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THE WORLD TRADE ORGANIZATION AND DISPUTES OVER EXTRATERRITORIAL APPLICATION:

The Effectiveness and Function of the World Trade Organization Dispute Settlement Body in International Law

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ABSTRACT

States have often applied their laws extraterritorially in order to force other states to comply with international interests such as human rights and environmental standards due to the absence of reliable enforcement and legislative bodies in international society. Many disputes caused by such extraterritorial application have been settled in dispute settlement procedures of the GATT and World Trade Organization (WTO). However, some argue that the WTO is not an appropriate forum to settle extraterritorial disputes since competence of the WTO is limited to "trade" issues and the legitimacy of extraterritorial measures should be assessed by applying all relevant international norms. This paper argues, by analyzing the nature of extraterritorial disputes and by comparing past approaches taken to extraterritorial disputes with the WTO procedures, that the WTO can provide effective solutions to extraterritorial disputes procedurally and substantially. This paper also argues that WTO can contribute to the development of the international legal system in the course of its resolution of extraterritorial disputes by examining state practices after the GATT/WTO dispute settlement.

RÉSUMÉ

Les Etats ont souvent mis en pratique leurs lois hors de leurs frontières dans le but de faire entrer les autres Nations dans les norms internationales telles les Droits de l'Homme ou bien les standards environnementaux. Ceci du au manque de législations au niveau international. De nombreux différends engendrés par de telles pratiques hors-frontières ont été résoles par biais de procèdures du GATT et de l'Organisation mondiale du commerce (OMC). Cependant, certains pensent que l'OMC n'est pas en mesure de régler de tells conflits puisque ses compétence sont limitées aux problèmes commerciaux. De plus, pour être en mesure de régler ces conflits, il faudrait appliquer toutes les norms internationales en vigueur. En analysant la nature des différends extraterritoriaux et en comparant les approaches passées des procédure de l'OMC, ce travail montre que l'OMC peut donner des solutions efficaces à ces différends. Ce travail démontre également que l'OMC peut contribuer au développement d'un système légal international après avoir vérifié les pratiques des Etats suivant les décisions prises par l'OMC/GATT lors de résolutions de conflits.

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I. INTRODUCTION

The World Trade Organization (WTO) is recognized as one of the most effective institutions specializing in the regulation of trade known to international society. Providing not only the constitutional structure for international trade regulation,[1] it also plays a significant role in broader trade issues such as trade in services,[2] trade related aspect of intellectual property rights,[3] agriculture,[4] investment, and sanitary standards, all of which make the international trading system more effective and comprehensive. In particular, the Dispute Settlement Body (DSB) of the WTO plays an important role in the efficient functioning of the WTO and in creating a rule-oriented system of international trade.[5] The WTO is the first and only international organization to possess an appeal system, the Appellate Body, as part of its dispute resolution system.[6] The number of cases of which the WTO was notified exceeded 230 by August 2001.[7]

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[1] In this article, the "WTO Agreement" means the Marrakech Agreement Establishing the World Trade Organization and "WTO agreements" indicates all agreements that are attached to and included in the WTO Agreement. Many scholars see the WTO Agreement as representing a "Constitution" or "Charter" for international trade. *See* JOHN H. JACKSON, THE WORLD TRADING SYSTEM: LAW AND POLICY OF INTERNATIONAL ECONOMIC RELATIONS 340-45 (2nd ed. 1997); ERNST-ULRICH PETERSMANN, THE GATT/WTO DISPUTE SETTLEMENT SYSTEM: INTERNATIONAL LAW, INTERNATIONAL ORGANIZATIONS AND DISPUTE SETTLEMENT 32-44 (1997).

[2] General Agreement on Trade in Services, Apr. 15, 1994, WTO Agreement, Annex 1B, *in* THE WORLD TRADE ORGANIZATION, THE LEGAL TEXTS: THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS 284 (1999) [hereinafter THE LEGAL TEXT].

[3] Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, WTO Agreement, Annex 1C, *id.* at 321 [hereinafter TRIPs Agreement].

[4] Multilateral Agreements on Trade in Goods, Agreement on Agriculture, Apr. 15, 1994, WTO Agreement, Annex 1A, *id.* at 33.

[5] Jackson regards the DSB as "the centerpiece" of the WTO. JOHN H. JACKSON, THE WORLD TRADE ORGANIZATION: CONSTITUTION AND JURISPRUDENCE 59 (1998). The WTO itself regards the DSB as "a central element in providing security and predictability to the multilateral trading system." Understanding on Rules and Procedures Governing the Settlement of Disputes, Apr. 15, 1994, WTO Agreement, Annex 2, art. 3:2, *in* THE LEGAL TEXTS, *supra* note 2, at 354 [hereinafter DSU].

[6] This does not include the appellate review in international law that involves individuals.

[7] Dispute Settlement Body, *Annual Report (2001): Overview of the State-of-play of WTO Disputes*, Oct. 12, 2001, WT/DSB/26/Add.1, *available in* the WTO Dispute Settlement Website (visited Oct 25, 2001) <http://www.wto.org/english/tratop_e/dispu_e/dispu_e.htm> [hereinafter *Overview of the State-of-play of WTO Disputes*].

The increase in the number of disputes brought before to the DSB has much to do with the procedures by which panels are constituted pursuant to WTO rules. Under the former General Agreement on Tariff and Trade 1947 (GATT 1947) system, the establishment of a panel required the unanimous consent of all Contracting Parties and the adoption of a panel report required the consent of the losing state. A state could, therefore, easily prevent the establishment of a panel and block a panel report unfavorable to it. However, pursuant to the new WTO system, both of the above procedures, as well as appeals to the Appellate Body, proceed by "negative consensus."[8] This "automaticity" of the jurisdiction, or the more compulsory nature of the jurisdiction, makes it easier for members to bring issues before a panel. Most of adopted reports have been implemented by members and these new procedures make panel and Appellate Body reports, and the whole WTO system, more persuasive and effective in international "trade" relations.[9]

As a result of factors such as automaticity and the efficient nature of the current WTO system, the legitimacy of trade measures with non-trade interests has increasingly been argued before the DSB. Those trade measures often entail "extraterritorial" effects since they may force other states to accept such interests or change their policies in order to comply with them. States sometimes feel the need to apply their laws extraterritorially due to the absence of reliable enforcement and legislative bodies in international society. Since the use of force is prohibited in modern international law, the most effective tool to force other states to comply with international law or interests involves trade measures

[8] DSU, *supra* note 5, art. 6:1, 16:4, & 17:14.

[9] Establishment of the Appellate Body is one of the factors that the DSB reports create jurisprudential effect. PETERSMANN, *supra* note 1, at 186-91. However, some scholars deny the judicial function of the DSB. *See, e.g.,* Cesare P.R. Romano, *the Proliferation of International Judicial Bodies: The Pieces of the Puzzle,* 31

that have extraterritorial effects. However, extraterritorial trade measures have increased the intensity of disputes since they unilaterally interfere with the domestic policy functions of other states.

Trade issues may only be one facet of the dispute, meaning that the legitimacy of the extraterritorial measure taken needs to be determined after taking into account all relevant international law.[10] The DSB may not be the best equipped to determine this kind of dispute because a panel or the Appellate Body must resolve the dispute at hand by applying the WTO agreements due to the jurisdictional limits placed on the Dispute Settlement Understandings (DSU). Article 3:2 of the DSU provides that the dispute settlement system "serves to preserve the rights and obligations provided in the covered agreements."[11] Article 3:5 provides that the DSB must base its decisions in accordance with the covered agreements and "shall not nullify or impair benefits accruing to any Member under those agreements, nor impede the attainment of any objectives of those agreements."[12] This means that the law applicable to the DSB is limited to the WTO agreements and, in the case of extraterritorial disputes, the DSB is not required to examine the rules constraining extraterritorial application established in public international law. These provisions are quite reasonable since the WTO is a "trade" organization. This paper hence examines (i) whether the WTO DSB can provide effective solutions to extraterritorial disputes procedurally and substantively and, (ii) if so, how it can best contribute to the development of the international legal system in the course of its resolution of extraterritorial disputes. This paper does not examine the

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N.Y.U. J. INT'L L. & POL. 709, 713-20 (1999).

[10] *See infra* Part II & III. *Cf.* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES §§ 402-403 (1987) [hereinafter RESTATEMENT (THIRD)].

[11] DSU, *supra* note 5, art. 3:2. In addition, there are other provisions that indicate the limit of applicable law in

question of whether the DSB is an effective forum to resolve disputes between trade and non-trade interests such as environment and labor. Rather, this paper primarily focuses on the "extraterritorial" aspects of disputes and the perspectives developed here to resolve extraterritorial disputes generally.

The paper is divided into four parts. Part II summarizes the disputes regarding extraterritorial application that have been brought before the GATT/WTO dispute settlement procedures. This part first describes the nature of extraterritorial disputes and then analyzes four cases that have been brought before the GATT/WTO. Part III examines the criticisms that have been made concerning the settlement of such disputes under the WTO DSB process. The first criticism relates to the appropriateness of the DSB as a forum for extraterritorial disputes and the second criticism concerns the problem of applicable law to the DSB. However, such criticisms will be rendered meaningless if the DSB can provide effective remedies. Therefore, part IV analyzes how the WTO dispute settlement system can promote the efficient and effective resolution of disputes procedurally and substantially by examining the nature of extraterritorial disputes and their resolution and by comparing past approach taken to extraterritorial disputes with the DSB procedures. Part V of the paper contains conclusions that result from earlier parts.

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the DSB. *See, e.g., id.* art. 7 &11.
[12] *Id.* art. 3:5.

II. DISPUTES OVER EXTRATERRITORIAL APPLICATION IN THE WTO

A. Public International Law Concerning Extraterritorial Application

State jurisdiction is a "manifestation of State sovereignty."[13] It is described as a capacity and a right of a state under international law to prescribe, enforce, and adjudicate rules of law or regulate activities having some connection to its own state.[14] In this connection, extraterritorial application of state jurisdiction is usually recognized as extending state jurisdiction over issues and activities beyond its borders and as ordering the performance of an obligation abroad.[15] States cannot exercise their jurisdiction over foreign territories based on the well-established principle of territorial integrity.[16] However, extraterritorial application in regard to prescriptive jurisdiction is not illegal by its nature and it is widely recognized under public international law that in some situations a state can exercise its jurisdiction extraterritorially over legitimate national policies.[17] Those policies relate to the essential elements of statehood under public international law, *e.g.* territory, nationals, and government. From these elements, principles of international law that relate to jurisdiction, such as the territorial principle, the nationality principle, and the protective principle, have been described. States have a

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[13] D.W. Bowett, *Jurisdiction: Changing Patterns of Authority over Activities and Resources*, 1982 BRIT. Y.B. INT'L L. 1, 1.

[14] *Id.*; IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 106 & 301 (5th ed. 1998).

[15] Werner Meng, *Extraterritorial Effects of Administrative, Judicial and Legislative Acts*, *in* 2 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 337, 338 (Rudolf Bernhardt ed., 1995).

[16] "Restatement (Third)" distinguishes prescriptive jurisdiction from enforcement (and judicial) jurisdiction and it defines prescriptive jurisdiction as the state's power "to make its law applicable to the activities, relations, or status of persons, or the interests of persons in things, whether by legislation, by executive act or order, by administrative rule or regulation, or determination of a court." *See* RESTATEMENT (THIRD), *supra* note 10, § 401 (1987). *See also* BROWNLIE, *supra* note 14, at 310-11; Bowett, *supra* note 13, at 16.

[17] Harold G. Maier, *Jurisdictional Rules in Customary International Law*, *in* EXTRATERRITORIAL

legitimate interest in the control and regulation of extraterritorial issues based on those jurisdictional principles.[18] In fact, due to economic interdependence, market integration, and information technologies, it has become difficult for a state to regulate conduct falling purely within its own territory.

Although states have rights in practice to prescribe national law extraterritorially, extraterritorial jurisdiction leads to serious disputes between states. One such dispute relates to the extraterritorial application of US anti-trust laws that have been the cause of serious conflicts between states for more than 50 years.[19] The US, in particular, has applied its anti-trust laws based on the "effects doctrine," considered as deriving from the objective territoriality principle, to eliminate the adverse effects of the acts of foreigners abroad on its territory and internal market policies. This question was recently prominent in court considerations in *Hartford Fire Insurance Co v. California.*[20] In this case, English insurance companies were alleged to have violated US antitrust laws by engaging in certain conspiracies aimed at forcing certain other primary insurers to change the terms of their standard domestic commercial general liability insurance policies to conform with the policies the appellant insurers wanted to sell. The English appellants argued that their conduct was legal and in conformity with English law. The British Government,

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JURISDICTION IN THEORY AND PRACTICE 64, 65 (Karl M. Messeen ed., 1996).

[18] A.L.C. DE MESTRAL & T. GRUCHALLA-WESIERSKI, EXTRATERRITORIAL APPLICATION OF EXPORT CONTROL LEGISLATION: CANADA AND THE U.S.A. 18-25 (1990). A universal principle exists in addition to those three principles of jurisdiction. The universal principle emanates from the interests of statehood that " a state has a legitimate object in upholding the international legal system in which it is a person." *Id.* at 18 & 25-26. However, much argument surrounds the nature and extent of each principle. *See, e.g.,* BROWNLIE, *supra* note 14, at 303-09.

