over persons, property or activities that have no territorial nexus whatsoever with the regulating state. However, extraterritorial jurisdiction is generally used as the exercise of jurisdiction outside the territory of a state, whereby the regulating state relies on a nexus – a nexus that can also be of territorial nature, for instance through effects on the territory.[32] As an overarching concept extraterritoriality refers always to an extension of some kind of jurisdictional boundaries. The term is tainted by the pejorative connotation it has acquired, with a feeling of illegitimacy, even though there are a number of

31 Olivier De Schutter, *Extraterritorial Jurisdiction as a Tool for Improving the Human Rights Accountability of Transnational Corporations* (2006) 9.

32 Ryngaert(2015), 7. Effects-based jurisdiction in the context of competition law will be discussed in more detail in chapter 4.

instances in which the exercise of extraterritorial jurisdiction is permitted under international law.[33]

Buxbaum observed that territoriality and extraterritoriality are legal constructs used to reinforce or resist claims to authority.[34] Territoriality *sensu stricto* refers to the authority and exercise of jurisdiction within the territory of a state over activities that have occurred within that territory. It could also refer *sensu lato* to the exercise of jurisdiction within the territory for activities occurring outside that territory, and that need to be 'activated' within the territory, such as npr-PPMs that only apply to foreign producers when they want to access the market. When not entering a certain market the rule will not apply (note the distinction with a rule that is prescribed extraterritorially without a need for activation, but where the effect can be limited or null because of a lack of enforcement). It has been argued that because of that 'market trigger' npr-PPMs are not extraterritorial as

> 'nothing that has happened outside the border attracts, by itself, any criminal or civil sanction. Foreign producers may use whatever processes they want, and use them with impunity. The only thing they cannot do is bring products produced through certain processes into the country.[35]

An implicit reference to 'market activation' can also be found in the Court of Justice of the European Union (CJEU)'s reasoning in the ATAA-case on the EU Emission Trading System (EU ETS)[36] whereby non-EU flight operators would be included in the EU ETS for their emissions of entire flights (both within and outside EU airspace) when landing or departing from EU airports. The Court referred to the physical presence of such operators in the EU at the moment of landing or departing, and did not see any extraterritorial application of rules because of this territorial trigger. However, to entirely deny an extraterritorial aspect here would stretch the concept of territoriality too much. The controversy and proposed countermeasures by other states in reaction to the EU's aviation measures for instance demonstrate the sensitive nature of these 'territorial measures'.[37] However, because of the territorial link that is nonethe-

33 Andreas F. Lowenfeld, *International Litigation and the Quest for Reasonableness* (Clarendon Press 1996) 15.

34 Hannah L. Buxbaum, 'Territory, Territoriality, and the Resolution of Jurisdictional Conflict' 2009, 57 American Journal of Comparative Law 631, 635.

35 Howse and Regan (2000), 274.

36 CJEU, *Air Transport Association of America and Others v Secretary of State for Energy and Climate Change* Grand Chamber 21 December 2011, C-366/10, para.125.

37 A coalition of 26 countries opposing the EU ETS signed the New Delhi Agreement, including India, the US, China, the Russian Federation, Japan, Brazil and Saudi Arabia. ('coalition of the unwilling'); The US adopted the 'European Union Emissions Trading Scheme Prohibition Act' in 2011, making it illegal for US airlines to comply with the EU ETS requirements; China as well has forbidden its airlines to comply with EU ETS obligations, after blocking a billion dollar order of Airbus aircrafts by Hong Kong Airlines, citing that

less present, such measures cannot be considered as fully extraterritorial either. It is thus clear that different forms or even 'degrees' of extraterritoriality can be discerned.

In order to classify a measure as extraterritorial, Bartels proposes to consider whether a measure is *defined* by something located or occurring abroad.[38] A mere impact on activities or persons abroad cannot suffice, as practically all economic legislation will have some impact abroad.[39] Whether a measure is defined by something abroad can be hard to determine, however. For instance, if a domestic regulation prescribes certain standards on emissions for production of cement, and these standards are applied to imported cement as well, that measure has the extraterritorial effect of prescribing production standards abroad, but applies equally in law and in fact to domestic and imported goods, and is thus not *per se* defined by something occurring abroad. If that same law was only to apply to imported products, in theory, then that law would be defined by something occurring abroad, even though the rationale behind both rules is the same. Would the latter rule be extraterritorial because it is only applied to imports? In my view, whether there is any discriminatory or protectionist nature needs to be determined in an evaluation of the application of the rule in *law* and in *fact*, but the extraterritorial character of the rule does not change. Under a broader interpretation of Bartels' approach, all PPMs would be considered extraterritorial as the central production activity occurs abroad. It would then need to be determined whether there is any permissive principle that could allow for the use of PPMs in general, as well as for the use of those PPMs in particular that aim at protecting environmental concerns abroad. This broad interpretation does seem to go beyond the AB's interpretation of PPMs[40] as well as the majority scholarly opinion.[41]

Meng suggests that a measure is extraterritorial if its effects abroad are substantial, foreseeable and not reasonable. He distinguishes between extraterritorial measures and legislation with extraterritorial links.[42] Both may influence what is occurring abroad, but the first category is characterized by *its intended coercive* effect on the addressee abroad, while mere factual foreign effects are not necessarily characterized by such an intention (but can be).[43] Npr-PPMs would fall within the latter category. According to Meng, npr-PPMs

as a retaliatory measure against the EU ETS. See also Lorenzo Schiano di Pepe, 'European Union Climate Law and Practice at the End of the Kyoto Era: Unilateralism, Extraterritoriality and the Future of Global Climate Law Governance' in Robert Percival, Jolene Lin and William Piermattei (eds), *Global Environmental Law at a Crossroads* (Edward Elgar 2014) 292. See also chapter 7 on the EU ETS Aviation measure.

38 Bartels (2002), 381.

39 Bartels, p379. See also AB Report *US-Shrimp* 1998, para.121.

40 Ibid. See chapter 2 for a discussion of *US-Shrimp.*

41 Among others Howse and Regan (2000); Horn and Mavroidis (2008); Meng(1994); Scott (2014).

42 Meng(1994), 75; 742.

43 Ibid 86.

are not extraterritorial, not even when the regulatory objective of a certain measure – for instance protection of the environment – is focused on production processes, both domestic and abroad.[44] The extraterritorial effects of trade measures follow naturally from a cross-border economic order and must thus be considered factual extraterritorial effects. He argues that lawful extraterritorial regulation is an 'indispensable factor of economic self-determination of States, i.e. of their freedom to reconcile economic needs with other political aims'.[45] Under Meng's approach npr-PPMs should not be governed by the public international rules on jurisdiction, but like all trade measures would only be subject to WTO rules: if a measure would need to be justified under Article XX GATT for instance, it would be subject to a proportionality and good faith test among others,[46] which could include a consideration of coercive effect.[47]

Scott makes a conceptual distinction between 'extraterritorial measures' and 'measures giving rise to territorial extension'.[48] Extraterritorial measures are defined as measures that 'impose obligations on persons who do not enjoy a relevant territorial connection with the regulating state',[49] whereas measures of territorial extionsion are 'triggered by a territorial connection but in applying the measure the regulator is required, as a matter of law, to take into account conduct or circumstances abroad'.[50] The circumstances that are to be taken into account can variably be defined by individual transactions (conduct

44 Ibid 77.

45 Ibid 752.

46 See Bartels (2002), 389.: 'The Chapeau reflects, and may even go beyond, a proportionality requirement attaching to the exercise of extraterritorial jurisdiction under public international law'.

47 See also the AB's reference in *US-Shrimp* to the 'intended and actual coercive effect' of the US measure on harvesting methods of shrimp (condemning the measure for being inconsistent with the chapeau of Article XX). The AB referred to a coercive effect through the application of the measure, as the measure allowed for no flexibility in pursuing the objective of turtle protection. The GATT panel in the first *Tuna* case considered that 'if the broad interpretation of Article XX(b) suggested by the United States were accepted, *each contracting party could unilaterally determine the life or health protection policies from which other contracting parties could not deviate* without jeopardizing their rights under the General Agreement.' (GATT Panel *US-Tuna (Mexico)* 1991, para.5.27.). The second *Tuna* panel stated 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, including their conservation policies, the balance of rights and obligations among contracting parties, in particular the right of access to markets, would be seriously impaired. Under such an interpretation the General Agreement could no longer serve as a multilateral framework for trade among contracting parties.' (GATT panel *US-Tuna (EEC)* 1994, para.5.26.). See also chapter 3 for a discussion of these disputes.

48 Scott (2014), 90.

49 For instance, US sanctions against Iran.

50 For examples of measures with territorial extension in different policy domains, see Joanne Scott, 'Extraterritoriality and Territorial Extension in EU Law' 2014, 62 The American Journal of Comparative Law 87, 96.

exclusively related to that transaction, such as PPMs linked to the production process of a particular import product, irrespective of their origin) or can be countrywide (for instance, has a certain country adopted its own measures aiming at the same objective).[51] The EU Emission Trading System applicable to airlines could for instance be considered a measure of territorial extension.