[19] Disputes over the extraterritorial application of U.S. anti-trust law began with the *Alcoa* judgement in 1945, which applied the Sherman Act extraterritorially based on the effects doctrine. U.S. v. Aluminum Co. of America, 148 F. 2d. 416 (2nd Cir. 1945). *See also* Timberlane Lumber co. v. Bank of America, 549 F. 2d. 597 (9th Cir. 1976); Mannington Mills Inc., v. Congoleum Co., 595 F. 2d. 1287 (3rd. Cir. 1979). *Cf.* Case 89/85, Imperial Chem. Indus. v. Commission, 18 E.C.R. 619 (1972).

appearing before the court as *amicus curiae*, insisted that the British government had established a comprehensive regulatory regime over the London reinsurance market and that the conduct alleged here was perfectly consistent with British law and policy.[21] The US Supreme Court granted US antitrust laws extraterritorial jurisdiction since it found that there was no true conflict between the relevant US and English law "where a person subject to regulation by two states can comply with the laws of both."[22] Thus, it held that no conflict existed when compliance with US law would not constitute a violation of foreign law. The judgment has been criticized since it did not examine the interests and policies of England that permitted the defendant's conduct.[23] Justice Scalia in his dissenting judgement held that, although allowing jurisdiction, a real conflict existed in the case since applicable foreign (British) law provided different and conflicting substantial rules.[24]

Steps are often taken to apply antitrust laws extraterritorially to advance domestic market policies of states. Besides promoting domestic policies, states take extraterritorial measures in order to further their "international interests" or to accelerate, more generally, the international lawmaking process.[25] For example, in 1996, the US enacted the Iran and Libya Sanctions Act (D'Amato-Kennedy Act), which seeks "to impose sanctions on

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[20] Hartford Fire Ins. Co. v. California, 509 U.S. 764 (1993).
[21] *Id.*
[22] *Id.* at 799
[23] Andreas F. Lowenfeld, *Jurisdictional Issues Before National Courts: The Insurance Antitrust Case*, *in* EXTRATERRITORIAL JURISDICTION IN THEORY AND PRACTICE, *supra* note 17, at 1, 10-11.
[24] *Hartford Fire*, 509 U.S. at 820-21 (Scalia, J., dissenting).
[25] For discussion of Canadian extension of state jurisdiction without international consensus and its justification, see H. Scott Fairley & John H. Currie, *Projecting beyond the Boundaries: A Canadian Perspective on the Double-Edged Sword of Extraterritorial Acts*, *in* TRILATERAL PERSPECTIVES ON INTERNATIONAL LEGAL ISSUES: RELEVANCE OF DOMESTIC LAW & POLICY 119, at 130-147 (Michael K. Young & Yuji Iwasawa eds., 1996).

persons making certain investments directly and significantly contributing to the enhancement of the ability of Iran or Libya to develop their petroleum resources, and on persons exporting certain items that enhance Libya's weapons or aviation capabilities."[26] The US measures aimed at cutting the financial means of both states to develop weapons and support terrorists and, in so doing, sought to regulate the actions of foreign nationals of foreign states residing outside the US.[27] In addition, the US imposed sanctions against Libya since it had not complied with United Nation (UN) Security Council resolutions that requested the extradition of two suspects allegedly involved in a bombing case. The US imposed sanctions against any person, including any foreign person, who transported goods, services and technology to Libya in violation of U.N. Security Council resolutions.[28] In order to pursue these objectives, the US prohibited the issuance of export-import licenses, loans from US financial institutions and procurement contracts, etc.[29] The European Community (EC) protested the US measures since they adversely affected the interests of persons residing in the EC. It enacted a blocking statute and ordered persons in the EC not to comply with any requirement claimed under the US Act.[30]

Concurrent and overlapping jurisdiction has been considered both convenient and acceptable.[31] Yet extraterritorial application has been the cause of serious international

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[26] Iran and Libya Sanctions Act, Pub. L. No. 104-172, Preamble, 110 Stat. 1541, 1541 (1996), 35 I.L.M. 1273 (1996). Sanctions are to be imposed where persons make an investment of $40,000,000 or more and where that investment directly and significantly contributes to the enhancement of both states' ability of petroleum industries. *Id.* § 5.

[27] *Id.* § 2.

[28] *Id.*

[29] *Id.* § 6.

[30] Council Regulation 2271/96 on Protecting against the Effects of the Extraterritorial Application of Legislation Adopted by a Third Country, art. 5, 1996 O.J. (L309) 1, 2.

[31] 1 L. OPPENHEIM, INTERNATIONAL LAW 457 (Robert Jennings & Arthur Watts eds., 9th ed. 1992).

conflict even in cases where a state has a right to apply law extraterritorially based on principles of jurisdiction or even though a state tries to enforce international law made in cases relating to the D'Amato-Kennedy Act. One reason for such conflicts might be that there is no treaty that directly regulates the manner of extraterritorial application or that forms a hierarchy of jurisdictional principles.[32] It has always been assumed that any such treaty would be difficult to conclude.[33] It is said that the customary international law of prescriptive jurisdiction, *i.e.* principles of jurisdiction, is still "primitive and inchoate" since states have usually hesitated to limit their ability to affect the legal interests of other states.[34] Thus, extraterritorial issues cannot be solved through the application of customary international law since international principles relating to jurisdictional questions function to validate the prescriptive and adjudicative functions of all states.[35] Under such conditions, it is difficult for states to protect their legal and legitimate interests from illegitimate interference by reference to precise international norms. Extraterritorial measures will continue, therefore, to generate conflicts.[36]

The innately "unilateral" nature of the extraterritorial application of laws and the lack of international legislation on the substantial objects of extraterritorial application also contribute to the difficulty in arriving at solutions to extraterritorial issues.[37] If

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[32] Edith Brown Weiss, *The Rise or the Fall of International Law?*, 69 FORDHAM L. REV. 345, 355 (2000); Andrea Bianchi, *Comment to* Harold G. Maier, *Jurisdictional Rules in Customary International Law*, *in* EXTRATERRITORIAL JURISDICTION IN THEORY AND PRACTICE, *supra* note 17, at 73, 81-82.

[33] Bianchi, *supra* note 32, at 82; Bowett, *supra* note 13, at 24.

[34] Louis Henkin, *International Law: Politics, Values and Functions*, 216 RECUEIL DES COURS 315 (1989). *See also* Francesco Francioni, *Extraterritorial Application of Environmental Law*, *in* EXTRATERRITORIAL JURISDICTION IN THEORY AND PRACTICE, *supra* note 17, at 122, 124; F.A. Mann, *The Doctrine of Jurisdiction in International Law*, 111 RECUEIL DES COURS 1, 23 (1964).

[35] Francioni, *supra* note 34, at 124.

[36] *Id.*; Weiss, *supra* note 32, at 355.

[37] Joel P. Trachtman, *Externalities and Extraterritoriality: The Law and Economics of Prescriptive*

affected states were to agree to the extraterritorial reach of other states, extraterritoriality would, of course, no longer be an issue.[38] In 1983, Canada, the state most affected by US assertions of extraterritorial application, advised the US Department of State that the extraterritorial application of export controls would only be appropriate on the basis of "reciprocity."[39] The Canadian government thus assumed that no international dispute could exist where such reciprocity existed. The cases referred to above also support the same conclusion. Although the US measures against Libya aimed at accelerating the implementation of binding UN resolutions, it is difficult to maintain that the resolutions authorize the US to impose economic sanctions against nationals belonging to third states.[40] The decision of the US Supreme Court in *Hartford* refused to enforce insurance policies legally entered into in England. The fact that the Supreme Court did not consider the interests of foreign states and applied antitrust law extraterritorially might be considered "unilateralist." The determination of these disputes seem to have been based on the manner and degree of the extraterritorial application, such as its unilateral nature and the degree of consideration given to the interests of other states.[41] One Canadian

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Jurisdiction, in ECONOMIC DIMENSIONS IN INTERNATIONAL LAW: COMPARATIVE AND EMPIRICAL PERSPECTIVES 642, 643 (Jagdeep S. Bhandari & Alan O. Sykes eds., 1997) [hereinafter Trachtman, *Externalities and Extraterritoriality*].

[38] Bianchi, *supra* note 32, at 82.

[39] *Quoted in* THE CANADIAN LAW AND PRACTICE OF INTERNATIONAL TRADE WITH PARTICULAR EMPHASIS ON EXPORT AND IMPORT OF GOODS AND SERVICES 462 (J.G. Castel et al. eds., 2nd ed. 1997) [hereinafter THE CANADIAN LAW AND PRACTICE OF INTERNATIONAL TRADE].

[40] Kazuhiro Nakatani, *Economic Sanctions and Compliance: Theoretical Aspects, in* TRILATERAL PERSPECTIVES ON INTERNATIONAL LEGAL ISSUES: FROM THEORY TO PRACTICE 347, 353-55 (Thomas J. Schoenbaum et al. eds., 1998). Nakatani also notes in the context of UN economic sanctions against Libya that Libya has an obligation to prosecute suspects and that if Libya prosecutes suspects in its own domestic courts there may not be a breach of international law. *Id.* at 358-59. However, Canada opposed unilateral extraterritorial measures although it justified the use of extraterritorial measures without the backing of UN resolutions when the international community clearly requires sanctions against the violation of obligation *erga omnes*. THE CANADIAN LAW AND PRACTICE OF INTERNATIONAL TRADE, *supra* note 39, at 453-54.

[41] Bianchi, *supra* note 32, at 77-78; Bowett, *supra* note 13, at 24; Mann, *supra* note 34, at 46.

authority noted that Canada would not be opposed to extraterritorial application if such application did not undermine the laws and policies of other states relating to the same subject matter.[42]

It is suggested that not all extraterritorial measures should be condemned by states and that states should permit such measures despite the fact that they may adversely affect their legitimate interests.[43] Some scholars insist that extraterritorial jurisdiction should have legitimacy and should be granted when it tries to achieve a universal duty or obligation *erga omnes*.[44] Bianchi, for example, argues that extraterritorial application in order to protect an obligation *erga omnes*, such as the protection of human rights, protection of the environment, and the control of weapons of mass destruction, are not "disguised measures" and thus have not been the subject of strong opposition by other states.[45] He gives the example of the US embargo against Uganda sanctioning the systematic and massive violations of human rights by Idi Amin. The US prohibited all transactions between Ugandan and US companies including subsidiaries and branches owned or controlled by US citizens.[46] He notes that these measures were not protested

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[42] Douglas H. Forysthe, Introductory Note, *Canada: Foreign Extraterritorial Measures Act Incorporating the Amendments Countering the U.S. Helms-Burton Act*, 36 I.L.M. 111, 111 (1997).

[43] Bianchi, *supra* note 32, at 88.

[44] Murase, while criticizing the unilateral enforcement of antitrust law and export regulations, states that the legitimacy of extraterritorial application in order to achieve international interests such as environmental protection is different from the legitimacy of other extraterritorial measures based on national interests. He also gives broader legitimacy to the extraterritorial application of national laws that try to achieve international objectives. Shinya Murase, *International Liability of States in International Environmental Law: Control of Multinational Companies*, 93 THE JOURNAL OF INTERNATIONAL LAW AND DIPLOMACY 418, 423 (Japanese Association of International Law ed., 1994). *See also* Fairley & Currie, *supra* note 25, at 147; Jack I. Garvey, *New Evolution for Fast-Tracking Trade Agreements: Managing Environmental and Labor Standards through Extraterritorial Regulation*, 5 UCLA J. INT'L L. & FOREIGN AFF. 1, 34-57 (2000).

[45] Bianchi, *supra* note 32, at 88. *See also* D. Orentlicher & T. Gelatt, *Public Law, Private Actors: The Impact of Human Rights on Business Investors in China*, 14 NW. J. INT'L L. & BUS. 66, 102-103 (1993).

[46] 43 Fed. Reg. 58, 571-73 (1978).

against by other states since concern over human rights was considered universal.[47] Bianchi considers that such absence of opposition indicates that "unilateral enforcement of *erga omnes* obligations by means of extraterritorial application of municipal law might be a novel method of enforcement of international law."[48] In view of the increase in the number of multilateral treaties entered into and the absence of enforcement mechanisms within treaty regimes, it may be both necessary and possible for states to extend treaty obligations extraterritorially in order to achieve full compliance of international law.[49]

Some concern, however, should be expressed for the threat that the unilateral application of the above kind poses to the rule-oriented international legal system especially since only economically powerful states, such as the US, would be able to apply and force compliance of their laws extraterritorially given the need for effective enforcement of judgements.[50] This fear is expressed in several international documents. Principle 12 of the Rio Declaration of Environment and Development states that "[u]nilateral actions to deal with environmental challenges outside the jurisdiction of the importing country should be avoided. Environmental measures addressing transboundary or global environmental problems should, as far as possible, be based on an international consensus."[51] In addition, in 1999, the UN General Assembly (GA) adopted a resolution,

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[47] Bianchi, *supra* note 32, at 88.
[48] *Id.*
[49] *See, e.g.*, Betsy Baker, *Eliciting Non-Party Compliance with Multilateral Environmental Treaties: U.S. Legislation and the Jurisdictional Bases for Compliance Incentives in the Montreal Ozone Protocol*, 1992 GER. Y.B. INT'L L. 333, 347-49; Beth Stephens, *Expanding Remedies for Human Rights Abuses: Civil Litigation in Domestic Courts*, 1997 GER. Y.B. INT'L L. 117.
[50] Ernesto M. Hizon, *Comment to* Francesco Francioni, *Extraterritorial Application of Environmental Law*, *in* EXTRATERRITORIAL JURISDICTION IN THEORY AND PRACTICE, *supra* note 17, at 133, 134-35.
[51] Rio Declaration on Environment and Development, June 14, 1992, Principle 12, 31 I.L.M. 874 (1992). However, some argue that the Rio Declaration does not prohibit unilateral measures. *See* PHILIP SANDS, 1 PRINCIPLES OF INTERNATIONAL ENVIRONMENTAL LAW: FRAMEWORKS, STANDARDS AND IMPLEMENTATION 190 (1995) (discussing the status of Principle 12).

the Elimination of Coercive Economic Measures as a Means of Political and Economic Compulsion, that condemns unilateral extraterritorial laws that infringe upon international law and undermine principles embodied in the UN Charter.[52] This resolution also condemns the imposition of extraterritorial sanctions against foreign corporations.[53] This kind of response to the extraterritorial application of laws indicates that the application of extraterritorial laws has not yet achieved the status of consensus in international law. On the other hand, as Howse notes, "there is no rule of customary international law ... that prohibits the taking of such unilateral action, at least where a good faith effort for a co-operative solution has failed, or is not working."[54] It thus seems that questions surrounding extraterritorial application and the disputes that arise from such application, will continue to present difficulties for the international judicial system since laws concerning extraterritorial application have yet to be determined.[55]

During the 1990s, international disputes over extraterritorial application came to be dealt with increasingly by GATT/WTO panels. The WTO therefore came to be greatly involved in the resolution of extraterritorial disputes. Extraterritorial measures that try to implement or enforce international interests have, in particular, been argued before the GATT/WTO. The GATT and the WTO agreements do not, however, directly attempt to regulate questions of extraterritorial application as such. The next section examines how the GATT/WTO forum has adapted itself to deal with these extraterritorial disputes.

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[52] G.A. Res. 53/10, U.N. GAOR, 53th Sess., U.N. Doc. A/53/L.7/Rev.1 (1998).
[53] *Id.*
[54] Robert Howse, *The Turtles Panel, Another Environmental Disaster in Geneva*, 32 J. WORLD TRADE 73, 73 (1998).
[55] Trachtman, *Externalities and Extraterritoriality, supra* note 37, at 646-50.

B. Disputes over Extraterritorial Application before the WTO[56]

Two types of extraterritorial applications exist in import-export control regulations: direct extraterritoriality and indirect extraterritoriality. Direct extraterritoriality refers to domestic regulation that directly imposes obligations upon nationals or residents of a foreign state.[57] Indirect extraterritoriality, on the other hand, requires actors in foreign countries to comply with domestic laws of another state in order to gain access to its domestic market.[58] Although these two types of extraterritoriality differ in certain respects, their results are the same: interference in the domestic policies of other states.[59] If states pursue the same policies with reciprocal laws, the need to apply laws extraterritorially would disappear. A state's own domestic policies might be achieved with the assistance of regulations made in other states. The following cases can be seen to combine both types, direct and indirect, of extraterritorial application.

1. Tuna-Dolphin Case (I & II)

The US enacted the Marine Mammal Protection Act (MMPA) in 1972 (amended in 1988 and 1990) to protect the accidental killing of, or serious injury to, dolphins by tuna fishing practices. Tuna are often found swimming below dolphins in the Eastern Tropical Pacific Ocean. Fishing vessels catching tuna in that region often encircle dolphins with purse-seine nets. These nets, so used to harvest tuna, result in the deaths of many dolphins. Under the MMPA, any person or vessel under the US jurisdiction is prohibited from taking the life of any marine mammal in connection with the harvesting of fish and

[56] The cases sited and described here also relate to other important questions of law. However, due to the nature of this thesis, the arguments not relevant to extraterritoriality are omitted.
[57] INTERNATIONAL LAW OF EXPORT CONTROL: JURISDICTIONAL ISSUES 9 (Karl M. Meessen ed., 1992).
[58] *Id.*
[59] Meng, *supra* note 15, at 338.

the use of any fishing method, including purse-seine nets, contrary to regulations issued under the Act.

The MMPA prohibits the import into the US of fish and fish products caught with methods that entail the killing of dolphins in contravention of US standards.[60] This provision applies to US territorial waters, to US's exclusive economic zone (EEZ), and also to the high seas. In addition, the MMPA prohibits imports into the US of yellow fin tuna caught by purse-seine nets, unless the exporting country satisfies the following requirements:

> (1) the harvesting nation maintains a conservation programme for marine mammals equivalent to the United States;
> (2) the rate of incidental taking of marine mammals in the harvesting nation does not exceed that of the United States by more than 1.25 times during the same period;
> (3) the rate of incidental taking by the harvesting nation is monitored by the U.S. agency;
> (4) the harvesting nation complies with all reasonable requests by the United States for cooperation in specified research.[61]

In 1990, the US imposed an embargo on imports of tuna from Mexico until the Mexican Secretary submitted evidence that the Mexican vessels were not to exceed the U.S. kill rate of Eastern spinner dolphins by 15 %. After this embargo, the US Customs Service strengthened its prohibition on the importing of Mexican tuna following several court orders. In response to these embargoes Mexico requested, in January 1991, the Contracting Parties to establish a panel under Article XXIII of GATT 1947 to examine the issue (*Tuna I*).

The US argued that even if the measures imposed under the MMPA were not consistent with its GATT obligations such as Article XI (the general prohibition of

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[60] 16 U.S.C. § 1371(a)(2) (1994).
[61] *Id.* § 1371 (a)(2)(B).

quantitative restriction), they were justified by the general exceptions in Article XX (b) and XX (g).[62] Article XX allows exceptions to the WTO agreements, and also allows the adoption and enforcement of measures, if such exceptions and measures are:

> (b) necessary to protect human, animal or plant life or health…
> (g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption…

The US insisted that the aim of the MMPA was the protection of animal life and the conservation of living resources and that the measures taken by the US were, therefore, exempted under the Article XX exceptions.

One of the main arguments was whether the general exceptions in Article XX (b) and (g) extended to the imposition of restrictions to conserve resources extraterritorially, and whether extraterritorial restrictions for the conservation of dolphins could be exempted under these provisions.[63] The US asserted that its measures simply specified the products that could be marketed in the territory of the US, and did not apply extraterritorially, although the measures necessarily had effects outside US territory.[64] According to this interpretation, the US measures could be categorized as applying

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[62] United States- Restriction on Imports of Tuna, Aug. 16, 1991, GATT B.I.S.D. (39th Supp.) at 155 (1993) [hereinafter *Tuna I Panel Report*].
[63] See Francioni, *supra* note 34, at 122 for a fuller discussion of this argument.
[64] *Tuna I Panel Report*, *supra* note 62, para. 3.49.

extraterritorially, but only indirectly. Mexico argued that the average rate of incidental taking provision and other MMPA provisions applying to tuna caught in the Eastern Tropical Pacific was an extraterritorial restriction on fishing and that these extraterritorial measures were not provided for in GATT Article XX (b) and (g).[65] Mexico also contended that permitting one contracting party to impose an embargo to conserve the resources of others would introduce the concept of extraterritoriality into the GATT and that this would threaten the interests of all Contracting Parties.[66]

The Panel, upholding Mexico's position, found that Article XX (b) and (g) was to be interpreted in the sense of referring only to the conservation of animals or resources located within the territory of the importing state.[67] It also held that if Article XX allowed a state to take extraterritorial measures, each contracting party could unilaterally determine the conservation policies from which other contracting parties could not deviate without threatening their rights under the GATT.[68] Mexico and the US reached an agreement after this panel report, so that the report was never formally adopted. As a result, the European Economic Community (EEC) and the Netherlands requested, in 1992, the establishment of a Panel to reconsider the same issue (*Tuna II*).

In *Tuna II*, the US argued that the *Tuna I* report was a policy statement, not an interpretation of the GATT, and that "it was not the province of dispute settlement panels to conduct a policy review of the General Agreement."[69] It also contended that Article XX does not mention the use of "unilateral" measures or distinguish unilateral from other

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[65] *Id.* para. 3.48.
[66] *Id.*
[67] *Id.* para. 5.32.
[68] *Id.*
[69] GATT Dispute Panel Report on United States - Restriction on Imports of Tuna, June 16, 1994, para. 3.33,

multilateral measures and that Article XX would apply to all types of measures identically.[70] Thus, the US insisted that that Article XX does not set any jurisdictional limits because it does not anywhere distinguish extraterritorial measures from other measures under Article XX. Despite the *Tuna I* Panel Report, the Panel in *Tuna II* found that it could not support the conclusion that the Article XX exceptions only apply to policies related to the conservation of exhaustible natural resources located within the territory of the contracting party invoking the provision.[71] It then stated, concerning Article XX(g), that "the policy to conserve dolphins in the eastern tropical Pacific Ocean, which the US pursued within its jurisdiction over its nationals and vessels, fell within the range of policies covered by Article XX(g)."[72] It can be assumed that the panel permitted extraterritorial application of national law through the nationality principle within the context of Article XX(g). However, the Panel held in *Tuna II* that if Article XX were interpreted "to permit contracting parties to impose trade embargoes so as to force other countries to change their policies within their jurisdiction..., the objectives of the General Agreement would be seriously impaired."[73] Accordingly, the Panel concluded that the US measures did not full within the ambit of the exceptions contained in Article XX (b), (g), and (d) of the GATT 1947.

2. Shrimp-Turtle Case

Sea turtles are registered as endangered species under the Convention on

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GATT Doc. DS29/R, 33 I.L.M. 839 (1994) [hereinafter *Tuna II Panel Report*].
[70] *Id.* para. 3.13.
[71] *Id.* para. 5.20.
[72] *Id.* para 5.33.
[73] *Id.* para. 5.38.

International Trade in Endangered Species of Wild Flora and Fauna (CITES).[74] Sea turtles, however, are frequently caught in shrimp trawlers' nets and this has resulted in a rapid decrease in their numbers. In order to protect sea turtles, the US enacted Public Law 101-602 Section 609 of which prohibits shrimp imports from nations that do not require all of their shrimp trawlers to use Turtle Excluder Devices (TEDs) in their nets.[75] A TED is a device that allows sea turtles to escape from shrimp nets without severely limiting the shrimp catch. Section 609(b)(2) provides that the import ban on shrimp will not apply to harvesting nations, if the following requirements are satisfied by the harvesting nations:

> (A) the government of the harvesting nation has provided documentary evidence of the adoption of a program governing the incidental taking of such sea turtles in the course of such harvesting that is comparable to that of the United States; and
> (B) the average rate of that incidental taking by vessels of the harvesting nation is comparable to the average rate of incidental taking of sea turtles by United States vessels in the course of such harvesting...[76]

In October 1996, India, Malaysia, Pakistan and Thailand challenged the US measures as violating Article I, XI (quantitative restrictions) and XIII of GATT. They argued, in essence, that the US measures favored shrimp harvesting nations with TEDs and discriminated against those without them. The Panel and the Appellate Body issued reports in favor of the complainants.

One of the main arguments in this case centered on whether US extraterritorial environmental measures were justified under Article XX.[77] As in the *Tuna I & Tuna II*

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[74] Convention on International Trade in Endangered Species of Wild Flora and Fauna, Mar. 3, 1973, 12 I.L.M. 1085 (1973) (entered into force July 1, 1975) [hereinafter CITES].
[75] 16 U.S.C. §1537.
[76] *Id.*
[77] Another important issue in this case concerns the participation of NGOs. The WTO received and considered several reports from NGOs. United States – Import Prohibition of Certain Shrimp and Shrimp

Panels, the complainants argued that the US extraterritorial measures did not fall within the scope of Article XX of GATT. The type of extraterritorial measures in this case were different from that in the *Tuna I & II* Panels, since the sea turtles sought to be protected by the Act were usually found within US waters. However, this measure still had an indirect extraterritorial application, since the measures affected the conduct of foreign nationals and the policies of other third states. The Panel, nevertheless, avoided examining the jurisdictional scope of Article XX. Instead, the Panel, considering the object and purpose of the WTO multilateral trading system, held that the US measure constituted an unjustifiable discrimination between countries where the same conditions prevailed and thus could not be justified under Article XX.[78] The Panel especially noted that the US measures did not meet the standards set out in the "chapeau" of Article XX, which prescribes;

> Subject to the requirement that such measures are not applied in a manner which would constitute a means of *arbitrary or unjustifiable discrimination* between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any Member of measures... (Emphasis added.) [79]

Hence, the Panel concluded that the unilateral character of the measures threatened the "multilateral trading system."

Products, Oct. 12, 1998, paras. 79-91, WT/DS48/AB/R, *available in* WTO Dispute Settlement Website (visited Jan. 20, 2000) <http://www.wto.org/wto/dispute/distab.htm> [hereinafter *Shrimp-Turtle AB Report*]. *See* Asif H. Qureshi, *Extraterritorial Shrimps, NGOs and the WTO Appellate Body,* 48 INT'L & COMP. L. Q. 199, 204-205 (1999).

[78] United States – Import Prohibition of Certain Shrimp and Shrimp Products, May 20, 1996, para. 7.52 & 7.61, WT/DS48/R, *available in* WTO Dispute Settlement Website (visited Sep. 18, 1999) <http://www.wto.org/wto/dispute/distab.htm>.

[79] General Agreement on Tariff and Trade, Oct. 30, 1947, art. XX, *in* THE LEGAL TEXTS, *supra* note 2, at 423 [hereinafter GATT]. This agreement was incorporated into the GATT1994 by way of para. 1 (a) of Annex 1:A of the WTO Agreement.

The US appealed and claimed that the "threat to the multilateral trading system" as determined by the panel constituted a new interpretation of Article XX and added new obligations on members concerning Article XX.[80] The US argued that any such interpretation was not in accordance with the ordinary meaning of the Article.[81]

The Appellate Body reversed the Panel's finding concerning the interpretation of Article XX, since the Panel only considered the conformity of the measure with the "chapeau" of Article XX and did not examine the measure in the light of paragraph (b) and (g) exceptions. The Appellate Body, in particular, considered whether sea turtles could be categorized as "exhaustible living natural resources" within the meaning of Article XX. The Appellate Body examined this question by reviewing the United Nations Convention on the Law of the Sea (UNCLOS), CITES and other international treaties and concluded that sea turtles may properly be categorized as "exhaustible living natural resources" within the meaning of Article XX(g).[82] The Appellate Body in its considerations, however, avoided any direct examination of the jurisdictional scope of Article XX. Instead, it found that the US conservation measure was justified under Article XX (g) since there was a "sufficient nexus" between the turtles covered under Section 609 and the United States.[83]

The Appellate Body did, however, go on to finally conclude that the US measure failed to meet the requirements of the Article XX chapeau since the manner of application of the measure was "unjustifiably discriminatory."[84] In particular, it pointed to the

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[80] *Id.*
[81] *Id.*
[82] *Shrimp-Turtle AB Report, supra* note 77, paras. 129-33.
[83] *Id.* para. 133.
[84] *Id.* para. 186.

absence of steps taken by the U. S. to negotiate with the complainants, such negotiation deemed to be a prerequisite for the adoption of a multilateral approach to the conservation of sea turtles. This lack of negotiation was especially noticeable since the US had made greater efforts to negotiate with other Caribbean and Western Atlantic states. The Appellate Body also found that the inflexibility of the measures could not be justified and that the process of certification was non-transparent, unpredictable and lacked due process in its application and administration. The Appellate Body, finally, held that the US measures could not be justified under Article XX and that those measures violated its obligations under the WTO Agreement.

Although the Appellate Body did not examine the extraterritorial scope of Article XX of GATT directly, it stated that "conditioning access to a Member's domestic market on whether exporting Members comply with, or adopt, a policy or policies unilaterally prescribed by the importing Members may, to some degree, be a common aspect of measures falling within the scope of one or another of the exceptions (a) to (j) of Article XX"[85] since policies embodied in Article XX (a) to (j) are considered as legitimate. It also stated, however, that:

> ... it is not acceptable, in international trade relations, for one WTO Member to use an economic embargo to require other Members to adopt essentially the same comprehensive regulatory program, to achieve a certain policy goal, as that in force within that Member's territory, without taking into consideration different conditions which may occur in the territories of those other Members. Thus, while the statutory provisions of Section 609(b)(2)(A) and (B) do not, in themselves, require other WTO Members to adopt essentially the same policies and enforcement practices, the actual application of the measure, through the implementation of the 1996 Guidelines and the regulatory practice of administrators, requires them to adopt a regulatory program that is not merely comparable

[85] *Id.* para.121.

but essentially the same as the US program.[86]

As noted in the previous section of this paper, extraterritorial application can be characterized as a "unilateral" measure. From the language it uses, the Appellate Body appears to allow a broader extraterritorial scope to Article XX than ever before since it only requires states not to coerce other Members to adopt "essentially the same" measures as those states through "unilateral" measures. The decision of the Appellate Body seems to suggest that if a member has engaged in multilateral negotiations and has failed to reach consensus, it may then legislate unilaterally and extraterritorially as long as "sufficient nexus" can be established between the stated goal and the extraterritorial measure. What actually constitutes a "sufficient nexus," however, is nowhere clearly defined by the Appellate Body.[87]

3. Other Cases

The above cases are the most important cases on extraterritoriality and the GATT/WTO rules, although neither the *Tuna I* nor *II* reports were adopted. Other than these two cases, two other claims that relate to extraterritoriality have been brought before the DSB although both have been suspended.

One claim relates to that piece of US legislation, the Cuban Liberty and Democratic Solidarity Act (Helms-Burton Act).[88] That Act was enacted on 12 March 1996 to impose new economic sanctions on Cuba. As soon as President Clinton had signed the Act most

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[86] *Id.* para. 164.