All three approaches imply that 'real' extraterritorial measures are more intrusive to the jurisdiction and sovereignty of other states than measures with an extraterritorial effect or of territorial extension. Under the latter two approaches it can be argued that trade measures, and in particular npr-PPMs, are not to be considered strictly extraterritorial. However, just as not all extraterritorial measures are by their nature unacceptable, perhaps not all measures with territorial extension should be considered acceptable.[52] It is here that the public international law rules on jurisdiction (permissive principles) can be of help: can these principles be relied upon to determine whether an environmental concern abroad is a sufficiently strong nexus to 'justify' the extraterritorial *effect* of the measure? The extraterritorial effect is of npr-PPMs is then not as much a pure jurisdictional question, but rather part of the substantive analysis of the measure. Nonetheless, for lack of rules governing substantive exterritorial effects, it is submitted that the general jurisdictional principles are relevant guidance for this question.

The practical effect of legislation with an extraterritorial reach can render a measure potentially excessive, if for instance the addressees of that measure cannot 'reasonably afford to disregard the order without suffering considerable hardship'.[53] An interesting question in this regard, applying that reasoning to a trade context, is whether the principled acceptance of trade measures with an extraterritorial effect could depend on the market power of the imposing member state?[54] Should one just look at whether a producer-exporter has other reasonable (economic) alternatives in other markets? Should there be an assessment on a case-by-case basis of the market share of a specific producer, or through a cost-benefit analysis? When will the practical effect become 'impermissible'?[55] A number of other elements can be relevant in determining whether extraterritorial measures or measures with territorial extension could be allowed, such as the imminence of the environmental threat or whether there are other states with interests in jurisdiction,[56] or the risk for conflict with the regulation of other states. The level of acceptance, or rather of opposition, by other states seems to be subject to conditions beyond purely legal

51 Ibid 106.

52 See *infra* at 5.2 on the permissive rules for extraterritorial prescriptive jurisdiction under international law.

53 Werner Meng, 'Extraterritorial Effects of Legislative, Judicial and Administrative Acts' in Rudolf Bernhardt (ed), *Encyclopedia of Public International Law*, vol 2 (Elsevier 1995) 156.

54 See also chapter 7.6 on network power (market power) and the Brussels effect.

55 Bartels (2002), 378.

56 See *infra* at 4.5.3, as well as chapter 5 on comity in the context of competition law.

standards. For instance, the nature of the concern that is to be protected (national interest or general/common interest) can be relevant, as well as the international support and recognition of a specific norm (unilateral character or multilateral recognition). For example, it can be agreed upon that the protection of the environment is a common concern, but which measures contribute to environmental protection? What are the appropriate methods to act with respect to particular concerns? Does the precautionary principle apply? In other words, should there be agreement on the nature of the concern and the appropriate way to address that concern, even in case of newly arising concerns and scientific uncertainty? Chapter 6 on extraterritoriality and international human rights will take a closer look at these conceptual questions, to help determine whether the common nature of the prescribed norm can be a factor of influence in assessing the acceptability of PPMs with an extraterritorial effect.[57] Elements from that analysis, as well as from the continued analysis below and chapter 5 on competition law, that are relevant to an assessment of extraterritorial effects in a trade context will receive particular attention and will be integrated in a proposal for an extraterritoriality decision tree that can help WTO tribunals to decide on the jurisdictional limitation of regulatory space under WTO law (chapter 7).

4.5 Principles of extraterritorial jurisdiction

4.5.1 Lotus: prohibitive or permissive?

Under public international law, two approaches can be discerned with regard to jurisdiction. Either states are allowed to exercise jurisdiction as they see fit, unless there is a prohibitive rule to the contrary; or states are prohibited from exercising jurisdiction, unless there is a permissive rule to the contrary.[58] The Permanent Court of International Justice relied on the first approach in the 1927 *Lotus* case, the only case in which an international body actually expressed a general position on extraterritorial jurisdiction. It is questionable whether *Lotus* is still good law today though, as extraterritorial jurisdiction

57 Extraterritoriality in a human rights context differs from extraterritorial prescriptive jurisdiction as discussed here. In a human rights context, it refers to the practice by international human rights bodies that have created an extraterritorial extension of states' obligations under regional and international human rights treaties when states are acting outside their territory. The main difference with extraterritorial state measures is that in the case of human rights there is no state telling others what to do: rather (through the decisions of international courts and tribunals) states are bound to their own obligations that they themselves have agreed upon, not only within their territory, but also when acting beyond that territory (extension of own obligations). This practice and its relevance for the current research will be further explored in chapter 6 on international human rights law.

58 Ryngaert(2015), 29.

seems to be much more restricted than *Lotus* would imply.[59] The case concerned a collision on the high seas between a French steamer (the *SS Lotus*) and a Turkish collier (the *SS Boz-Kourt*) in which the latter sank resulting in the death of Turkish sailors and passengers. When the French steamer moored in Turkey for repairs, the French officers of the watch were arrested, tried and convicted of involuntary manslaughter. France protested strongly against this action, claiming that Turkey did not have jurisdiction to try the alleged offence. The question thus arose whether an international rule existed prohibiting the Turkish exercise of judicial jurisdiction, or in other words, whether Turkey had jurisdiction to prosecute.

Firstly, the Court emphasized that jurisdiction is territorial. The Court held that a state cannot exercise 'its power in any form' *outside its territory* unless a rule of international law permits it do so.[60] The Court then continued that from that principle it did *not* follow that international law prohibits a state from exercising jurisdiction *in its own territory* in relation to acts that have taken place abroad, and where that state cannot rely on a permissive rule of international law. The Court stated:

> '(…) international law as it stands at present [:] Far from laying down a general prohibition to the effect that States may not extend the application of their laws and the jurisdiction of their courts to persons, property and acts outside their territory, it *leaves them in this respect a wide measure of discretion which is only limited in certain cases by prohibitive rules*; as regards other cases, every State remains free to adopt the principles which it regards as best and most suitable. (…) In these circumstances all that can be required of a State is that it should not overstep the limits which international law places upon its jurisdiction; within these limits its title to exercise jurisdiction rests in its sovereignty.'[61] (emphasis added)

While the Court makes it clear that states cannot exercise their enforcement power outside their territory unless there is a permissive rule under international law,[62] there is no general rule prohibiting the application of laws and the jurisdiction of courts to persons, property and acts outside a state's territory. Such jurisdiction seems only to be limited by prohibitive rules. So once a territorial link is established, and the state is acting within its territory, states have a much wider discretion. This passage has been much criticized, as seeming to propagate the idea of states determining the delimitation of jurisdiction themselves, rather than international law.[63] Only where prohibitive

59 Restatement of the Law (Third) on Foreign Relations Law of the United States, 1986.
60 Permanent Court of International Justice, *S.S. Lotus* 7 September 1927, series A, no.10, p.18.
61 Ibid p.19.
62 Ibid p.18.
63 Ryngaert(2015), 34. Dissenting opinion van den Wyngaert to ICJ Arrest warrant, para.51, stating 'it has often been argued, not without reason, that the Lotus test is too liberal and

rules exist under international law, would a state be limited in its exercise of jurisdiction. As neither the PCIJ nor the International Court of Justice (ICJ) have given subsequent rulings on the issue,[64] *Lotus* is still a reference on jurisdictional issues under international law.[65] Nevertheless, state practice of extraterritorial jurisdiction seems to be more restricted than *Lotus* would imply. Rather than 'unrestricted' extraterritorial jurisdiction with limitations through *prohibitive* rules, customary law inclines towards a territoriality approach, whereby states can only exercise jurisdiction outside their territory through a *permissive* rule of international law.[66]

The permissive rules of customary international law with regard to prescriptive jurisdiction are based on the broad principle that there needs to be a sufficiently close connection between the state and the matter to be regulated.[67] The fact that a permissive principle allows a state to exercise prescriptive jurisdiction outside its territory does by no means entail that that state is entitled as well to enforce its laws extraterritorially. For instance, a state may ask from all its nationals (including those living abroad) to complete military service, but cannot send officers to neighbouring states to bring its nationals within the state's boundaries to comply with that duty.[68]

4.5.2 Permissive principles governing prescriptive jurisdiction

A number of principles have been developed according to which states may exercise prescriptive jurisdiction extraterritorially. These principles were

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that, given the growing complexity of contemporary international intercourse, a more restrictive approach should be adopted today'.

64 In the ICJ case Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v Belgium), Belgium had issued an international arrest warrant against the at the time Foreign Minister of Congo, accusing him of inciting racial hatred, which had led to Tutsi killings in Rwanda. Belgium issued the warrant based on universal jurisdiction. Congo made two separate legal claims, firstly relating to the immunity of incumbent foreign ministers, and secondly, contesting the universal jurisdiction. The Court held that indeed the warrant failed to respect the minister's immunity, but did not address the question on universal jurisdiction. (International Court of Justice, *Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v Belgium)* 2002, ICR Rep. 2002.) That issue was addressed in several separate opinions, which will be further discussed below in the subsection on universal jurisdiction.