[87] Qureshi, *supra* note 77, at 204-05; Dukgeun Ahn, Note, *Environmental Disputes in the GATT/WTO: Before and After US-Shrimp Case*, 20 MICH. J. INT'L L. 819, 848 (1999).

[88] Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996, Pub. L. No. 104-114 , 110 Stat. 786 (1996), 35 I.L.M. 37 (1996) [hereinafter Helms-Burton Act].

US trading partners reacted by calling for limitations to be placed on the ability of the new law to effect their own policies and practices. The Act concerned them since it had an extraterritorial effect that inhibited states from pursuing their own trade and diplomatic policies relating to Cuba.

The main purpose of the law was to strengthen the international sanctions against Cuba's Castro Government. The Act was intended to: (i) promote democracy in Cuba and, (ii) protect the property rights of US citizens who owned properties in Cuba before confiscation in 1964. The US also justified the Act by claiming that the Cuban government, through human rights abuses of Cuban nationals and through its totalitarian nature, posed a national security threat to the US and to its nationals.[89]

The most controversial part of the Act is Part III aimed at protecting the property rights of US nationals. The Act seeks to achieve this through allowing "civil remedies" based on the effects doctrine. Section 302 prescribes that "any person", who "traffics" in "property" that was confiscated by the Cuban Government on or after 1 January 1959 shall be liable to the payment of monetary damages to any US national who owned such property.[90]

"Any person" would mean a non-US national since US nationals are prohibited from having any transactions with Cuba. The term "traffic" includes almost all business transactions that relate to confiscated property, ranging from selling to mere use of the

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[89] *Id.* § 2 (28). This first aspect is embodied in Part I and II of the Helms-Burton Act. Part I strengthens international sanctions against the Castro Government; prohibition on investment in domestic telecommunications services, prohibition against indirect financing of Cuba and any loans, financing to traffickers, opposition to Cuban membership in international financial institutions and prohibition on import of and dealings in certain Cuban products and so on. Part II purports to assist and support self-determination of the Cuban people.

[90] *Id.* § 302 (a).

property.[91] The term "property" is also defined broadly, including not only real and personal property but also intellectual property.[92] As a result of the broad definition given to the terms "traffic" and "property," a large number of foreign nationals in business relations with Cuba became liable to action taken against them in US courts. Moreover, the Act stipulates that if foreign nationals do not cease trafficking, they will be liable to the payment of damages three times that normally prescribed.[93]

The US President was given the authority to suspend the application of Part III of the Act for renewable periods of up to six months.[94] However, the US Administration has taken the view that the President can also renew the suspension of the right based on Section 301 on a country-by-country basis.[95]

Some commentators have remarked that the real goal of Section 302 is not to provide US nationals with protection against wrongful confiscation but to restrain foreign investment in Cuba. The US Congress may well have intended this, as it was stated in the House of Representatives that "these provisions are intended primarily to create a 'chilling effect' that will deny the current Cuban regime venture capital, [and] discourage third-country nationals from seeking to profit from illegally confiscated property."[96] This kind of extraterritorial application can, therefore, be described as a "secondary boycott" illegal under international law. [97]

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[91] *Id.* § 4 (A)
[92] *Id.* § 4 (12).
[93] *Id.* § 302 (a)(3)(C).
[94] *Id.* § 306.
[95] Riyaz Dattu & John Boscariol, *GATT Article XXI, Helms-Burton Act and The Continuing Abuse of the National Security Exception*, 28 CAN. BUS. L. J. 198, 200 (1997).
[96] H. R. Rep. No. 104-202 (1996), *reprinted in* 1996 U.S.C.C.A.N. 527, 544 (submitted July 24, 1995).
[97] Andrea F. Lowenfeld, *The Cuban Liberty and Solidarity (LIBERTAD) Act. Congress and Cuba,* 90 AM. J. INT'L L. 419, 429-30 (1996).

Part III of the Helms-Burton Act was subject to two main international objections.[98] The first objection concerned the usage of the "effect doctrine" to justify the application of section 302.[99] The second objection concerned the nature of the extraterritorial measure and the "secondary boycott" effect of the Act. Canada and Mexico filed complaints with NAFTA and the European Union (EU) and requested the establishment of a WTO Panel. The Canadian Government supported the EU's request and planned to make written and oral submissions to the WTO panel as a third party.[100]

The principal objections voiced by the EU under GATT centered around (i) Section 110(c) of the Act which prohibits the allocation of any of the sugar quota to a country that is a net importer of sugar unless that country certifies that it does not import Cuban sugar that could indirectly find its way to the US, (ii) Section 103 which prohibits "any loan, credit or other financing" by US persons to any persons who traffics in confiscated property, (iii) Part III which creates a right of action in favor of US citizens in US courts to obtain compensation for confiscated Cuban properties, and (iv) Part IV which denies visas to, and excludes from the US, any person involved in the trafficking of confiscated property.[101]

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[98] Part IV strengthens the "chilling effect" in this meaning. Part IV provides for the exclusion from entry into the United States of any foreign nationals who traffic in confiscated property. If a trafficker conducts business in the U.S. market, he or she must choose either to obey the U.S. policy or to give up access to the U.S. market to some extent. If a trafficker follows the U.S. policy, the state entering a transaction between its nationals and Cuba will have its right to determine its diplomatic policy with Cuba infringed. Helms-Burton Act, *supra* note 88, § 401.

[99] Lowenfeld, *supra* note 97, at 430-31; Brigitte Stern, *Vers la Mondialisation Juridique? Les Lois Helms-Burton et D'Amato-Kennedy*, 100 REVUE GÉNÉRALE DE DROIT INTERNATIONAL PUBLIC 979, 992-97 (1996).

[100] Department of Foreign Affairs, *Canada Supports European Union Request for WTO Panel Helms-Burton*, Nov. 21, 1996 (visited Oct. 21, 1999) <http://www.dfait-maeci.gc.ca/english/NEWS/press_releases/96_press/96_214e.htm>.

[101] United States- The Cuban Liberty and Democratic Solidarity Act, Oct. 8, 1996, WT/DS38/2, *available in* WTO Online Documents Website (visited Jan. 20, 2000) <http://www.docsonline.wto.org>.

The EU mounted three objections to Part III. First, it argued that Part III violated Article I (most-favored-nation-treatment) of GATT because the presidential waiver under Part III could be applied on a country-by-country basis. Second, Part III and IV violated Article III (national treatment) of GATT because only foreigners are subject to its provisions. Lastly, the measures of Part III and IV were contrary to the provisions of the General Agreement on Tariffs and Services (GATS).

Another claim brought to the DSB also related to economic sanctions against Myanmar. The US state of Massachusetts, in June 1996, enacted a selective purchasing law formally titled Act Regulating State Contracts with Companies Doing Business with or in Burma (Myanmar),[102] so as to impose economic sanctions on Myanmar due to its blatant violation of human rights and to encourage transnational corporations to divest their interests in Myanmar. The Act provided, in essence, that the Commonwealth of Massachusetts and its public authorities were not allowed to procure goods or services from any person or company conducting business with Burma. The Act purports to apply to both US and non-US individuals and companies, including subsidiaries, operating in Myanmar.[103]

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[102] 1996 Mass. Acts 239, ch. 130 (codified at Mass. Gen. Laws §§7:22G-7:22M, 40 F½ (1997)).

[103] "Doing business with Burma' " is defined broadly to cover any person;

(a) having a principal place of business, place of incorporation or its corporate headquarters in Burma (Myanmar) or having any operations, leases, franchises, majority-owned subsidiaries, distribution agreements, or any other similar agreements in Burma (Myanmar), or being the majority-owned subsidiary, licensee or franchise of such a person;

(b) providing financial services to the government of Burma (Myanmar), including providing direct loans, underwriting government securities, providing any consulting advice or assistance, providing brokerage services, acting as a trustee or escrow agent, or otherwise acting as an agent pursuant to a contractual agreement;

(c) promoting the importation or sale of gems, timber, oil, gas or other related products, commerce in which is largely controlled by the government of Burma (Myanmar), from Burma (Myanmar);

(d) providing any goods or services to the government of Burma (Myanmar).

Id. §7:22G.

These measures were, like the Helms-Burton Act, met with international criticism. The US was criticized by both the EC and Japan who claimed that the law violated the Agreement on Government Procurement (AGP) covered in the WTO Agreement.[104] Japan noted that suppliers on the restricted purchase list were treated less favorably than were suppliers not on the list, in contravention of Article III:1 of AGP.[105] In addition, Japan was critical of the extraterritorial reach of the Act arguing it to be illegal under public international law.[106] Because the US Supreme Court found that the Act was in violation of the US Constitution, however, the EC and Japan found it unnecessary to pursue the issue before the DSB.[107]

C. Common Features of the Cases

Nation states have begun to use the GATT/WTO as a major international forum for the resolution of extraterritorial disputes in accordance with international law. Although both cases discussed above concerning the Helms-Burton and Massachusetts Acts have been discontinued, it is still possible to see the WTO as the main forum for the resolution of extraterritorial disputes.

Why do states often bring extraterritorial disputes before the WTO and the DSB? One reason for this is that the WTO covers a broad range of trade issues, not only trade in

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[104] United States - Measure Affecting Government Procurement, Request for Establishment of a Panel by the European Communities, Sep. 9, 1998, WT/DS88/3; United States - Measure Affecting Government Procurement, Request for Establishment of a Panel by Japan, Sep. 9,1998, WT/DS95/3, *available in* WTO Online Document Website (visited Jan. 20, 2000) <http://www.docsonline.wto.org>.

[105] *Id.*

[106] *Japan's Position Regarding the Problem of Massachusetts State Government Procurements*, *available in* Japanese Ministry of Foreign Affairs Website (visited Mar. 8, 2001) <http://www.mofa.jp>.

[107] Stephen P. Crosby, Secretary of Administration and Finance of Massachusetts v. National Foreign Trade Council, 530 U.S. 363 (2000).

goods but also trade in services, intellectual property rights, governmental procurement and investment. Therefore, extraterritorial prohibition of governmental procurement, such as was occasioned by the D'Amato-Kennedy and Massachusetts Acts, can be an issue with which the WTO dispute settlement procedures may be concerned. In addition, in the case of Helms-Burton Act, concerning the denial of US visas and the exclusion from the US of persons who traffic in properties of US nationals in Cuba,[108] the EC requested the establishment of the panel, claiming that such measures were inconsistent with Articles II, III, VI, XVI and XVII of GATS and paragraphs 3 and 4 of the GATS Annex on the Movement of Natural Persons.[109] In general, the admission and expulsion of foreigner nationals is considered a matter for domestic jurisdictions and, therefore, as matter for the discretion of the state.[110] However, since the GATS prescribes the movement of natural persons, WTO members can argue before the panel questions previously deemed to be issues for domestic jurisdictions to deal with. Second, the automaticity of the DSB procedures makes the WTO important since disputes over extraterritorial application have never been challenged before international judicial bodies. As noted before, a state cannot block the establishment of a panel and the adoption of panel and AB reports without negative consensus. The WTO, therefore, might be the most jurisdictionally accessible forum in international society for dealing with these questions. Third, Article XXIII of the GATT accelerates and improves the chances of dispute settlement in the WTO. Article XXIII:1 prescribes that;

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[108] Helms-Burton Act, *supra* note 88, § 402.

[109] United States- The Cuban Liberty and Democratic Solidarity Act, *supra* note 101.

[110] Brownlie considers that the expulsion of foreign nationals is within the discretion of the state but notes that in some cases the manner of expulsion may infringe upon international norms, such as those dealing with genocide or discrimination. BROWNLIE, *supra* note 14, at 522-23. *See also* 1 L.

> If any contracting party should consider that any benefit accruing to it directly or indirectly under this Agreement is being nullified or impaired or that the attainment of any objectives of the Agreement is being impeded as the result of
> (a) the failure of another contracting party to carry out its obligations under this Agreement, or
> (b) the application by another contracting party of any measure, whether or not it conflicts with the provisions of this Agreement, or
> (c) the existence of any other situation,
> the contracting party may, with a view to the satisfactory adjustment of the matter, make written representations or proposals to the other contracting party or parties which it considers to be concerned. Any contracting party thus approached shall give sympathetic consideration to the representations or proposals mad to it.[111]

It is easy for WTO members, by virtue of this provision, to bring extraterritorial issues before the panel since the GATT/WTO system in principle allows its members to bring a case despite the fact that no violation of the WTO agreements may have occurred.[112] This situation is known as the "non-violation" complaint and the "situation" complaint where members, should it be recognized that WTO objectives have been impeded by a member, are permitted to raise issues. In addition, violation of a WTO obligation is automatically regarded as causing "damage" to the benefits or interests of GATT/WTO members meaning that states are not obliged to prove such "damage."[113] Thus, although extraterritorial measures may not seem to infringe upon obligations under the WTO agreements, they can be examined in the WTO easily if other members believe

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OPPENHEIM, INTERNATIONAL LAW, *supra* note 31, at 897-98 & 940.

[111] GATT, *supra* note 79, art. XXIII.

[112] E.U. Petersmann, *Violation and Non-Violation Complaint in Public International Trade Law,* 1991 GER. Y.B. INT'L L. 175, 192. However, in practice, the GATT/WTO dispute settlement mechanism has admitted only two causes of complaint:

> (1) nullification or impairment of benefits of contracting members as a result of the violation of the agreements by another contracting member;
> (2) nullification or impairment of benefits of contracting members as a result of the application of measures by another party, whether or not it violates the agreements.

YUJI IWASAWA, WTO NO FUNSO SHORI [DISPUTE SETTLEMENT OF THE WTO] 76 (1997).

[113] *Id.*

that the measures nullify or impair their benefits under the WTO agreements. The EC alleged, in relation to the Helms-Burton Act, that even if measures taken by the US did not constitute a violation of specific provisions of GATT or GATS, they nevertheless nullified or impaired the EC's expected benefits under GATT and GATS and impeded the attainment of the objectives of GATT.[114]

Lastly, GATT/WTO dispute settlement procedures do not require that extraterritorial measures are actually taken or exercised before a case can be brought. For instance, in 1993, Columbia and other Latin American states complained that the EC introduced a common market organization for bananas, replacing the various national banana import systems that the complainants had previously put in place.[115] This new system was planned to commence July 1993. The Panel was nevertheless established one month earlier in June 1993.[116] Similarly, a WTO member was able to complain of the extraterritorial measures contained in the Helms-Burton Act although the application of Part III had been suspended at the time by the President.[117]

The cases examined in the GATT/WTO share some common features. First, states often justify extraterritorial measures on the basis that the underlying purpose behind the measures taken is the implementation of international norms or international interests. The US may try to achieve domestic goals, but those domestic goals relate to, and cannot be easily separated from, other interests under public international law. For instance, the protection of human rights and the environment is a major topic under international law

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[114] United States - The Cuban Liberty and Democratic Solidarity Act, *supra* note 101.
[115] EEC- Import Regime for Bananas, Feb. 11, 1994, GATT Doc. DS38/R, 34 I.L.M. 177 (1995).
[116] *Id.* para. 2.
[117] Helms-Burton Act, *supra* note 88, § 306(b); *United States: Statement by the President on Suspending Title III of the Helms-Burton Act*, 36 I.L.M. 216 (1997).

and is considered as a universal concern.[118] In the *Shrimp-Turtle* case, the target of protection under the Section 609 was categorized as endangered species under the CITES. In the Helms-Burton case, the Cuban government's confiscation of property owned by US nationals was recognized by the EC as constituting a violation of international law concerning nationalization and property rights of foreign nationals.[119] In such cases, extraterritorial measures have been imposed to supplement the international compliance system or to promote international legislation.[120]

This point is important in deciding the legitimacy of extraterritorial measures before the DSB since some extraterritorial measures do not relate to international norms but rather try to achieve other trade related advantages. The extraterritorial application of anti-trust law and security law can be included in this category. This defining of purposes relates to questions of legality since measures having extraterritorial application should be treated differently.[121] Legitimacy for extraterritorial measures that try to achieve international objectives is to be found in a normative order external to the trading system.[122] In debates surrounding the Helms-Burton Act, Clagett, a proponent of the Act, insisted that it could be justified on the basis of international human rights theory and that, as such, it constituted a legitimate countermeasure under international law.[123] In

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[118] In recent public international law texts chapters appear relating to "international environmental law". *See, e.g,* BROWNLIE, *supra* note 14, at 283-99.

[119] *See* Memorandum of Understanding Concerning the U.S. Helms-Burton Act and the U.S. Iran and Libya Sanctions Act, Apr. 11, 1997, E.U.-U.S., 36 I.L.M. 529 (1997); Stefaan Smis & Kim Van der Borght, Current Developments, *The EU-U.S. Compromise on the Helms-Burton and D'Amato Acts*, 93 AM. J. INT'L L.227 (1999).

[120] Francioni, *supra* note 34, at 125-26; Fairley & Currie, *supra* note 25, at 143-47.

[121] Robert Howse & Michael J. Trebilcock, *The Free Trade- Fair Trade Debate: Trade, Labor, and the Environment, in* ECONOMIC DIMENSIONS IN INTERNATIONAL LAW, *supra* note 37, at 186, 189.

[122] *Id.*

[123] Brice M. Clagett, *The Cuban Liberty and Democratic Solidarity (LIBERTAD) Act: Title III of the*

Helms-Burton Act is Consistent with International Law, 90 AM. J. INT'L L. 419, 436 (1996).

opposition to the Act, the UN GA adopted a resolution that condemned the Act as adversely affecting the legitimate interests of persons under UN member state jurisdiction and as adversely affecting the freedom of trade and navigation.[124] It also urged the US to comply with the purposes of the UN Charter embodying the principle of the sovereign equality of states and non-interference in internal affairs.[125] In its resolution, the GA is indicating that the issue relates not only to the WTO but also related to public international law. The Panel and the Appellate Body may be called upon to consider other international norms in interpreting the WTO agreements on the extraterritorial issues. In the *Shrimp-Turtle* case, the Appellate Body examined many international treaties in interpreting the scope of GATT Article XX(g).

Secondly, since claims to extraterritorial legitimacy for international interests rely largely on non-WTO law, states are more willing to appeal to the GATT Article XX and XXI exception clauses of the WTO Agreement.[126] In the *Tuna* and *Shrimp-Turtle* cases, the main arguments related to whether the US measures fell within the Article XX general exception. In the debate surrounding the Helms-Burton Act, it was argued that the US could rely on the security exception contained in GATT Article XXI.[127] Extraterritorial application is generally sought in order to impose "economic sanctions" against a state that benefits from illegitimate acts. These economic sanctions are normally pursued

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[124] *Necessity of Ending the Economic, Commercial and Financial Embargo Imposed by the United States of America against Cuba*, G.A. Res. 51/17, U.N. GAOR, 57th Sess., U.N.Doc. A/51/355 (1996). In addition, the Inter-American Juridical Committee adopted the opinion and found that the *Helms-Burton Act* violated international law. Opinion of the Inter-American Committee in response to Resolution AG/Doc. 3375/96 of the General Assembly of the Organization Entitled "Freedom of Trade and Investment in the Hemisphere," Aug. 23, 1996, OAS Doc. CJI/SO/II/doc.67/96 rev. 5, 35 I.L.M. 1329 (1996) [hereinafter Opinion of the Inter-American Juridical Committee].

[125] G.A. Res. 51/17, *supra* note 124.

[126] GATT, *supra* note 79, art. XX & XXI.

[127] Dattu & Boscariol, *supra* note 95, at 199.

through import-export controls. Therefore, a state can be aware of violating general WTO rules yet proceed with the argument available to it that its actions fall under one or other of the exceptions contained in Article XX or XXI.

This second point is important in relation to Article 31.3(c) of the Vienna Convention on the Law of Treaties. The DSB must consider the relevance of international law in interpreting exceptions clauses since the exceptions clauses form part of a crucial interface between the WTO system and other international law.[128] As for the general exceptions contained in GATT Article XX, it is necessary to examine whether any particular exception can be invoked consistently in light of other relevant international norms. In respect of the security exception, states often argued under the former GATT system that the security exception functioned as a bar to a panel review of measures taken under Article XXI.[129] However, all provisions contained in the newer WTO agreements come under the jurisdiction of the DSB otherwise specified in Appendix 2 of DSU.[130] This means that the DSB should take some account of UN Security Council resolutions relating to economic sanctions before ruling on the validity of extraterritorial measures taken by states. The legitimacy or otherwise of extraterritorial measures need to be determined pursuant to the WTO dispute settlement procedures after other relevant international law has been taken into account since states have tended to claim that their

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[128] Gabrielle Marceau, *A Call for Coherence in International Law: Praises for the Prohibition Against "Clinical Isolation" in the WTO Dispute Settlement*, 33 J. WORLD TRADE 87, 89 (1999).

[129] See the debate between Canada and the EEC over the Falkland case in 1982. GATT Council, *Minutes of Meeting held on May 7, 1982*, GATT Doc. C/M/157 (June 22, 1982).

[130] DSU "shall apply to disputes brought pursuant to the consultation and dispute settlement provisions of the agreement listed in Appendix 1." *DSU, supra note 5, art.* 1; Hannes Schloemann & Stefan Ohlhoff, *"Constitutionalization" and Dispute Settlement in the WTO National Security as an Issue of Competence*, 93 AM. J. INT'L L. 424, 440 (1999).

actions fall under one or more of the exceptions to the WTO rules.[131]

The Panel and the Appellate Body have not as yet examined the question of the legitimacy of extraterritoriality itself in any detail. The Panel in *Tuna II* did not limit the extraterritorial scope of US law nor did it state any reason for not having done so.[132] In the *Shrimp-Turtle* case, the Appellate Body noted that there was a sufficient nexus between the sea turtle and the measure complained of. This nexus approach is quite close to what is known as the "genuine link" requirement for extraterritoriality.[133] However, although the Appellate Body used other international treaties in order to assess whether sea turtles are properly categorized as exhaustible natural resources, it did not review the relevant international law on extraterritorial jurisdiction before determining under what circumstances extraterritorial application can have legitimacy under the WTO agreements. The Appellate Body simply implied that unilateral measures might be acceptable if states do not force other states to adopt "essentially the same" policies that they themselves have adopted. The DSB was not required to determine the question of extraterritoriality in the disputes that were suspended since negotiation led to compromise.

Thirdly, and perhaps most importantly, extraterritorial measures have not been specifically authorized in the process of any GATT/WTO dispute settlement. Although

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[131] Aaditya Mattoo & Petros C. Mavroidis, *Trade, Environment and the WTO: Dispute Settlement Practice Relating to Article XX of GATT* 331, *in* INTERNATIONAL TRADE LAW AND THE GATT/WTO DISPUTE SETTLEMENT SYSTEM 325 (Ernst-Ulrich Petersmann ed., 1997).

[132] Hizon argues that the extraterritorial issues arise in the GATT/WTO panels only when there is a consensus on what are the legitimate environmental standards in multilateral treaties. This argument means that the GATT/WTO does not allow extraterritorial application if there is no consensus on the subject of the law. Hizon, *supra* note 50, at 133-135.

[133] BROWNLIE, *supra* note 14, at 313. Gerber notes that if a state applies its law extraterritorially, it must have a nexus between the act to be regulated and the state. If the state does not have a legitimate nexus or genuine link, the extraterritorial measure is regarded as illegal since it interferes with the internal affairs of another state. D.J. Gerber, *Beyond Balancing: International Law Restraints on the Reach of National Laws,* 10 YALE

J. INT'L L. 202, 212 (1984).

the Appellate Body decided that the object of the US measures came within the terms of Article XX(g), it found that the US measures constituted arbitrary and unjustifiable discrimination between members contrary to the chapeau of Article XX and consequently that they were not justified under Article XX.[134] Both the Helms-Burton and Massachusetts cases were not pursued. It has been argued, however, that the relevant Acts in both cases were in violation of WTO obligations.[135] The US would almost certainly have been unable to justify the measures it had taken before the DSB.

The fact that the DSB has never attempted to place jurisdictional limits on trade measures and that it has never allowed extraterritorial measures to succeed where those measures have been disputed under the WTO system does not mean that there is no use in arguing against "extraterritorial" measures before the DSB. Nor does this mean that questions of extraterritoriality cannot be addressed by the WTO since the question of extraterritorial legitimacy needs to be examined in the context of international law in general.[136] Considering the frequent resort to the WTO dispute settlement system in handling these issues, it seems important to discuss the effectiveness and function of the WTO dispute settlement in relation to extraterritorial disputes. Criticisms of the DSB's approach to dispute settlement have been heard. The next chapter examines this criticism. It is hoped that this review will serve as a basis for further discussion later of the function and effectiveness of the DSB in determining extraterritorial disputes.

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[134] *Shrimp-Turtle AB Report*, *supra* note 77, para. 191.
[135] *See, e.g.*, Stern, *supra* note 99, at 999-1000.
[136] Mattoo & Mavroidis, *supra* note 131, at 331.

III. PROBLEMS CONCERNING WTO DISPUTE SETTLEMENT PROCEDURES

As can be observed from past disputes brought before the GATT/WTO, extraterritorial measures are often taken to achieve non-trade related goals or in the pursuit of other international interests. The justifications for these measures are often to be found outside the trading system. For instance, Part III of the Helms-Burton Act sought compensation from foreign persons who trafficked in properties the ownership of which was claimed by US nationals. The US justified this measure on grounds that the confiscation of properties owned by US nationals by the Cuban government was illegal under public international law and that the US measures were legitimate countermeasures.[137] Section 609 in the *Shrimp-Turtle* case also aimed at protecting marine mammals explicitly protected in the CITES. The adoption of "unilateral" measures that have extraterritorial effects has become one common mechanism used to encourage foreign states to comply with international law and conform to international interests.[138] As a result, criticism has been leveled at the process used by the DSB, a dispute settlement forum specifically set up to deal with disputes arising out of "trade" matters. The criticism arises from the fact that the legitimacy of the extraterritorial measures taken should be assessed after taking into account all relevant international norms yet cases to come before the GATT/WTO reflect the fact that the GATT/WTO system emphasizes trade interests over other international concerns. Criticism leveled at

[137] Clagett, *supra* note 123, at 311.
[138] Bianchi, *supra* note 32, at 89; Sarah H. Cleveland, *Norm Internationalization and U.S. Economic Sanctions*, 26 YALE J. INT'L L. 1, 4 (2001).

the DSB concerns two issues: (i) the problem of forum appropriateness and (ii) the problem of applicable law for extraterritorial disputes. These two problems are quite closely intertwined although (i) relates to the potential of other international judicial systems to do a better job while (ii) relates to the relationship between the WTO system and broader international norms.

A. Institutional Appropriateness of the WTO as a Forum for Extraterritorial Dispute Resolution

Some argue that the WTO does not provide an appropriate forum to settle disputes over extraterritorial application and that such questions should be determined before some other international forum. [139] Extraterritorial measures, which aim at enforcing international norms, create overlapping competence between the WTO and other potential dispute settlement forums. For example, the disputed extraterritorial issues at the center of the *Shrimp-Turtle* case could be dealt with under CITES arbitration procedures since sea turtles are categorized as endangered species in the CITES. Article XVIII of the CITES prescribes that:

> 1. Any dispute which may arise between two or more Parties with respect to the interpretation or application of the provisions of the present Convention shall be subject to negotiation between the Parties involved in the dispute.
> 2. If the dispute cannot be resolved in accordance with paragraph 1 of this Article, the Parties may, by mutual consent, submit the dispute to arbitration, in particular that of the Permanent Court of Arbitration at the Hague, and the Parties submitting the dispute shall

[139] Mattoo & Mavroidis, *supra* note 131, at 331. For the discussion in environment and trade context, see Jefferey L. Dunoff, *Institutional Misfits: The GATT, the ICJ & Trade-Environment Disputes*, 15 MICH. J. INT'L L. 1043, 1111-28 (1994); Richard G. Tarasofsky, *Ensuring Compatibility Between Multilateral Environmental Agreements and GATT/WTO*, 1996 Y.B. INT'L ENVTL L. 53.

be bound by the arbitral decision.[140]

This Article, therefore, requires that negotiations take place between states and that, if such negotiations fail, that states are able, with consent, to submit their remaining differences to binding arbitration in accordance with the Hague Convention for the Pacific Settlement of International Disputes.[141] It may be more appropriate for states to avail themselves of this procedure because generally arbitrators apply not only the CITES but also other relevant agreements and any other rules of international law applicable to the dispute.[142] Parties can determine the procedural arrangements, involving things such as the terms of reference and the selection of arbitrators, and they can exercise a high degree of control over the dispute resolution process.[143] Seeing to it that both environmental and trade specialists are involved in the arbitration may result in a more appropriate settlement of extraterritorial issues. Moreover, if the parties agree that an outcome based on international law would lead to an inappropriate outcome, they can instruct arbitrators to apply other standards, such as domestic standards, as occurred in the *Trail Smelter* arbitrations of 1938 and 1941. In the *Trail Smelter* arbitration, the issue of transboundary pollution had not been sufficiently developed in the domain of international law so the parties authorized the application of municipal law to the

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[140] CITES, *supra* note 74, art. 18.
[141] *Id.* art. 18:2.
[142] Stefan Ohlhoff & Hannes Schloemann, *Rational Allocation of Disputes and "Constitution": Forum Choice as an Issue of Competence*, *in* DISPUTE RESOLUTION IN THE WORLD TRADE ORGANIZATION 307-09 (James Cameron & Karen Campbell eds., 1998) [hereinafter Ohlhoff & Schloemann, *Rational Allocation of Dispute and "Constitution"*].
[143] *See, e.g.*, Declaration of the Government of the Democratic and Popular Republic of Algeria Concerning the Settlement of Claims by the Government of the United States of America and the Government of the Islamic Republic of Iran, 1981, Article III (1), 20 I.L.M. 230 (1981). For details of the arbitration, see generally J.G. MERRILLS, INTERNATIONAL DISPUTE SETTLEMENT 88-120 (3rd. ed. 1998).