65 Cedric Ryngaert, *Jurisdiction in International Law* (Vaughan Lowe ed, Oxford University Press 2008) 22.; Interesting to note is that with regard to collisions at sea the Lotus principle under which the Turkish vessel was deemed equivalent to Turkish territory has been overturned by article 11(1) of the UN Convention on the Law of the Sea of 1958, which emphasized that only the flag state or the state of which the alleged offenders was a national has jurisdiction over sailors regarding incidents occurring on the high seas.

66 International Law Commission, *Report on the work of the fifty-eighth session – Annex V: Extraterritorial Jurisdiction* (2006) 231; International Bar Association, *Report of the Task Force on Extraterritorial Jurisdiction* (2009) 9; Mann (1964), 36.

67 Crawford(2012), 457.

68 Mann (1964), 13.

outlined in the Harvard Research of International Law, which was carried out in the 1920s and 1930s in an effort to codify the international rules of jurisdiction.[69] The later American Law Institute's Restatements (Second and Third) on Foreign Relations Law can be seen as its follow-up.[70] Both the Harvard principles and the Restatement aim to depict the global status of jurisdictional principles, rather than only the US position on the matter.[71] With sovereignty and non-intervention as starting points, a state may regulate (prescriptive jurisdiction) conduct occurring outside its territory if there is a connecting factor as a basis for its jurisdiction.

The applicability of a jurisdictional principle allowing for the exercise of extraterritorial jurisdiction does not necessarily mean that jurisdiction will automatically be established. The US for instance, which has quite a track record on extraterritoriality, has two theories at its disposal to limit extraterritorial jurisdiction: the *Charming Betsy* doctrine and the presumption against extraterritoriality.[72] The *Charming Betsy* doctrine entails that 'an act of Congress ought never to be construed to violate the law of nations, if any other possible construction remains'.[73] In many cases, the doctrine goes hand in hand with the presumption against extraterritoriality, which requires courts to presume that a statute is 'meant to apply only within the territorial jurisdiction of the US' unless 'a contrary intent appears'.[74] If Congress intends to legislate on foreign matters and the presumption against extraterritoriality is thereby overcome, the *Charming Betsy* doctrine operates to avoid conflict with international law. US Courts have developed a number of comity-driven constraints in order to avoid such conflict,[75] which will be discussed in section 5.3 of this chapter. Comity is also at issue in cases of overlapping jurisdiction as acts can be within the lawful ambit of multiple jurisdictions. In order to avoid double jeopardy, it is recognized as a principle of comity that the state

69 'Harvard Research on International Law: Jurisdiction with Respect to Crime' 1935, 29 American Journal of International Law 435, 445.

70 Restatement volumes are codifications of case law with highly persuasive authority as they are built on input from academics, attorneys and judges. They seek to inform about general principles of common law. The Restatements are extensively cited by courts throughout the US. To date there have been three series of Restatements, all published by the American Law Institute. The Third Restatement dates from 1986 and the ALI is currently working on a Fourth Restatement.

71 See for instance Amicus Curiae Brief by the European Commission on Behalf of the European Union in support of neither party in *Kiobel v Royal Dutch Petroleum Co.*, US S.Ct., 2012.

72 See for an interesting more in-depth discussion about its application Anthony J. Colangelo, 'A Unified Approach to Extraterritoriality' 2011, 97 Virginia Law Review 1019.

73 *Charming Betsy*, 6 US at 118.

74 *Morrison v National Australian Bank Ltd*, 130 S. Ct. 2877. For a more in-depth analysis, see J.H. Knox, 'A Presumption against Extraterritoriality' 2010, 104 American Journal of International Law 351.

75 Scott (2014), 93.

with the strongest link will usually exercise jurisdiction.[76] However, this determination might not always be easy to make. While states may agree on the appropriate legal bases for the exercise of jurisdiction, it is less clear on how these criteria should be put into practice.[77]

The next section will first give an overview of the generally accepted jurisdictional grounds. The principles discussed below refer to prescriptive (and linked adjudicatory) jurisdiction, but not to enforcement jurisdiction: as has been noted earlier, enforcement jurisdiction is strictly territorial, unless the foreign state has given its consent.

4.5.2.1 Subjective territoriality principle

The starting point for jurisdiction is that all states have competence over events occurring and persons present (either nationals, residents or otherwise) within their territory.[78] This is the most common and least controversial basis for jurisdiction and entails that states may prescribe laws within their territory. One can discern *subjective* territoriality, which creates jurisdiction over crimes or acts commenced within the state even if completed or consummated abroad, and *objective* territoriality, according to which jurisdiction is founded when any essential constituent element of a crime or act is consummated on the forum state's territory.[79] In other words, the subjective theory rests on the *Lotus* principle that control over territory necessarily included control over events that affected that territory.[80]

States have tried to extend the territorial principle by merely requiring minor contact with the territory. For instance, the US Foreign Corrupt Practices Act[81] relies primarily on territorial jurisdiction, but requires only a limited territorial nexus of the practices with the US, such as the 'use of the mail or other instrumentality of interstate or foreign commerce in furtherance of the improper activity'.[82] How far can these limits be pushed? Would it for instance suffice as a territorial nexus that a computer server on US territory has been used in an internet scam in order to claim jurisdiction?[83] Civil and

76 See *infra* at 4.5.3. on comity and reasonableness.
77 Bianchi(1996), 75.
78 IBA, Report of the Task Force on Extraterritorial Jurisdiction (2008), 11. For a historical overview of the developments of the territoriality principle, see Ryngaert(2015), 50.
79 Crawford(2012).
80 Harold G. Maier, 'Jurisdictional Rules in Customary International Law' in Karl M. Meessen (ed), *Extraterritorial Jurisdiction in Theory and Practice* (Kluwer Law International 1996) 67.
81 Foreign Corrupt Practices Act of 1977, as amended, 15 U.S.C. §§ 78dd-1, et seq.
82 IBA, Report of the Task Force on Extraterritorial Jurisdiction (2008), 11.
83 Ryngaert(2015), 79. on internet and territorial jurisdiction. In practice states require a substantial territorial connection in order to establish jurisdiction, such as users within the territory are addressed or scammed; the location of the offender's computer identifiable through the IP address; or the location of the server. Extraterritoriality in the field of internet law could raise more challenges with regard to enforcement jurisdiction: if searches are

common law differ in their approaches to the required territorial nexus. Under common law, temporary presence of the defendant within the territory suffices, for instance, for a court to acquire jurisdiction *in personam* when a writ was served while the defendant was within the territory of the state. The length of the stay does not affect the jurisdictional claim.[84] Outside the common law world, this practice is virtually unknown, and jurisdiction would rather be based on the habitual residence of the defendant.

When the AB in *US-Shrimp* referred to a sufficient nexus-requirement in relation to the migratory sea turtles in and outside US waters,[85] it seemed to justify its position by relying on the territoriality principle. The GATT does not limit its territorial scope in any way and the AB did not clarify why it found it needed to establish a territorial link. Rather, the AB emphasized that it did not 'pass upon the question of whether there is an implied jurisdictional limitation in Article XX(g), and if so, the nature or extent of that limitation'.[86] Contrary to the AB's statement, referring to a 'sufficient nexus' does seem to lay down a jurisdictional limitation, requiring such nexus before a state can act upon certain concerns under Article XX. As the AB did not elaborate on the concept of 'sufficient nexus', it is unclear whether that nexus could also be of a moral nature, for instance, for those concerns that do have no physical link with the territory in any way. However, a mere moral concern seems to be an insufficient link in order to protect an environmental problem outside the territory of the state. The notion of 'sufficient nexus' bears resemblance to what has been proposed by Mann: rather than a strict territorial link, he proposed to instead rely on a 'meaningful connection' or 'genuine link' between the regulating state and the matter being regulated. He referred to a connection, 'so close, so substantial, so direct, so weighty, that legislation in respect of [the given set of facts] is in harmony with international law', adding that a 'merely political, economic, commercial or social interest does not in itself constitute a specific connection'.[87] Bartels proposes the concept of 'legitimate state interest' as a deciding criterion, which could be applied regardless of the location of the concern to be regulated, and rather focuses on 'balancing the sovereign interests of states in regulating matters of concern to them'.[88] Nevertheless, that does not answer the question when an interest can be considered 'legitimate'. Does it suffice that the regulating considers the matter 'legitimate'? The protection of environmental global commons could be seen as a legitimate state interest or as an issue with a meaningful connection to all states, but especially where different states interests could

conducted by states agents that do not physically cross the territory when accessing foreign servers or accessing foreign, should this be considered extraterritorial?