dispute.[144] Merrills notes that the terms of reference in the arbitration provided an "invaluable opportunity to advance the development of international environmental law."[145] In the extraterritorial context, it would be possible for parties to guide arbitrators to use the "balance of interests" approach developed by US courts as a comity in disputes arising from concurrent jurisdiction.[146] Furthermore, extraterritorial measures are often taken because no relevant international norm yet exists or because international law lacks any effective remedy. Dolphins, at the time of the *Tuna I* dispute, were not explicitly protected in treaty regimes such as the CITES. Under such conditions, if arbitrators had been allowed to apply not only international law but also the domestic laws of nations, a valuable contribution to the development of international environmental law may have occurred. It is thus suggested that trade measures against targeted states should be premised on a prior finding by a dispute settlement body belonging to another non-trade treaty regime that the targeted state violated international law.[147] Such other dispute settlement bodies would "possess the appropriate institutional expertise and experience for determining whether … concern about the conformity of a country's environmental or labor practices to international standards is warranted."[148]

The character of, and the procedures used by, the GATT/WTO dispute settlement mechanism is relevant when considering the problem of conflict between jurisdictions

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[144] Trail Smelter Arbitration (U.S. v. Can. 1941), 3 R.I.A.A. 1905.
[145] MERRILLS, *supra* note 143, at 100.
[146] Although "Restatement (Third)" notes that the balance of interests approach is international norm, there is no case in courts of other states that utilize the approach and it is often suggested that the approach is not international law but a comity. For even though the courts of several nations employ the approach, it is not because they believe that international law requires to apply the approach. Maier, *supra* note 17, at 71-73; *but see* RESTATEMENT (THIRD), *supra* note 10, § 403.
[147] Howse & Trebilcock, *supra* note 121, at 220.
[148] *Id.*

and thus of the forum appropriateness of the WTO. As noted in the previous chapter, WTO dispute settlement procedures are activated automatically on account of the negative consensus system it has adopted.[149] This automaticity means that WTO dispute settlement proceedings possess a compulsory nature and members have a "right to a panel." A member can, within a certain period of time prescribed in the DSU, request the establishment of a Panel even if the member requested to enter into negotiations refuses to do so.[150] Panels are established unless, after deliberations, the DSB determines by consensus not to establish any such Panel.[151] A Panel is convened within 20 days of a request being made and it takes only six months (three months in cases of urgency) for a Panel to submit a report to the interested parties.[152] It has been noted that the WTO dispute settlement procedures is the "quickest worldwide system for the settlement of disputes among states."[153] The recourse to the Appellate Body is again a matter of right available to members and states are prohibited from resorting to unilateral reprisals. WTO dispute settlement procedures have the potential to exclude other forums from examining extraterritorial issues because those other forums, such as arbitration and the International Court of Justice (ICJ), do not admit adjudication by right but require the acceptance of jurisdiction by all parties and because the convening of a Panel occurs more quickly than the convening of any other alternative forum. Furthermore, there is no legal means for denying a WTO member its right to trigger DSB procedures despite the existence of alternative dispute settlement mechanisms.[154] As Petersmann notes, the legal primacy of WTO law over bilaterally agreed dispute settlement is emphasized in Article 3:5 of the

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[149] *See supra* pp. 1-2.
[150] DSU, *supra* note 5, art. 4:3.
[151] *Id.* art. 6:1.
[152] *Id.* art. 12.

DSU,[155] which prescribes that:

> All solutions to matters formally raised under the consultations and dispute settlement provisions of the covered agreements, including arbitration awards, shall be consistent with those agreements and shall not nullify or impair benefits accruing to any Member under those agreements, nor impede the attainment of any objective of those agreement. [156]

The principle of the "free choice of means" of peaceful dispute resolution under Article 33 of the UN Charter is, accordingly, limited in practice. The WTO dispute settlement procedures with their automaticity and their streamlined procedures mean that the WTO system prevails over other alternative procedures.[157] This tendency for the WTO dispute settlement of extraterritorial measures to take priority over other international forums, therefore, is set to continue and intensify despite the fact that there is no rule of international law that awards any one legal system priority over another.[158]

Criticism of the fundamental character of the WTO is generated from the fact that not only trade-related issues but also many other international economic issues are now dealt with as forming part of the WTO's sphere.[159] As noted in the introduction of this paper,

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[153] PETERSMANN, *supra* note 1, at 183.
[154] Tarasofsky, *supra* note 139, at 71.
[155] PETERSMANN, *supra* note 1, at 182.
[156] DSU, *supra* note 5, art. 3:5.
[157] MERRILLS, *supra* note 143, at 217-18; PETERSMANN, *supra* note 1, at 182. *Cf.* United Nations Convention on the Law of the Sea, Dec. 10, 1982, art. 279 & 280, 21 I.L.M. 1261 (1982) [hereinafter UNCLOS].
[158] Weiss, *supra* note 32, at 351. Brack notes that "in practice," not in theory, multilateral trading systems are more powerful and influential than are MEAs and various environmental agencies such as UN Commission on Sustainable Development since trade departments generally tend to wield greater political clout within national governments than do environmental agencies. He also notes that the existing hierarchy of international law favors in practice the MTS over MEAs, which is both unfair and undesirable. Duncan Brack, *Environmental Treaties and Trade: Multilateral Environmental Agreements and the Multilateral Trading System*, *in* TRADE, ENVIRONMENT, AND THE MILLENNIUM 271, 130-31 (Gary P. Sampson & W. Brandnee Chambers eds., 1999). Hansen notes that the kind of preference given to trade interests over environmental interests undermines the legitimacy of trade institutions especially since nothing in the GATT support such preference. Isela Hansen, *Transparency, Standards of Review, and the Use of Trade Measures to Protect the Global Environment*, 39 VA. J. INT'L L. 1017, 1046 (1999).
[159] The WTO covers non-trade issues such as technical barriers. *See, e.g.*, Agreement on Trade-Related Investment Measures, Apr. 15, 1994, WTO Agreement, Annex1A, *in* THE LEGAL TEXTS, *supra* note 2, at 121.

the WTO covers intellectual property rights, trade in services, investment, safeguards, governmental procurement, etc. as well as trade issues, and the newly formed Committee on Trade and Environment tries to reconcile tensions between trade policies and environmental protection.[160] Due to the broad sphere of influence of the WTO, the relevance of the WTO has increased as states are forced in the global era to pursue their domestic and international policies through the adoption of extraterritorial measures. Trade measures are taken not only for economic reasons but also for other non-trade related reasons. The EC in the Helms-Burton dispute complained to the DSB that immigration is fundamental to national sovereignty and that the US denial of visas as provided for in the Helms-Burton Act also influenced the flow of investment in violation of GATS.[161] The US denial of visas can be considered as a countermeasure. However, disputes arising out of immigration questions can lead to the establishment of a WTO Panel since the denial of visas affects the flow of investments and trade in services. Environmental policies, as in the *Tuna* and *Shrimp-Turtle* cases, also need to receive input from the field of economics although these two areas, the environmental and the economic, each support their own legal regimes reflecting their own scope, character and content. Some multilateral environmental treaties (METs) have provisions enabling states to take trade measures against other states that do not comply with treaty obligations.[162] These METs also incorporate restraints on trade in particular substances or products

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[160] Committee on Trade and Environment, *The Relationship between the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) and the WTO*, Oct. 13, 2000, WT/CTE/W/165, *available in* WTO Online Document Web (visited Nov. 1, 2000) <http://www.docsonline.wto.org>.

[161] United States- The Cuban Liberty and Democratic Solidarity Act, *supra* note 101.

[162] There are about 120 METs and 20 of them have provisions restricting trade in order to protect the global environment. These treaties limit the import or export of particular goods not only from members but also from non-members. *See, e.g.,* Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal, Mar. 22, 1989, art. 1, 4, &11, 28 I.L.M. 657 (1989) [hereinafter

between both parties to the treaty and between parties and non-parties.[163] MET trade measures often aim at protecting an obviously global and transboundary world environment. The Basel Convention on the Control of Transboundary Movement of Hazardous Wastes and their Disposal allows exporting states to prohibit shipments of hazardous or other wastes if those wastes will not be managed in an environmentally sound manner in the importing country.[164] The convention, therefore, deals with fundamental economic and trade matters.

Many domestic policies relating to, say, immigration and the environment, and which are often considered external to the international trading system may, nevertheless, be inconsistent with state obligations under the WTO agreements. These domestic policies may violate basic principles of the GATT and WTO agreements such as most favored nation treatment, national treatment, and elimination of quantitative restrictions.[165] The Basel Convention requires that states be distinguished on the basis of their environmental records. The recently ratified Cartagena Protocol on Biosafety, established under the framework of the United Nations Convention on Biological Diversity, also triggered debate over liberal trade and biosafety concerns since its import restrictions are

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Basel Convention].

[163] For more details on trade measures in MEAs, see Brack, *supra* note 158, at 271.

[164] *See, e.g.*, Basel Convention, *supra* note 162, art. 4.

[165] *See* GATT, *supra* note 79, art. I, III, & XI. However, it is difficult to judge for certain whether theses measures violate WTO obligations since there is no case that is brought to the DSB concerning the conflict between the MEAs and WTO agreements.

determined by importing states.[166] There is no reference in the Cartagena Protocol to the WTO agreements. The Protocol also fails to prevent decisions on import restrictions being made in an arbitrary or unjustifiably discriminatory manner. Since inconsistencies between liberal trade and other international policies may exist, the question arises as to whether the WTO is an appropriate forum for the determination of such disputes. Each international regime has its own "culture" and approach to enforcement. Environmental regimes have developed negotiation-centered mechanisms leading to consensus-based solutions, while the WTO and the DSB have adopted a more treaty-based or rule-oriented approach.[167] It is suggested, therefore, that extraterritorial measures that aim at implementing international interests should be examined in other international forums.[168] Director-General Renato Ruggiero of the WTO states that:

> In all this we must also be clear that every global issue should have its own solution. Environmental and social problems need environmental and social answers - and seeking solutions through trade rules is not a substitute. And *those solutions should be multilaterally agreed in the proper forum* – in coordination with trade rules - so that different policies can reflect common values and be mutually supportive. (Emphasis added.)[169]

This view is reasonable considering the character of the former GATT dispute settlement system that was not characterized as an "international judicial system" but was seen as a forum for "diplomacy" and "negotiation."[170] It was argued that the GATT was

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[166] The SPS Agreement, TBT Agreement, Agreement on Agriculture, and TRIPs Agreement have provisions dealing with biosafety issues. *See also* Asif H. Qureshi, *The Cartagena Protocol on Biosafety and the WTO- Co-Existence or Incoherence?,* 49 INT'L & COMP. L. Q. 835 (2000).

[167] Ohlhoff & Schloemann, *Rational Allocation of Disputes and "Constitution", supra* note 142, at 307-09.

[168] Dunoff, *supra* note 139, at 1100.

[169] Renato Ruggiero, *The Next 50 Years: Challenges and Opportunities for the Multilateral Trading System,* June 11, 1998 (visited on June 25, 2001) <http://www.wto.org/wto/speeches/hamburg.htm>.

[170] The GATT system was originally developed from an instrument of diplomacy. DAVID PALMETER & PETROS C. MAVROIDIS, DISPUTE SETTLEMENT IN THE WORLD TRADE ORGANIZATION: PRACTICE AND

not an appropriate forum for broad international legal issues. It was said that GATT was created as an instrument for diplomacy to promote flexibility in international trade relations.[171] Under such a system, a Panel could not be established without the consent of all Contracting Parties and Contracting Parties could decide the terms and conditions of any dispute resolution before the Panel. In the *Nicaragua* case (1983), the US reduced the share of its sugar imports allocated to Nicaragua. Nicaragua requested the establishment of a Panel claiming that US measures violated Article II, XI, and XIII of GATT. The US argued that "it was neither invoking any exceptions under the provisions of the General Agreement nor intending to defend its actions in GATT terms."[172] The US also argued that the measure was not taken to promote any trade policy so that the review and resolution of the issue did not fall within the ambit of GATT.[173] Since the US did not justify its act based on the national security exception under Article XXI, the Panel issued a report that the measure taken violated Article XI and XIII. The US, however, strengthened economic sanctions since it was of the opinion that it was meaningless to examine the issue as a trade one only. Nicaragua, in response to the economic sanctions, requested the establishment of another Panel. The US in response invoked the national security exception and it agreed to the establishment of a Panel on the basis that the Panel be precluded from considering the validity of the US measures under the Article XXI defense. The Panel could not examine the motivation behind the US measures that needed

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PROCEDURE 7-11(1999); Robert E. Hudec, *The GATT Legal System: A Diplomat's Jurisprudence*, *in* 2 THE WORLD TRADING SYSTEM: CRITICAL PERSPECTIVES ON THE WORLD ECONOMY 8, 21-25 (Robert Howse ed., 1998).

[171] Hudec, *supra* note 170, at 53.

[172] United States- Imports of Sugar from Nicaragua, Mar. 13, 1984, para. 3.10, GATT BISD (31st Supp.) at 67, 72 (1985).

[173] *Id.*

to be examined as relevant to the question of the legitimacy of economic sanctions from public international law. The Panel, therefore, had to conclude that the US neither complied with, nor failed to comply with, its obligations under GATT.[174]

The *Nicaragua* cases indicate that if a GATT dispute also relates to other non-GATT fields of international law (*e.g.* law concerning the legitimacy of economic sanctions) such part of the dispute can easily be removed as a substantive issue before GATT dispute settlement procedures. The Panel was only permitted to examine issues within the context of GATT. It can be concluded that the GATT dispute settlement system worked only for the maintenance of the GATT diplomatic system since it excluded non-GATT considerations from its dispute settlement procedures in order to achieve its own objectives.[175] The GATT Panel has been criticized for failing to consider a broader range of international issues.

Considering these characteristics of the GATT/WTO and conflicts that exist between international systems, it has been suggested that the ICJ may work as a superior balancing mechanism.[176] Parties before the ICJ cannot unilaterally determine the applicable law as was the case in the *Nicaragua* Panel. In the *Fisheries Jurisdiction* case, the ICJ held that:

> The Court..., as an international judicial organ, is deemed to take judicial notice of international law, and is therefore required in a case falling under Article 53 of the Statute,

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[174] United States - Trade Measures Affecting Nicaragua, Oct. 13, 1986, para. 5.3, GATT Doc. L/6053, *available in* 1986 GATTPD LEXIS 1.

[175] AKIRA KOTERA, WTO TAISEI NO HO-SEIDO [THE LEGAL STRUCTURE OF THE WTO SYSTEM] 57-59 (2000).

[176] TRADE, INVESTMENT AND THE ENVIRONMENT 129 (Halina Ward & Duncan Brack eds., 2000); Benedict Kingsbury, *Is the Proliferation of International Courts and Tribunals a Systemic Problem?,* 31 N.Y.U. J. INT'L L. & POL. 679, 693 (1999); Marceau, *supra* note 128, at 142-43. It has also been suggested that the use of advisory opinions by the ICJ is an effective way of resolving conflicts between trade and other non-trade policies such as environmental policies. Although the WTO is not an organ of the UN, recourse is possible through the Commission on Sustainable Development. *See* Tarasofsky, *supra* note 139, at 71-72.

> as in any other case, to consider on its own initiative all rules of international law which may be relevant to the settlement of the dispute. It being the duty of the Court itself to ascertain and apply the relevant law in the given circumstances of the case, the burden of establishing or providing rules of international law cannot be imposed upon any of the parties for the law lies within the judicial knowledge of the Court.[177]

According to the judgement, it is the Court that makes the final decision on the applicable law. It is thus argued that the ICJ should act and thereby earn a place for itself as a superior court in the international legal system.[178]

Procedures employed by the ICJ, however, are not without shortcomings. First, international law does not impose any obligation on states to settle disputes with other states in any international "judicial" system, including the ICJ.[179] Many international treaties have provisions for the submission of disputes concerning the interpretation and application of such treaties to the ICJ but such provisions are optional not obligatory.[180] It is up to states to exercise such options. Extraterritorial measures are often taken in order to promote the international law-making process. In those cases, states cannot rely on a treaty provision to bring a case before international judicial bodies. States, therefore, must have recourse to the ICJ pursuant to the ICJ Statute. However, the ICJ Statute requires states to agree to the submission of a dispute or accept compulsory jurisdiction. In both cases, mutual agreement between parties to a dispute is necessary in order for the court to

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[177] Fisheries Jurisdiction (U.K. v. Ice.), 1974 I.C.J. 3, 9 (para.17) (July 25).

[178] Kingsbury, *supra* note 176, at 693.

[179] U.N. Charter only prescribes an obligation of peaceful settlement of disputes and does not require the submission of disputes to the ICJ. U.N. CHARTER art. 32:1.

[180] *See, e.g.*, United Nation Convention on Environmental Impact Assessment in a Transboundary Context, Feb. 25, 1991, art.15:2, 30 I.L.M. 800 (1991) [hereinafter Espoo Convention].

> 2. When signing, ratifying, accepting, approving or acceding to this Convention, or at any time thereafter, a Party may declare in writing to the Depositary that for a dispute not resolved in accordance with paragraph 1 of this Article, it accepts one or both of the following means of dispute settlement as compulsory in relation to any Party accepting the same obligation:
> (a) Submission of the dispute to the International Court of Justice;
> (b) Arbitration in accordance with the procedure set out in Appendix VII.

have jurisdiction.[181] Although a state may consent to compulsory jurisdiction, it may place conditions on that consent. The US acceptance of compulsory jurisdiction, which was subsequently withdrawn in 1986 at the time of Nicaragua disputes, excluded the dealing with any dispute arising under multilateral treaties.[182] The settlement of disputes arising from extraterritorial issues such as these can only be examined through customary international norms. Such customary norms tend to be rudimentary. It is possible, for instance as happened in the *Shrimp-Turtle* case, to base arguments on the CITES and WTO agreements. However, if the case had been argued before the ICJ under such conditions, the same problem would have occurred as occurred with the DSB since the US measures would have been examined only through customary international norms. A dispute settlement pursued under ICJ rules would not be effective (the same can be said for the arbitration process) especially in the present situation where states hesitate to prescribe jurisdictional limits on their actions.[183]

Secondly, it is suggested that some disputes are inappropriate ones for arguing before the ICJ.[184] Some writers insist that environmental claims, which have been submitted for resolution in the GATT/WTO system, are not suited to ICJ resolution because of the technical nature of environmental problems and the unsettled character of much of the relevant international environmental law.[185]

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[181] Statute of the International Court of Justice, June 26, 1945, art. 36:2 (entered into force Oct. 24, 1945) [hereinafter ICJ Statute].
[182] The two exceptions to this clause were when "all parties to the treaty affected by the decision are also parties to the case before the Court" or when the U.S. "specially agrees to jurisdiction."
[183] Bianchi, *supra* note 32, at 82.
[184] In the past, this argument has arisen in the field of legal and political disputes. *See, e.g.,* United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran), 1980 I.C.J. 3, 19 (final judgment on the merits, May 24); MERRILLS, *supra* note 143, at 155-59.
[185] Ahn, *supra* note 87, at 823-24.

In conclusion, it can be said that the problem of forum appropriateness exists not only in the context of the WTO but exists also in the context of other international judicial systems including the ICJ's general jurisdiction. Those who would criticize the WTO as an inappropriate forum for the determination of certain claims seem unable, as things stand, to come up with a more suitable alternative forum. It seems preferable to persevere with the compulsory DSB system for the handling of extraterritorial disputes than to be left with no such forum at all.[186]

B. The Problem of Applicable Law for Disputes over Extraterritorial Application before the WTO DSB

A second problem relates to the applicable law for extraterritorial disputes and the relationship between public international law and the WTO. As noted above, WTO policies and decisions impact on many non-trade issues. The DSB, as also noted above, is the most jurisdictionally accessible forum before which states are able to bring extraterritorial issues. In extraterritorial disputes, arguments relate not only to international economic norms, such as the GATT and WTO agreements, but also to public international law principles relevant to the environment, human rights and to the legitimacy of any countermeasures taken. Given that other forums or dispute settlement mechanisms are less accessible than the DSB, it is important to consider just *how* the WTO DSB should approach and consider legitimate interests external to the WTO system.

[186] There are also another proposal to create new international forum for the coordination of trade and the environment although this idea has not been explored in any detail. Brack, *supra* note 158, at 130; Dunoff, *supra* note 139, at 1111.

The most crucial issue here, perhaps, is whether extraterritorial measures should be considered "legitimate" in light of applicable international law.[187] Extraterritorial questions argued before the GATT/WTO have been found not to have been authorized under GATT Article XX. The underlying interests behind extraterritorial measures have been ignored. The DSB has referred to the WTO agreements only when deciding upon the legitimacy of extraterritorial measures taken.

It is crucial to examine the relationship between non-WTO law and the WTO "trading" system in order to find a way forward in disputes over extraterritorial application. Given that the WTO is established by "treaty," the Panel and the Appellate Body of the WTO can only deal with issues that are prescribed in the WTO agreements.[188] According to Article 3:4 of the DSU, recommendations or rulings made by the DSB "shall be aimed at achieving a satisfactory settlement of the matter in accordance with the rights and obligations under this Understanding and under the covered agreements."[189] All determinations reached by the DSB shall not nullify or impair the benefits of Member states under the WTO agreements nor impede the attainment of any objectives of the Agreements.[190] It therefore seems, according to the above Articles, the Panels and Appellate Body cannot apply non-WTO international law in determining the legitimacy of trade measures brought before them. The Panel in *Tuna II* found that environmental treaties cited by the parties "were not relevant as a primary

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[187] Mattoo & Mavroidis, *supra* note 131, at 331.
[188] This view is represented by the position that the WTO is not a court of general international law jurisdiction. KOTERA, *supra* note 175, at 53-54 (2000); PALMETER & MAVROIDIS, *supra* note 170, at 52-59; Marceau, *supra* note 128, at 109-115.
[189] DSU, *supra* note 5, art. 3:4.
[190] *Id.* art. 3:5

means of interpretation of the text of the General Agreement."[191] It then concluded that those treaties were not relevant as a supplementary means of interpretation of GATT since they were not concluded within the context of the GATT.[192] At the same time, however, the DSU did not relate to the competence of the Panel and the Appellate Body to interpret external international norms.[193] Australia has noted, in proceedings of the Committee of Trade and Environment of the WTO, that it was not within the competence of the WTO to interpret provisions of other international agreements.[194] In the *EC-Regime for the Importation, Sale and Distribution of Bananas*, the Appellate Body noted that it was not empowered to interpret international agreements other than the WTO agreements although it would possess such a power if such other agreements could be considered part of WTO law.[195] This position is affirmed as well in *the EC- Measures Affecting the Importation of Certain Poultry Products* in which the Appellate Body held that a tariff agreement between two WTO members did not constitute WTO law and, therefore, could not be put as part of a submission to a Panel.[196]

On this point, it is necessary to examine the nature of the WTO as an international organization and to examine the question of whether the WTO constitutes a "self-contained regime" separate from other fields of international law. A "self-contained

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[191] *Tuna II Panel Report*, *supra* note 69, para. 5.19.
[192] *Id.* paras. 5.19-20.
[193] PETERSMANN, *supra* note 1, at 134.
[194] Committee on Trade and Environment, *Reports of Meeting held on 6 April 1995*, para. 77-78, WT/CTE/M/2 (May 8, 1995), *available in* WTO Online Document Website (visited Dec. 8, 2000) <http://www.docsoline.wto.org>.
[195] EC- Regime for the Importation, Sale and Distribution of Bananas, Sep. 9, 1997, paras. 101-167, WT/DS27/AB/R, *available in* WTO Dispute Settlement Website (visited Jan. 20, 2000) <http://www.wto.org/wto/dispute/distab.htm>.
[196] EC - Measures Affecting the Importation of Certain Poultry Products, July 23, 1998, para. 81, WT/DS69/AB/R, *available in* WTO Dispute Settlement Website (visited Jan. 20, 2000) <http://www.wto.org/wto/dispute/distab.htm>.

regime" is here defined as a regime that is equipped with countermeasures against particular international illegal acts and that, therefore, removes the general legal consequences of such acts from impact of general international law. The notion of a "self-contained regime" first appeared in the ICJ in the *Case Concerning US Diplomatic and Consular Staff in Teheran*. In this case, the ICJ held that "the rules of diplomatic law... constitute a self-contained regime which, on the one hand, lays down the receiving State's obligations regarding the facilities, privileges and immunities to be accorded to diplomatic missions and, on the one hand, foresees their possible abuse by members of the mission and specifies the means at the disposal of the receiving State to counter any such abuse. These means are, by their nature, entirely efficacious..."[197] The ICJ then continued that diplomatic law itself provides the necessary means of defense against, and sanction for, the illicit activities of diplomatic or consular missions.[198]

The question of whether the GATT/WTO system is a "self-contained" regime[199] or whether it allows other dispute settlement systems to play a part in the settlement of disputes relating to GATT and WTO agreements has often been debated.[200] It has also been questioned whether the WTO DSB can properly deal with broad international issues such as environmental ones. No provision exists in GATT/WTO law for an appeal to the ICJ.[201] Kotera suggests that the GATT/WTO system constitutes an international "regime"

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[197] *Case Concerning United States Diplomatic Consular Staff in Tehran*, 1980 I.C.J. para. 86.
[198] *Id.*
[199] *Third Report on State Responsibility, by Mr. Gaetano Arangio-Ruiz, Special Rapporteur,* [1991] 2 Y.B. Int'l L. Comm'n 25-26, para. 84-88; *Fourth Report on State Responsibility by Mr. Gaetano Arangio-Ruiz, Special Rapporteur*, [1992] 2 Y.B. Int'l L. Comm'n 35-42, para. 97-125.
[200] *Id.*; P.J. Kuyper, *The Law of GATT as a Special Field of International Law*, 1994 NETH.Y.B. INT'L L.227.
[201] Many multilateral and bilateral treaties provide for the ICJ to function as the body to hear disputes arising out of such treaty. For instance, the Espoo Convention relating to environmental impact assessments requires states to accept the compulsory jurisdiction of the ICJ. Espoo Convention, *supra* note 180, art. 2 (a).

that tries to achieve common international trade objectives and that it is important to limit the application of non-GATT/WTO law and international law in order to achieve those objectives.[202]

Is the WTO system "closed" from other international norms if we assume it as to be a "regime"? If one assumes the WTO to be a regime, the WTO dispute settlement system needs to limit the application of other external international norms as Kotera notes.[203] In addition, the DSU seeks to limit the competence of the WTO dispute settlement system. Article 3:2 of the DSU states that the purpose of dispute settlement undertaken pursuant to the WTO is the preservation of rights and obligations of Members under the WTO agreements.[204] It further provides that "[r]ecommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements." Article 7 of the DSU also prescribes the terms of reference for the Panel:

> Panels shall have the following terms of reference unless the parties to the dispute agree otherwise within 20 days from the establishment of the panel:
>
> > "To examine, in the light of the relevant provisions in (name of the covered agreement(s) cited by the parties to the dispute), the matter referred to the DSB by (name of party) in document ... and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in that/those agreement(s)."[205]

Accordingly, only relevant provisions of WTO agreements can be part of any submission to a panel because the words "in the light of the relevant provisions" in the WTO agreements mean that the WTO is supposed to directly apply WTO law only.[206]

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[202] KOTERA, *supra* note 175, at 175.
[203] *Id.*
[204] DSU, *supra* note 5, art. 3:2.
[205] *Id.* art. 7:1.
[206] Joel P. Trachtman, *The Domain of WTO Dispute Resolution*, 40 HARV. INT'L L. J. 333, 343 (1999)

Does the WTO system operate as an exclusive system separate from the rules and norms of public international law? The WTO dispute settlement system continues to be influenced by its predecessor the GATT. States cannot preclude a Panel from examining and interpreting other fields of international law. All issues that relate to the WTO agreements may be argued before a Panel or Appellate Body and a state cannot unilaterally determine which issues are to be considered by the Panel as the US attempted to do in the *Nicaragua* case.[207] Therefore, much opportunity exists for the discussion of broad international legal issues before the WTO DSB.

The WTO is not an organization separate from public international law. The structures and agreements that establish the WTO closely resemble those of other international organizations.[208] The WTO is an international organization with the status of other international organizations such as the UN or International Labor Organization. The Appellate Body itself acknowledged in the *US- Standards for Reformulated and Conventional Gasoline* case that the WTO is not independent from the wider body international laws.[209]

[hereinafter Trachtman, *The Domain of WTO Dispute Resolution*]. Mattoo and Mavroidis offer another interpretation for Article 7 of the DSU, explaining that the inclusion of the phrase "unless the parties to the dispute agree otherwise" leaves open the possibility of invoking provisions of external international treaties. However, they argue that actual interpretation of treaties depends on Article 3:2 of the DSU and the Vienna Convention on the Law of Treaties. Mattoo & Mavroidis, *supra* note 131, at 333. Palmeter and Mavroidis argue that Article 7 together with Article 3:2 of the DSU achieve the character of Article 38 (1) of the Statute of the International Court of Justice which prescribes the law applicable to the ICJ. PALMETER & MAVROIDIS, *supra* note 170, at 35-37.