84 Akehurst (1972-1973), 171.

85 See chapter 3 for a discussion of the case.

86 AB Report *US-Shrimp* 1998, para.133.

87 Mann (1964), 49.

88 Bartels (2002), 374.

overlap or conflict, I would argue that a territorial connection of some kind, for instance, through effects,[89] would strengthen a jurisdictional claim.

4.5.2.2 Objective territoriality or effects

The objective territoriality principle or effects doctrine permits a state to exercise jurisdiction with regard to activities that originate abroad but which have a substantial, direct and foreseeable effect upon or in its national territory.[90] The effects doctrine is only recognized as a separate legal basis (rather than an interpretation of the territoriality principle) by a few countries, such as the US, Brazil and Singapore. The Third Restatement of Foreign Relations Law refers explicitly to the effects doctrine, referring to foreign conduct that has or is intended to have substantial effects.[91] The effects doctrine is best known from its application under antitrust law, which will be discussed in chapter 5. The existence of direct and substantial effects[92] (see by analogy Mann's requirement of a connection 'so close, so substantial, so direct, so weighty') on the state's territory, whether on its economy, or, for instance, on its air, water or soil, would support a finding of a connection, link, or legitimate interest.

The effects doctrine or objective territoriality principle could be relevant for assessing the extraterritorial effect of npr-PPMs. If states prescribe npr-PPMs in order to protect environmental concerns located outside their territory, the extraterritorial effect of those PPMs could be permitted when states can demonstrate that their environment is affected by what is occurring abroad, or in other words, that they have a meaningful connection, genuine link or legitimate interest in regulating the activities abroad that lead to environmental harm to their territory. In view of the requirements of direct and substantial effects, or a close, substantial and direct link to the state, it could be argued that the objective territoriality principle would not permit purely outward-looking concerns, such as for instance the pollution of a foreign lake, or the threat of extinction of a foreign animal species. If a state could demonstrate environmental effects within its territory, irrespective of whether that state is the only state affected or where several or all even all states are affected (e.g. climate change), those effects could possibly create support for a jurisdictional claim. Chapter 5 on the effects doctrine and competition law will elaborate on these issues.

89 See chapter 5 on the effects doctrine and competition law, and chapter 7 on the extraterritoriality decision tree.

90 See chapter 5. See also amongst others Jason Coppel, 'A Hard Look At The Effects Doctrine of Jurisdiction in Public International Law' 1993, 6 Leiden Journal of International Law 73.

91 1986, 402(1)(c).

92 Ibid.

4.5.2.3 Active personality principle

Under the nationality or active personality principle states are entitled to exercise jurisdiction over its nationals, even when they are outside the territory of that state.[93] In criminal law, it is hardly contested that states can exercise their jurisdiction over nationals who are accused of committing an offence abroad. The nationality principle might easily create overlap in jurisdiction in cases of double nationality or cross-border movement, and states can place limitations on the nationality principle by confining it to serious offences for instance.[94] Such restrictions are not required by international law: states have the unlimited right to base jurisdiction on the nationality of the accused.[95] Variations to the nationality principle could be an active personality application to residents or those that are domiciled in the prosecuting state, or the flagstate for crew of merchant vessels.[96]

Beyond criminal law, the nationality principle can also be relied on by states to prescribe the conduct of its own citizens abroad.[97] Any regulation must advance a legitimate interest of the state, and may not merely be used to cause mischief in another state.[98] For instance, the UK cannot require its citizens to drive on the left side of the road in countries where the rule of the road prescribes driving on the right side. Such a rule could not be seen as advancing any legitimate state interest and would only cause mischief abroad. An exercise of prescriptive jurisdiction does not mean that the prescribed rules can be enforced extraterritorially: enforcement always requires the consent of the territorial state. As long as the national is abroad, the effect of the prescribed rule may be limited without enforcement, but nationals can be bound by their home country laws and face enforcement when they return to that home country.

Controversial situations can arise with regard to legislative jurisdiction based on the nationality principle for legal persons.[99] For instance, states could feel morally obliged to prescribe standards to improve the ethics and accountability of their multinational corporations abroad. The complex legal structure of multinationals combined with the principle of limited liability enjoyed by almost all corporations, can lead to different behavioural standards

93 In private international law, national law often follows the national outside the territory as far as his personal status is concerned. Courts may thus apply foreign law provided it does not violate domestic law. See Ryngaert(2015), 104.

94 Ibid 105.

95 Akehurst (1972-1973), 156.

96 Ibid.

97 L. Austen Parrish, 'Evading Legislative Jurisdiction' 2012, 87 Notre Dame Law Review 1673, 1679.

98 Akehurst (1972-1973), 189.

99 See for a more in-depth discussion De Schutter (2006), 9. See also Ani-Yonah Reuven, 'National Regulation of Multinational Enterprises: An Essay on Comity, Extraterritoriality and Harmonization' 2003, 42 Columbia Journal of Transnational Law 5.

within such a large corporation. Typically the parent company is incorporated in a developed country and complies with stringent standards, whereas affiliates are operating in developing countries, often under less-stringent standards. Unless states would pierce the corporate veil by for instance relying on a 'control' theory (mother company controlling the daughter company or foreign branches) states cannot regulate the affairs of the subsidiaries.[100] As legislation cannot be extraterritorially enforced without the consent of the territorial state, states prescribing a higher standard depend to a large extent on the 'goodwill' of the corporation. Soft-law instruments have been adopted to encourage corporations to observe higher ethical standards, such as the OECD Guidelines on Multinational Enterprises.[101] Multinationals operating in or from territories of the countries adhering to the Guidelines are recommended to observe the Guidelines[102] and governments should encourage companies to 'observe the Guidelines wherever they operate, while taking into account the particular circumstances of each country'.[103]

The nationality principle is of little help to the discussion on npr-PPMs, based on the premise that the producers of the imported goods are not nationals of the market of entry. The boundaries of nationality jurisdiction could possibly (albeit controversially) be stretched by regulating foreign conduct of companies that are incorporated abroad, where these companies are the subsidiaries of a parent company that holds the nationality of an EU Member State. However, this type of nationality jurisdiction has not yet been applied to environmental standards.[104]

4.5.2.4 Passive personality principle

According to the passive personality principle, a state may exercise jurisdiction over aliens for acts committed abroad that are harmful to nationals of the forum state, even where these aliens are not within the forum's state territory.[105] This principle has stirred more controversy than the territoriality or active personality principles as it is perceived as quite aggressive. According to Mann, the passive personality principle 'should be treated as an excess of

100 Ryngaert(2015), 108.

101 OECD (2011), *OECD Guidelines for Multinational Enterprises*, OECD Publishing (first published in 1976 and revised in 2000 and 2011).

102 OECD Declaration on International Investment and Multinational Enterprises, 25 May 2011: I.

103 OECD (2011), *OECD Guidelines for Multinational Enterprises*, Part I: *Recommendations for Responsible Business Conduct in a Global Context: Concepts and Principles,* para.3.

104 For instance, the EU has exercised "subsidiary jurisdiction" in regulating the remuneration that may be paid to certain categories of staff employed by banks and investment firms (article 92 of Directive 2013/36 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms). See also Joanne Scott, 'The New EU "Extraterritoriality"' 2014, 51 Common Market Law Review 1, 10.

105 Crawford(2012), 461.

jurisdiction'.[106] In his dissenting opinion to the *Lotus* case, judge Moore already rejected this principle as he noted that an individual going abroad cannot take with him his home law for protection, but falls under the dominion of the local law.[107] One of the difficulties with the principle is that a perpetrator of a crime might not be reasonably expected to know the law of the nationality of his victim, whereas under the active personality principle, he can be expected to know his own national law applicable to his behaviour (in addition to the law of the host territory).[108] Without knowing the law, he cannot be deterred by it, and deterrence is a classical aim of criminal law.[109] Furthermore, as Moore put it, it would imply that people living in an international city could within the hour be subject to a multiplicity of foreign criminal codes.[110]

Nevertheless, the passive personality principle is today recognized as legitimate with regard to certain crimes, such as international terrorism.[111] The principle also finds recognition in criminal law treaties, where *aut dedere aut iudicare* provisions authorize (not compel) protection of nationals.[112] State practice remains limited though as only few states have actually applied their laws in this way.[113] Outside the realm of criminal law, the passive personality principle has little relevance.

4.5.2.5 Protective principle

Under the protective principle, states can assert jurisdiction over acts committed abroad which (might) harm security interests, the territorial integrity, political independence or other key interests of the state.[114] Such jurisdiction shall be based on concrete and primary interests, but has also been interpreted in a broader context. For instance, when Adolf Eichmann was abducted by Israeli agents in Argentina to ensure that he would be tried in Israel under the Nazi Collaborators (Punishment) Law, Israel invoked the protective principle in relation to the Jewish victims of the accused, despite the fact that Israel

106 Mann (1964), 92.
107 Dissenting Opinion Mr. Moore 7 September 1927, p.92.
108 Ryngaert(2015), 110.
109 Ibid.
110 Dissenting Opinion Mr. Moore 7 September 1927, p.92.
111 Shaw(2008), 666. See for instance the US Anti-Terrorism Act 1986.
112 E.g. Article 4(b) of the Convention of Offences Committed on Board Aircraft, Tokyo, 14 September 1963, 220 UNTS 10106; Article 6(2)(b) of the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, Rome, 10 March 1988, 222 UNTS 29004; Article 5(1)(c) of the UN Torture Convention, New York, 10 December 1984, 1465 UNTS 85.
113 The International Criminal Court may not exercise jurisdiction based on the passive personality principle, but only based on the territoriality or active personality principle (Article 12, Rome Statute).
114 Akehurst (1972-1973), 158.

was not a state when the offences in question occurred.[115] This exercise was considered highly controversial though.[116] The principle is well-established, but while a sense of gravity is required, it remains unclear which interests could fall under the protective principle. The principle has been abused in the past: during the cold war the protective principle was used to harm other states rather than safeguard a state's own political independence, and at that point, lost its validity.[117] Nevertheless, the protective principle exists mainly because there can easily be a gap in the domestic law of one state when it comes to offences against the security and integrity of foreign states, such as, for instance, the act of treason.[118] Through an extraterritorial application of laws, each state can thus determine their own vital interests and act accordingly. In practice states make only limited use of the protective principle, and when they do, the circumstances prove little controversial for the assertion of jurisdiction, such as forgery, counterfeiting of foreign currency or false visa claims.[119]

The protective principle can also be discerned in the practice of trade restrictions or boycotts. Article XXI GATT authorizes trade restrictions in order to protect national security. Secondary boycotts, whereby states boycott foreign actors who have commercial relations with a boycotted state and which are thus extraterritorial in nature, may be premised on the protective principle.[120] For instance, in 1996, the US enacted the Cuban Liberty and Democratic Solidarity (Libertad) Act,[121] also known as the Helms-Burton Act, after two US planes were downed in Cuba. Apart from a comprehensive economic boycott of Cuba, the Act prohibited any person (of whatever nationality) from dealing in confiscated property in Cuba belonging to American citizens and visas would be refused to any person that trafficked or owned such confiscated property, as well as to his or her family. The US seemed to justify the extraterritorial scope of the Act under the protective principle where it considered that Cuba formed a national security threat to the US.[122] The Helms-Burton Act was met with

115 Crawford(2012), 462.
116 Hans Baade, 'The Eichmann Trial: Some Legal Aspects' 1961, 10 Duke Law Journal 400, 401.
117 Akehurst (1972-1973), 158.
118 Shaw(2008), 667.
119 Ryngaert(2008), 99.
120 Ibid.
121 Cuban Liberty and Democratic Solidarity Act (Helms-Burton), Public Law 104th-114, 12 March 1996, 110 Stat 785, 22 USC §6021.
122 Section 2(28) of the Cuban Liberty and Democratic Solidarity Act (Helms-Burton), Public Law 104th-114, 12 March 1996, 110 Stat 785, 22 USC §6021-91 states that "for the past 36 years, the Cuban government has posed and continued to pose a nationals security threat to the US". Pursuant to Section 3(3) the purposes of the Act are 'to provide for the continued national security of the United States in the face of continuing threats from the Castro government of terrorism, theft of property from US nationals by the Castro government, and the political manipulation by the Castro government of the desire of Cubans to escape that results in mass migration to the US'.

strong opposition from a number of countries, among which the EU member states.[123] Firstly, the EU challenged the Helms-Burton Act before a WTO panel;[124] and secondly, adopted blocking legislation.[125] Seen in the light of the EU's own extraterritorial practices,[126] one can wonder which other interests motivated the EU to take such a strong stand against the US Act. One reason could be that some EU Member States, especially Spain and Italy, had considerable trade interests with Cuba.[127] The WTO panel proceedings were suspended,[128] after both parties came to a mutually agreed solution: some parts of the Helms-Burton Act would be suspended, while others would not be actively enforced, in return for the EU stepping-up its commitment to supporting democracy in Cuba.[129] The real issue of extraterritorial legislation was, however, not explicitly addressed. Similar legislation aimed at Iran and Libya known as the D'Amato Act 1996[130] was also adopted by the US, based on alleged US vital security interests.[131] That Act premised to apply trade sanctions against foreign corporations with significant investments in, or that entered into contracts with, certain Libyan and Iranian industries. The aim was to preclude these two states to develop biological and nuclear weapons. The D'Amato Act came in the wake of the controversial Helms-Burton Act, and received relatively little attention. The Act was ultimately never enforced. It is indeed highly questionable whether the US reliance on the protective

123 See among others Brigitte Stern, 'Can the United States set rules for the world? A French view.' 1997, 31 Journal of World Trade 5.

124 , *United States – The Cuban Liberty and Democratic Solidarity Act* WT/DS38. The case was settled outside the WTO Dispute Settlement Body (see http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds38_e.htm).

125 Council Regulation (EC) 2271/96 of 22 November 1996 Protecting Against the Effects of the Extraterritorial Application of Legislation Adopted by a Third Country, and Actions Based Thereon or Resulting Therefrom. The Regulation prescribed that no court decision by a non-EU giving effect to the US Acts could be recognized or enforced within the EU (Article 4); and that no EU citizens or residents should comply with any requirement or prohibition resulting from those Acts (Article 5).

126 The European Commission for instance had already developed its position in favour of an extraterritorial application of EU competition law in line with the effects doctrine, as will be discussed below in chapter 4.

127 Edwin Vermulst and Bart Driessen, 'The Choice of a Switch: The European Reaction to the Helms-Burton Act' 1998, 11 Leiden Journal of International Law 81, 82.

128 The proceedings were terminated in 1998 after the Panel's authority lapsed in April 1998 according to Article 12.12 DSU. Until that time, the EU kept open the option of opening the proceedings again.

129 Alexander Layton and Angharad M. Parry, 'Extraterritorial Jurisdiction – European Responses' 2004, 26 Houston Journal of International Law 309, 317.; European Commission Market Access Database on Trade at http://madb.europa.eu/madb/barriers_details.htm?barrier_id=960295&version=4 (Helms-Burton Act).

130 Iran and Libya Oil Sanctions Act, 1996 (D'Amato Act), Public Law 104-172, 5 August 1996, 110 Stat. 1541, 50 USC §1701.

131 See Charles Tait Graves, 'Extraterritoriality and its Limits: The Iran and Libya Sanctions Act of 1996' 1998, 21 Hastings International and Comparative Law Review 715.

principle was justified. Secondary boycotts can only be justified in times of war or where there is a threat to international security.[132] For instance, when the US adopted the US Comprehensive Iran Sanctions, Accountability and Divestment Act in 2010, there may have been a shared perception by some of the danger emanating from Iran. Not all perceived the threat in that way, as the Russian Federation, China and India for instance opposed the Act.[133]

Even though the exact limitations of the protective principle are unclear (i.e. which interests could be seen as key interests of a state), it is questionable whether the protection of the environment could be seen as such an interest, although for some countries, current environmental challenges do form an actual and realistic threat to the very existence of their country and territory.[134] In that way, the protective principle could offer an additional argument for the urgency of certain acts with extraterritorial effects.[135] However, as with the territoriality principle, rather than serving as a free-pass, reliance on the protective principle would need to be supported by more concrete arguments based on context and effect of the act in question.[136]

4.5.2.6 Universality principle

Universal jurisdiction amounts to the assertion of (criminal) jurisdiction for individual crimes in breach of international law, without necessarily requiring a specific link with the forum state: the character of the crime concerned is more relevant. The principle can be invoked in respect of particularly heinous crimes that are a threat to the international order, namely war crimes, genocide, crimes against humanity, slavery and piracy.[137] There has been much debate whether a link with the state is required, or whether states can rely on the principle without any link at al.

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132 Ryngaert(2015), 118.

133 Ibid.

134 See for instance Walter Kälin, Displacement and Climate Change: Towards Defining Categories of Affected Persons, Working Paper submitted by the Representative of the UN Secretary-General on the Human Rights of Internally Displaced Persons, 25 August 2008; Walter Kälin and Nina Schrepfer, Protecting People Crossing Borders in the Context of Climate Change Normative Gaps and Possible Approaches, UNHCR, PPLA/2012/01, 2012. Several scenarios are identified that could cause environmentally-induced movements: sudden onset disasters (e.g. hurricanes, floods), slow onset environmental degradation (e.g. sea-level rise, desertification), slow onset events for low lying small island states (resulting in loss of territory), resource stress triggering disturbances, violence and armed conflict. See also Dupuy and Vinuales(2015), 369.

135 See for instance Felicity Deane, 'The WTO, the National Security Exception and Climate Change' 2012, Carbon & Climate Law Review 149., in which she explores the options to rely on Article XXI for climate change purposes.

136 See chapter 7 on the extraterritoriality decision tree. See also reasonableness criteria below at 4.5.3.

137 Crawford(2012), 468.

The universality principle was at issue in the ICJ case *Arrest Warrant* of 11 April 2000 (*Democratic Republic of Congo v Belgium*).[138] Belgium had issued an international arrest warrant against Mr. Yerodia, who was at the time the Foreign Minister of Congo, accusing him of inciting racial hatred,[139] which had led to Tutsi killings in Rwanda in 1998. Belgium based its arrest warrant on an extreme form of universal jurisdiction, namely universal jurisdiction *in absentia*: the warrant was issued against a person who was not its national, not present on its territory, for acts committed on the territory of another state, against (mostly) nationals of another state. The Court did not address whether universal jurisdiction was permitted, as Belgium had not respected the minister's immunity. The ICJ members appended to the judgment a total of four Separate Opinions, one Joint Separate Opinion, and three Dissenting Opinions, representing a wide range of views on the issue of universal jurisdiction. The opinion was expressed that universal jurisdiction should be available for particularly heinous crimes,[140] albeit with a territorial link, for instance when the accused is within the territory of the state exercising universal jurisdiction.[141] Other judges were of the opinion that universal jurisdiction should be permitted, even *in absentia*, as there is no rule prohibiting such exercise in international law.[142] What is clear is that universal jurisdiction is available for particularly heinous crimes that are universally condemned, but a link to the forum might still be required.[143] That was also stated in a 2005 Resolution of the Institut de Droit International, where universal recognition was recognized as a ground of jurisdiction.[144] However, if a defendant can be tried based on another basis of jurisdiction (such as the territorial principle, so that the defendant will be tried in the state where the

138 *Arrest Warrant Case* 2002, p.3.
139 Ibid p.10.
140 Arrest Warrant Case, ICJ, Separate Opinion, Judge Koroma, paras.9-10.
141 Arrest Warrant Case, ICJ, Separate Opinion President Guillaume, paras.12-16. Arrest Warrant Case, ICJ, Separate Opinion Judge Ranjeva, paras.5-11; Arrest Warrant Case, ICJ, Separate Opinion Ad-Hoc Judge Bula-Bula, paras.78-88.
142 Arrest Warrant Case, ICJ, Separate Opinion Ad-Hoc Judge Van den Wyngaert, paras.49-58; Arrest Warrant Case, ICJ, Separate Opinion Judges Higgins, Kooijmans and Buergenthal, paras.20-49.
143 In 2003 the Belgian Court of Cassation dismissed another arrest warrant case against Israeli Prime Minister Ariel Sharon, again because it violated his personal immunity. Afterwards the Belgian law on crimes against humanity was amended so that the defendant or the victim now need to be citizens or residents of Belgium, and the prosecutor may dismiss the case if it can be brought before a more appropriate national or international tribunal. Furthermore, immunities under international law need to be respected.
144 Institut de Droit International, 'Universal Criminal Jurisdiction with Respect to the Crime of Genocide, Crimes Against Humanity and War Crimes', 2005, 71AnnIDI 296.

acts were committed), that approach should be preferred.[145] Only a few states have exercised universal jurisdiction,[146] but few states oppose it.[147]

A number of treaties explicitly authorize or even require the exercise of (quasi-)universal criminal jurisdiction, such as the UN Torture Convention[148] or the Geneva Conventions,[149] the latter being ratified by virtually all states.[150] Such treaties are frequently characterized by the obligation of *aut dedere aut iudicare*: a state should either try the accused when present in its territory or extradite him/her to a state party that is willing to do so.[151] In the *Belgium v Senegal* case, the ICJ affirmed the obligation to extradite or prosecute under the UN Torture Convention.[152] Belgium had instituted proceedings against Senegal, which had failed to prosecute Hissene Habré, the former president of Chad who was suspected of torture, war crimes and crimes against humanity. Since the overthrow of his government in 1990, he had been

145 International Law Association, *Final Report on the Exercise of Universal Jurisdiction in Respect of Gross Human Rights Offences* (2000) 20.; *The Princeton Principles on Universal Jurisdiction* (2001) principle 8.

146 For instance Belgium, Spain, the US. A comprehensive study from 2011 by Langer has found that only thirty-two such cases have gone to trial since World War II. *See* Maximo Langer, 'The Diplomacy of Universal Jurisdiction: The Political Branches and the Transnational Prosecution of International Crimes' 2011, 105 American Journal of International Law 1, 7. *See also* Eugene Kontorovich, 'Kiobel Surprise: Unexpected by Scholars but Consistent with International Trend' 2014, 89 Notre Dame Law Review 1671, 1684.

147 The UK for instance has long been opposed to the principle as it adhered to a true territoriality principle, but arrested Pinochet in 1998 based on an international arrest warrant issued by a Spanish judge. (*R v Bow Street Metropolitan Stipendiary Magistrate, Ex Parte Pinochet Ugarte*, [1998] UKHL 41; 3 W.L.R. 1456 (H.L. 1998)); Menno T. Kamminga, 'Universal Civil Jurisdiction: Is It Legal? Is It Desirable?' 2005, 99 American Society of International Law Proceedings 123, 124.; Ryngaert(2008), chapter 4.5.; UN Secretary-General, *The Scope and Application of the Principle of Universal Jurisdiction: Report of the Secretary-General* (2011).

148 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, UN Doc.A/39/51 (1984), 1465 UNTS 85.

149 International Committee of the Red Cross, *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (I)*, 1949, 75 UNTS 31; *Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (II)*, 1949, 75 UNTS 85; *Geneva Convention Relative to the Treatment of Prisoners of War (III)*, 1949, 75 UNTS 135; *Geneva Convention Relative to the Protection of Civilian Persons in Time of War (IV)*, 1949, 75 UNTS 287.

150 Cedric Ryngaert, 'Universal Tort Jurisdiction over Gross Human Rights Violations' 2007, 38 Netherlands Yearbook of International Law 3, 16. – Art. 5.2 of the UN Torture convention; articles 49/50/129/146 of the 1949 Geneva Conventions; see also Article 5.2 of the Montreal Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation; art. 3.2 of the Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons; art 5.2 International Convention Against the Taking of Hostages.; For a comprehensive overview of treaties authorizing universal or quasi-universal jurisdiction, see Shaw(2008), 673. and Secretary-General (2011), 43.

151 Crawford(2012), 470.

152 International Court of Justice, *Questions Concerning the Obligation to Prosecute or Extradite (Belgium v. Senegal)* 2012. For a discussion, see https://www.asil.org/insights/volume/16/issue/29/belgium-v-senegal-international-court-justice-affirms-obligation.

residing in Senegal as a political asylum seeker. The Court followed Belgium in its claim and found that Senegal indeed had to ensure prosecution or extradite Habré to a country willing to prosecute.[153]

Universal jurisdiction is often equated with criminal jurisdiction. However, states may also be willing to establish universal *civil* jurisdiction, thereby allowing their courts to hear complaints for damages by victims of serious infringements of international law, such as serious human rights violations.[154] The argument is that civil remedies should be available to the victims of criminal acts of universal concern,[155] as is already a possibility for breaches of domestic criminal law in virtually all domestic legal systems.[156] Only a few states so far have asserted universal civil jurisdiction,[157] with a well-known example being the United States through its 1789 Alien Tort Claims Act, known as the Alien Tort Statute (ATS).[158]

The ATS provides that 'the district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States'.[159] In 1980 the Statute was held to incorporate current customary international law protective of individual

153 International Court of Justice *Questions Concerning the Obligation to Prosecute or Extradite (Belgium v. Senegal)* (2012), p.42.

154 Ryngaert (2007), 4. European Commission, *Brief of the European Commission on Behalf of the EU as Amicus Curiae in Support of Neither Party in Kiobel v Royal Dutch Petroleum Co.* (2012) 4.

155 *Brief of the European Commission on Behalf of the EU as Amicus Curiae in Support of Neither Party in Kiobel v Royal Dutch Petroleum Co.* 18.

156 Donald Francis Donovan and Anthea Roberts, 'The Emerging Recognition of Universal Civil Jurisdiction' 2006, 100 American Journal of International Law 142, 142.; Within the EU such proceedings are currently available in Austria, Belgium, Denmark, Finland, France, Germany, Greece, Italy, Luxembourg, the Netherlands, Poland, Portugal, Romania and Sweden. *See* Commission 18.; For countries beyond Europe *see* Amnesty International, *Universal Jurisdiction: A Preliminary Survey of Legislation Around the World* (2011). Work has also been undertaken for a treaty on universal tort jurisdiction (Convention of Jurisdiction and Foreign Judgments in Civil and Commercial Matters) by the Hague Conference on Private International Law, but negotiations have stalled (see http://www.cptech.org/ecom/jurisdiction/hague.html). Article 18(3) of the 1999 Preliminary Draft Convention (Preliminary Document no.11) stated that courts should not be prevented to exercise universal jurisdiction in cases between private actors in respect of serious crimes under international law or gross human rights violations.

157 For other examples, see International Law Association (2000), 22.

158 For a more comprehensive overview of ATS litigation, see among others Spar (2011).; Anja Seibert-Fohr, 'United States Alien Tort Statute' 2008, Max Planck Encyclopedia of Public International Law.; Jochen von Bernstorff, Marc Jacob and John Dingfelder Stone, 'The Alien Tort Statute before the US Supreme Court in the *Kiobel* Case: Does International Law Prohibit US Cours to Exercise Extraterritorial Civil Jurisdiction over Human Rights Abuses Committed Outside of the US?' 2012, 72 Zeitschrift für Ausländisches Öffentliches Recht und Völkerrecht 579.; L. Austen Parrish, '*Kiobel,* Unilateralism, and the Retreat from Extraterritoriality' 2013, 28 Maryland Journal of International Law 208.

159 Alien Tort Statute (also known as Alien Tort Claims Act).

rights.[160] Three conditions have to be fulfilled in order to establish jurisdiction under the ATS: firstly, the plaintiff must be an alien; secondly, the defendant (private or legal person)[161] must be responsible for a tort; and thirdly, the tort must violate 'the law of nations' or a treaty to which the US is a party. In the 2004 case of *Sosa v Alvarez-Machain*, the Supreme Court limited the scope of the statute to 'norms of an international character accepted by the civilized world' and of 'definite content'.[162] Only alleged violations of international law norms that are 'specific, universal and obligatory' would lead to recognized causes of action. Next to the crimes also covered by universal criminal jurisdiction (such as genocide, war crimes, crimes against humanity), the ATS covers civil liability for gross human rights violations, such as torture or slave labour.[163] Suits have also been initiated on the basis of labour rights, right to health, and environmental damage, but US federal courts have been reluctant to apply socio-economic and environmental rights under the ATS.[164]

The reason for mentioning the ATS here is that it has been invoked for acts outside US territory, leading US courts to exercise extraterritorial jurisdiction.[165] In the recent *Kiobel* case, the US Supreme Court found no reference to an extraterritorial scope of the ATS in a textual and historical interpretation

160 *Filartiga v Peña-Irala,* 630 F.2d 876 (2nd Cir, 1980); Crawford(2012), 475; Seibert-Fohr (2008). The case involved a suit for damages against a Paraguayan police officer for the kidnapping, torture and death of Paraguayan national. As a consequence of *Filartiga* and similar subsequent suits, the US Congress enacted the Torture Victim Protection Act in 1991, which permits damage suits against foreign officials for torture and extrajudicial killings. Under the Torture Victim Protection Act claims can be brought both by citizens and non-citizens.

161 Attempts have been made to also rely upon the ATS against other states, however, this was rejected by the Supreme Court in the *Amerada Hess* case whereby a claim was issued against Argentina for the bombing of a ship in international waters during the Falkland war. (*Argentine Republic v Amerada Hess Shipping Corp.* 109 S. Ct. 683 (1989). The ATS has been frequently invoked to sue multinational corporations, for instance for involvement in the Apartheid regime (E.g. *Khulumani v. Barclay Nat'l Bank Ltd.,* 504 F.3d 254 (2d Cir. 2007)), abuses in detention facility by private military companies (E.g. *Saleh v Titan Corp,* 436 F.Supp.2d 55 (D.D.C. 2006)), alleged complicity in terrorism (E.g. *Almog v Arab Bank, PLC,* 471 F.Supp.2d 257 (E.D.N.Y. 2007) or human rights violations (E.g. *Wiwa v Royal Dutch Petroleum Co.,* 226 F.3d 88 (2d Cir.2000)).

162 542 US 692, 749 (2004).

163 Seibert-Fohr (2008), 1.

164 The right to health was deemed to be not precise enough to qualify under the ATS as an international norm with definite content in *Flores v Southern Peru Copper Corp*, but in *Abdullahi v Pfizer Inc* the US Court of Appeals for the 2nd Circuit recognized a customary international prohibition of nonconsensual human medical experimentation which is universal, specific and of mutual concern, and thus actionable under the ATS.

165 Apart from extraterritorial judicial jurisdiction, there is no exercise of extraterritorial prescriptive jurisdiction (the applicable law is 'the law of nations', however, within the frame of US procedural rules), nor is there any extraterritorial enforcement jurisdiction. Cases are brought before the US civil courts by private parties. For a discussion on whether the ATS constitutes an exercise of prescriptive or adjudicative jurisdiction, see Anthony J. Colangelo, '*Kiobel*: Muddling the Distinction Between Prescriptive and Adjudicative Jurisdiction' 2013, 28 Maryland Journal of International Law 65.

thereof,[166] and found 'no indication that the ATS was passed to make the United States a uniquely hospitable forum for the enforcement of international norms'.[167] Rather, the Court continued, the ATS was enacted to provide judicial relief to foreign officials injured *in* the US. It noted that 'claims [must] touch and concern the territory of the United States with sufficient force'.[168] This last statement does leave an opening for future extraterritorial actions, albeit with a more limited extraterritorial effect. Actions that have occurred abroad could in theory displace the presumption against extraterritoriality, as long as there is a sufficiently strong link, for instance, if the defendants are American nationals.[169]

In sum, the universality principle cannot be relied upon to justify extraterritorial acts concerned with environmental protection.[170] Criminal universal jurisdiction can only be established in case of war crimes and crimes against humanity. There seems to be a broader scope for states to address other serious violations of international law through civil universal jurisdiction, headed mainly by cases brought under the US ATS. Nevertheless, recent developments show that both internally and externally opposition can be detected against an overly broad use of the statute, and a sufficiently strong link to the territory is required.[171] While the universality principle might thus appeal at first sight with regard to the global environmental concerns, there is no state practice that would support the application of the principle for environmental protection through npr-PPMs.

4.5.3 Comity, reasonableness and effective connection

Having established that states may exercise extraterritorial jurisdiction under public international law, the question remains whether there are principles cautioning or obligating states to moderate the jurisdictional claims they could

166 US Supreme Court, *Kiobel v. Royal Dutch Petroleum Co.* US Supreme Court 2013, 133 S.Ct. 1659, 7.

167 Ibid 12.

168 Ibid 14.; The Court came to a unanimous conclusion (that in this case the ATS cannot be applied extraterritorially), however, four justices followed a different reasoning in a concurring opinion in judgment, with two other concurring opinions added.

169 Donald I. Baker, 'Extraterritorialiy and the Rule of Law: Why Friendly Foreign Democracies Oppose Novel, Expansive US Jurisdiction Claims by Non-Resident Aliens Under the Alien Tort Statute' 2013, 28 Maryland Journal of International Law 42, 44; Beth Stephens, 'Extraterritoriality and Human Rights After Kiobel' 2013, 28 Maryland Journal of International Law 256, 271.

170 Jansen and Lugard (1999), 535.

171 Some states have opposed the overbroad use of the ATS without a sufficient nexus to the territory, see for instance Netherlands and the United Kingdom, *Brief of the Governments of the United Kingdom of Great Britain and Northern Ireland and the Kingdom of the Netherlands as Amici Curiae in Support of the Respondents in Kiobel v Royal Dutch Petroleum Co.* (2012).

in principle make, such as international comity,[172] a rule of reason,[173] or a balancing of legitimate claims.[174] This is of particular relevance when several states have an interest in exercising jurisdiction.

Comity has multiple meanings and it is difficult to identify a unified standard for the application of comity.[175] In French comity would be referred to as *courtoisie internationale*, in German as *Völkercourtoisie*, terms not pointing to any legal obligation, but rather a matter of respect and good manners. In English, however, the term is more ambiguous. Comity can be used as a synonym for private international law, but can also serve as a limiting principle for extraterritorial jurisdiction under public international law.[176] Without discussing private international law and conflict of laws rules in depth, a short clarification on comity might be useful. Conflict rules are a product of domestic law and determine which law will be applied in a situation where laws of different states may apply. In the US this is applied through the principle of comity. The principle refers to more than just goodwill and courtesy. Rather the idea is that courts out of respect for foreign sovereignty should apply foreign law and give effect to foreign-created rights and duties.[177] In the US comity has become a rule that obliges courts to apply foreign law in certain circumstances and can justify deference of jurisdiction.[178] Judges have to decide which law to apply, which is not an easy task as it involves a weighing and balancing of domestic and foreign interests, that can be difficult to determine. Comity in this sense is almost unknown in the EU,[179] and these matters are regulated under the Rome regulations.[180] Comity has also been inter-

172 Maier(1996), 69.
173 Ryngaert(2008), 134 et al.
174 Bianchi(1996), 84.
175 For a comprehensive overview of the developments of the comity doctrine, see Th. M. de Boer, 'Living Apart Together: The Relationship Between Public and Private International Law' 2010, 57 Netherlands International Law Review 183.; Joel R. Paul, 'The Transformation of International Comity' 2008, 71 Law and Contemporary Problems 19.; Ryngaert(2008), 138.
176 Paul (2008), 19.
177 Ibid.
178 Ibid 28.
179 Ryngaert(2008), 167. According to Ryngaert, 'European uneasiness with (judicial) comity is rooted in a belief that the courts are not diplomats and ought not to be granted too much discretionary power on the basis of such a fuzzy concept as comity, lest the State become a '*gouvernement des juges*'.' In competition law cases, we do see more use of the comity principle, which will be discussed in chapter 4.
180 Regulation 593/2008/EC of the European Parliament and of the Council of 17 June 2998 on the Law Applicable to Contractual Obligations (Rome I); Regulation 864/2007/EC of the European Parliament and of the Council of 11 July 2007 on the Law Applicable to Non-Contractual Obligations (Rome II).

preted as a means to avoid 'true conflict' between different laws where, for instance, the foreign law required a party to act contrary to domestic law.[181]

The Restatement (Third) on Foreign Relations Law lists a number of criteria according to which legislators and courts are to consider the connections and degree of interests of all the affected states. Under this reasonableness test, interests are balanced in order to answer the question of which state has a stronger interest in regulating a certain matter.[182] Even actions that would be deemed legally permissible could still be unreasonable in a certain context. There is thus a two-step test: first, one must determine whether the dispute has a sufficient nexus to justify the assertion of jurisdiction (through one of the jurisdictional bases); and second, one must determine whether such an assertion would be reasonable in the light of international fairness and competing national interests.[183] The criteria to determine whether the exercise of jurisdiction is reasonable include

a) the link of the activity to the territory of the regulating state, i.e. the extent to which the activity takes place within the territory, or has substantial, direct and foreseeable effect upon or in the territory;
b) the connections, such as nationality/residence/economic activity, between the regulating state and the person principally responsible for the activity to be regulated, or between that state and those whom the regulation is designed to protect;
c) the character of the activity to be regulated, the importance of regulation to the regulating state, the extent to which other states regulate such activities, and the degree to which the desirability of such regulation is generally accepted;
d) the existence of justified expectations that might be protected or hurt by the regulation;
e) the importance of the regulation to the international political, legal or economic system;
f) the extent to which the regulation is consistent with the traditions of the international system;
g) the extent to which another state may have an interest in regulating the activity; and
h) the likelihood of conflict with regulation by another state.[184]

181 Hartford Fire Ins. Co. v California, 509 US 764 (1993) at 769. For a further discussion of the case, see chapter 4 on competition law.
182 Buxbaum (2009), 649.
183 'Notes: Constructing the State Extraterritorially: Jurisdictional Discourse, the National Interest and Transnational Norms' 1990, 103 Harvard Law Review 1273, 1274.
184 1986, §403(2).

This implies that even when extraterritorial jurisdiction is exercised on an internationally recognized legal basis, that exercise may nevertheless be limited through an additional analysis of reasonableness. This is a reflection of comity in the sense of goodwill and courtesy: if a state recognizes that the interests of another state are greater in a certain case, in a future case where the interests might be reversed, the same reasonableness can be expected from that other state.[185] Even though the Restatement states that such analysis forms part of international law, little evidence exists that courts outside the US believe this is a required approach under international law.[186] There is only one source of international law pointing to such principle, which is Judge Fitzmaurice's separate opinion in the *Barcelona Traction* case, stating that

> '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 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.'[187]

Ryngaert has identified a number of international legal concepts to inform the interest-balancing-informed rule of reason as set forth in the Restatement. He argues that these concepts can support such a jurisdictional rule of reason by providing *opinio juris*. In particular, these principles are the principle of non-intervention,[188] the genuine connection,[189] equity,[190] proportionality,[191] abuse of rights,[192] and the responsibility or duty to protect.[193] Nevertheless, the rule of reason does not seem to have crystallized as a rule of international law yet, as that would require *opinio juris*. European states tend to focus on the sufficiently close legal connection and disregard 'mere political, economic, commercial or social interests'.[194] As Mann has put it:

> 'The so-called balancing of interests is nothing but a political consideration: it is not the subjective or political interest, but the objective test of the closeness of

185 Maier(1996), 73.
186 Stigall (2012), 338.; Maier(1996), 73.
187 International Court of Justice, *Barcelona Traction, Light and Power Company Lth (Belgium v Spain)* 1970, Rep3, 105, sep op Fitzmaurice.
188 Ryngaert(2015), 154.
189 Ibid 156.
190 Ibid 157.
191 Ibid 158.
192 Ibid 160.
193 Ibid 161.
194 Frederick A.P. Mann, 'The Doctrine of International Jurisdiction Revisited After Twenty Years' 1984, 186 Recueil des Cours of The Hague Academy of International Law 9, 29.

> connection, of a sufficiently weighty point of contact between the facts and their legal assessment that is relevant. The lawyer balances contacts rather than interests.'[195]

However, the different approaches are not that different. The requirement of a 'weighty' and 'significant' connection cannot but include a trace of a reasonableness test as known in the US.[196] While a pure connection-approach sounds more objective than the connection-plus-interest-approach, the distinction between 'greater interest' and 'significant connection' seems to be subtle one.[197] Scott has argued that the guidance on reasonableness might be too broad, as the focus is 'virtually exclusive on the question of whether it is reasonable for a state to act – as opposed to the question of whether it is reasonable for a state to act in the manner it has, having regard to the design features of the measure at hand'.[198] Thus even if different states have different interests, these interests can be taken into account when designing a measure, which can be seen as a more practical and realistic approach to reasonableness. Such consideration of other state's interests can be crucial for the acceptance by other states of (trade) measures with an extraterritorial effect.

4.6 Conclusion

This chapter has given an overview of the theoretical framework of jurisdiction and extraterritoriality, outlining the distinction between extraterritorial prescriptive jurisdiction and enforcement jurisdiction. Whereas the latter is always prohibited, absent consent of the territorial state, extraterritorial prescriptive jurisdiction is not *per se* unlawful: when a state can rely on a connecting factor through one of the permissive principles, an extraterritorial exercise of jurisdiction can be permitted. Imposing environmental requirements on foreign production processes through npr-PPMs is an exercise of extraterritorial prescriptive jurisdiction, as all enforcement remains territorial.

Different degrees of extraterritoriality have been discerned with regard to prescriptive measures. In chapter 2, two notions of extraterritoriality related to npr-PPMs were identified: firstly, regarding the foreign production process targeted by a PPM; secondly, regarding the non-trade concern that is located (partly) outside the territory of the regulating state. The first notion refers to a question of definition: are PPMs in general 'extraterritorial measures', and if so, do states have jurisdiction to impose such measures? As discussed in this chapter, npr-PPMs are not fully extraterritorial, as they need to be activated

195 Ibid 31.
196 Bianchi(1996), 90.
197 Ryngaert(2008), 171.
198 Scott (2014), 34.

through a territorial connection, being market access. Rather, they can be designated as measures with an extraterritorial effect or territorial extension. The question of extraterritoriality in the context of npr-PPMs is thus not a pure jurisdictional question, but a substantive matter. Nonetheless, the question remains that extraterritorial effect can be permitted or justified when the npr-PPM is protecting a non-trade concern abroad? Does it matter whether states aim at protecting inward-looking or outward-looking concerns?

The most relevant jurisdictional principle to this assessment is the objective territoriality principle, also known as the effects doctrine, which could arguably allow states to act when their environment is affected by activities occurring abroad. The next chapter on the effects doctrine and competition law will explore this in more detail. Open questions relate to what would count as an effect: only physical environmental concerns or also moral concerns? How should we approach common environmental concerns that in principle affect all states, even though some will be more affected than others? Can outward-looking measures also rely on the effects doctrine? The protective principle could possibly be relied upon by those states whose very existence is threatened by, for instance, climate change, although it is unlikely that states will resort to the use of PPMs in such emergency situations. The universality principle could not be relied upon, as states have only accepted universal jurisdiction with regard to the most heinous crimes, and provided there is some form of territorial link.

A requirement of reasonableness, comity or significance has been discussed in addition to the permissive principles of jurisdiction. Different interests must be balanced in order to determine whether a state can indeed exercise jurisdiction extraterritorially. These interests should also be taken into account in the design of a measure. In a WTO context, a requirement of reasonableness can be read in the necessity test as required by the paragraphs of Article XX GATT or a proportionality test under the *chapeau.*

The following chapters will further explore extraterritoriality in different fields of law: when can it be permitted, and on which grounds? Chapter 5 on competition law will give an insight into effects-based jurisdiction and examine its boundaries. Chapter 6 on international human rights law will examine the rationale of international human rights bodies to extend states' obligations and the importance of 'fundamental and shared' norms. Part III of this thesis will then apply the lessons learned to a WTO context and answer the question whether npr-PPMs with an extraterritorial effect could and should be accepted under existing WTO law.