[207] *See supra* pp. 46-47.

[208] Unlike the GATT, the WTO is an international organization that is established by treaty and has legal personality. WTO Agreement, *supra* note 1, art. 1. In addition, the establishment of the WTO as an international organization contributes to the creation, within the WTO, of a rule-oriented system or rule of law. PETERSMANN, *supra* note 1, at 44-57

[209] United States - Standards for Reformulated and Conventional Gasoline, Apr. 29, 1996, at 17, WT/DS2/AB/R, *available in* WTO Dispute Settlement Website (visited Sep. 4, 1999) <http://www.wto.org/wto/dispute/distab.htm> [hereinafter *U.S. Gasoline AB Report*].

Having the status of a legal personality (*i.e.* to have the status of an international organization) necessarily implies that, according to public international law principles, the WTO is subject to international law.[210] Recognized as an international organization, the WTO gains immunity status based on principles of international law. This fact also supports the conclusion that the WTO is subject to the application of wider public international law. However, what needs to be examined here is how the WTO incorporates, or relates to, other international norms.

The Appellate Body has stated in the *Gasoline* case, which considered the question of whether US environmental measures could be exempted from WTO obligations according to GATT Article XX, that the WTO agreements cannot be read or interpreted in clinical isolation from public international law.[211] The WTO directly or indirectly incorporates many rules of public international law into its agreements. The WTO and the DSB incorporate international norms when interpreting their agreements or when performing their dispute settlement functions.

First, in the preamble to the WTO Agreement, the words "sustainable development" appear. The concept of sustainable development has been the focus of much attention in many environmental treaties and is now assumed to be a fundamental principle of international environmental law. Principle 1 of the Rio Declaration prescribes that: "human beings are at the center of concerns for sustainable development."[212] Principle 4 prescribes that "in order to achieve sustainable development, environmental protection shall constitute an integral part of the development process and cannot be considered in

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[210] KOTERA, *supra* note 175, at 24-27.
[211] *U.S. Gasoline AB Report*, *supra* note 209, at 17.
[212] Rio Declaration, *supra* note 51, Principle 1.

isolation from it."[213] The Rio Declaration is now recognized as manifesting customary international law and the concept of sustainable development is situated as "a candidate emergent principle of general international law."[214] This means that, although the WTO is specialized in the field of trade, it incorporates the concerns of international law on environmental and developmental issues as a major part of the WTO system.[215]

Second, the TRIPs Agreement, which prescribes trade-related aspects of intellectual property, incorporates provisions of other international treaties, such as the Paris Convention (1967), the Berne Convention (1971), the Rome Convention, and the Treaty on Intellectual Property in Respect of Integrated Circuits. The Paris Convention and the Berne Convention are the main international intellectual property treaties and they both contain National Treatment and Most Favored Nation principles. The Paris and Berne Conventions established a system prior to the establishment of the WTO. The WTO then later introduced elements of this pre-existing system. Article 2, for example, of the TRIPs Agreement states that: "in respect of Parts II, III and IV of this Agreement, Members shall comply with Article 1 through 12, and Article 19 of the Paris Convention (1967)."[216] These treaties, far from being replaced, continue to operate under the supervision of World Intellectual Properties Organization.

In addition to substantive aspects, procedural principles of public international law were introduced into the dispute settlement process. The most important example of this

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[213] *Id.* Principle 4.

[214] Brownlie takes this position but he also assumes that this concept remains problematic and nebulous and cannot use as a principle to solve disputes over environment. BROWNLIE, *supra* note 14, at 287.

[215] Many scholars argue that this indicates the incorporation of environmental concerns in the general exceptions more profoundly. Marceau, *supra* note 128, at 108-09.

[216] TRIPs Agreement, *supra* note 3, art. 2.

is Article 3:2 of the DSU, which provides that the WTO agreements shall be examined in accordance with customary rules of interpretation formulated in accordance with public international law.[217] The Appellate Body considerations in *Gasoline* and *Japan- Taxes on Alcoholic Beverages* indicate that Articles 31 and 32 of the Vienna Convention on the Law of Treaties constituted customary rules of interpretation.[218] Article 31 prescribes the general rules of interpretation and Article 32 outlines other supplementary means of interpretation.[219] In particular, Article 31:3(c) is important in understanding the relevance of public international law to the WTO system. Article 31:3(c) states that as a rule of interpretation, "any relevant rules of international law applicable in the relations between the parties" shall be taken into account together with the context of the relevant treaty.[220] Does this call for a clarification of the meaning of WTO rules in a manner consistent with multilateral treaties and customary international law and with the consent of both parties

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[217] DSU, *supra* note 5, art. 3.2.

[218] *U.S. Gasoline AB Report*, *supra* note 209, at 17; Japan- Taxes on Alcoholic Beverage, Oct. 4, 1996, para. D, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, *available in* WTO Dispute Settlement Website (visited Sep. 4, 1999) <http://www.wto.org/wto/dispute/distab.htm>.

[219] Article 31 of the Vienna Convention states;

> Article 31 General rule of interpretation
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> 1 A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose
>
> 2 The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
>
> (a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;
>
> (b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty
>
> 3 There shall be taken into account together with the context:
>
> (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
>
> (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
>
> (c) any relevant rules of international law applicable in the relations between the parties
>
> 4 A special meaning shall be given to a term if it is established that the parties so intended.

Vienna Convention on the Law of the Treaties, May 23, 1969, art. 31, 1155 U.N.T.S. 340.

[220] *Id.* art. 31.3(c).

to the dispute?[221] The answer to this question seems to be yes since the Appellate Body in the *Shrimp-Turtle* case examined many international treaties that were not directly covered in the WTO agreements in order to clarify the meaning of the words "exhaustible natural resources" as used in Article XX (g).[222] The Appellate Body held that this article must be interpreted in the light of "contemporary concerns of *the community of nations* about the protection and conservation of the environment" (emphasis added).[223] It then examined the UNCLOS, the Convention on Biological Diversity and the CITES.

In *EC- Measures Concerning Meat and Meat Products* (*Hormones*), however, the Appellate Body rejected the application of a precautionary principle as a relevant international norm for the interpretation of WTO agreements. The EC argued that to interpret Articles 5.1 and 5.2 of the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement) relating to the assessment of risks, the precautionary principle should be used as a customary rule of interpretation of public international law.[224] The Appellate Body, however, stated that the status of the precautionary principle was still a subject of debate within international law and it had not yet acquired the status of customary international law even though it might have become a rule of international environmental law.[225] It refused to use the precautionary principle in the interpretation of the SPS Agreement. It is argued that the refusal to use the precautionary principle in *Hormones* is inconsistent with Article 31.3(c) of the Vienna

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[221] PETERSMANN, *supra* note 1, at 120.
[222] *Shrimp-Turtle AB Report*, *supra* note 77, para. 129.
[223] *Id.*
[224] EC- Measures Concerning Meat and Meat Products (Hormones), Jan. 16, 1998, para. 123, WT/DS/26/AB/R, WT/DS48/AB/R, *available in* WTO Dispute Settlement Website (visited Jan. 20, 2000) <http://www.wto.org/wto/dispute/distab.htm> [hereinafter *Hormones AB Report*].
[225] *Id.* para.123

Convention and with Article 3:2 of the DSU.[226] Trebilcock and Howse note that the dynamic approach of the *Shrimp-Turtle* case, which recognized that developments in international environmental law were relevant to the interpretation of GATT, is clearly consistent with Article 31 of the Vienna Convention, which is now assumed to form part of WTO legal regime.[227]

Although both the *Hormones* and *Shrimp-Turtle* reports were adopted in 1998, their approaches to the interpretation of external international norms differ. First, the main focus of *Hormones* related to the interpretation and application of WTO agreements, the SPS Agreement, while *Shrimp-Turtle* was concerned with the question of whether the US measures could be exempted from WTO obligations under Article XX of the GATT. The general exceptions contained in Article XX and the security exceptions contained in Article XXI form a crucial interface between the WTO system and other important policy objectives.[228] Trachtman suggests that substantive non-WTO law may be indirectly incorporated by reference to provisions such as Article XX of the GATT.[229] Kotera notes that these exception clauses help put non-WTO law matters outside the ambit of the WTO and that this works to keep the character of the WTO regime supported by common interests.[230] This indicates that the exception clauses clearly limit the scope of the WTO and the jurisdiction of the DSB and link the WTO to the wider international legal system.

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[226] For example, Palmeter and Mavroidis criticize the report stating that "it is not clear from the opinion what the consequences would be if, in the view of the Appellate Body, the principle had been accepted as part of customary international environmental law but not of international law generally." PALMETER & MAVROIDIS, *supra* note 170, at 48-49.

[227] MICHAEL J. TREBILCOCK & ROBERT HOWSE, THE REGULATION OF INTERNATIONAL TRADE 74-75 (2nd ed. 1999).

[228] KOTERA, *supra* note 175, at 176; Marceau, *supra* note 128, at 89.

[229] Trachtman, *The Domain of WTO Dispute Resolution, supra* note 206, at 343.

[230] Kotera notes that another way of supporting a regime is to admit or incorporate other fields into its regime, such as the SPS agreement and TBT agreement. KOTERA, *supra* note 175, at 176-78.

Article XXI (c) prescribes the relationship between the UN and the WTO whereby member states are allowed to adopt economic measures inconsistent with WTO obligations if those measures are consistent with obligations under the UN Charter. Therefore, an examination of the relationship between the WTO exception clauses and public international law is vital, while in other areas the WTO must comply with the WTO agreements and preserve the rights and obligations of Members under the Agreements as prescribed by the DSU.[231] Secondly, it is difficult to apply newly emerged customary international norms to WTO dispute settlement procedures. The Panel and the Appellate Body are not empowered to discover or judge external international norms as part of the DSU process.[232] When the Appellate Body examined international treaties in *Shrimp-Turtle*, it did not directly apply the treaties themselves but applied them indirectly as interpretive materials that must be used by the DSB when enforcing other WTO obligations.[233] International treaties could be used to assist in analyzing the circumstances behind a dispute.[234] On the other hand, the Appellate Body in the *Hormones* case followed the approach of the ICJ in the *Gabcikobo-Nagymaros Project* case. In that latter case, the ICJ did not examine evidence contained in an environmental impact assessment from the standpoint of the precautionary principle even though one party sought such an examination.[235] If a non-WTO treaty relates to particular provisions of the WTO agreements as in *Shrimp-Turtle*, the Panel and the Appellate Body need not decide on other wider international law questions. Given that the WTO is not a judicial

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[231] Trachtman, *The Domain of WTO Dispute Resolution, supra* note 206, at 343; DSU, *supra* note 5, art. 3:2.
[232] PETERSMANN, *supra* note 1, at 134.
[233] Marceau, *supra* note 128, at 112.
[234] *Id.* at 133.

organ in the strict sense[236] nor a court of general jurisdiction, the application of debatable principles (such as the precautionary principle) to general international law may hinder not only the operations of the WTO dispute settlement system but also those of international law.[237]

The WTO can be considered rather flexible with respect to disputes over extraterritorial application when compared with a self-contained regime that does not allow for the use of other dispute settlement procedures to assist in the resolution of disputes. WTO Members are prohibited from taking unilateral actions or countermeasures according to the DSU and any such measures must be accordance with the rules and procedures of the DSU. Article 23 of the DSU prescribes that a unilateral determination that a violation has occurred, or that the attainment of any covered agreements has been impeded, cannot be made by a Member and that Members have recourse to dispute settlement procedures in accordance with the DSU.[238] However, in the Helms-Burton case, the EC, Canada, and Mexico enacted blocking statutes as "countermeasures" against US extraterritorial application before requesting the convening of a Panel. Mexico considered the extraterritorial measures of the Helms-Burton Act "intolerable aggression to the sovereignty of nations." It enacted a blocking statute that prohibited persons from engaging in "acts that affect trade or investment when the said acts are the consequence of the extraterritorial effects of foreign statutes."[239] It also introduced a "claw-back" clause

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[235] Gabcikobo-Nagymaros Project (Slov. v. Hung.), 1997 I.C.J. 1, para. 29-58 (Sep. 25).
[236] Romano, *supra* note 9, at 713-20.
[237] United States and Canada argued that the precautionary principle is not crystallized as international customary principle. *Hormones AB Report*, *supra* note 224, para. 43 & 60.
[238] DSU, *supra* note 5, art. 23:2 (a).
[239] "Ley de Proteccion al Comercio y la Incersion de Normas Extranjeras que Contravengan el Derecho Internacional," art. 1, D.O., 23 de octubre de 1996 (Mex.), *translated in* 36 I.L.M. 145 (1997)

and granted persons affected by foreign extraterritorial measures the right to sue the person who filed the suit in a foreign country for the recovery of damages.[240] These blocking statutes tried to nullify the extraterritorial effects of the Helms-Burton Act and constituted countermeasures under general international law. However, the blocking statutes were not based on WTO rules. Nor did Mexico and the EC suspend these measures while requesting the issue to be dealt with by the WTO. It can be inferred that the WTO is not a closed system operating in isolation from wider international law.[241]

The WTO system is not a closed system but rather directly and indirectly incorporates many aspects of international law. It is true that the WTO cannot exceed its own powers derived from the WTO agreements and that the WTO is not a court of general jurisdiction.[242] Furthermore, as the WTO is not an organ of the UN, the checking of its institutional power through means such as the use of an advisory opinion of the ICJ is limited.[243] The automaticity of DSB procedures precludes political checks upon its dispute settlement procedures. Once a Council decision is reached no body exists that is able to examine whether that decision is *ultra virus* or in some other way defective. The Panel and the Appellate Body should balance rights and obligations under the WTO agreements to ensure that the legitimacy of the system under which they operate is maintained.[244]

[hereinafter "Ley de Proteccion"].

[240] *Id.* art. 5.

[241] Rene Browne, Notes, *Revising "National Security" in an Interdependent World: The GATT Article XXI Defense After Helms-Burton*, 86 GEO. L. J. 405, 428-30 (1997) (discussing the relationship between blocking statutes and the WTO DSB).

[242] Marceau, *supra* note 128, at 109-115. Many Japanese scholars also take the position that the WTO is not a organization to manage all economic issues and that the WTO cannot take general international law in its dispute settlement system. *See, e.g.*, IWASAWA, *supra* note 112, at 99.

[243] ICJ Statute, *supra* note 181, art.65:1.

[244] For the discussion on the legitimacy of international legal system, see generally THOMAS FRANCK,

However, possibilities exist for the WTO to examine the "substantive" and "procedural" norms of international law outside of the WTO agreements. First, it can examine the norms that the WTO agreements incorporate directly, such as customary rules of interpretation and the Berne Convention. Secondly, general exceptions (GATT Article XX) and security exceptions (GATT Article XXI) allow the WTO DSB to examine other international norms. These exception clauses function to limit the jurisdiction of the WTO and to link the WTO system to other international norms.[245] The importance of international law in the Appellate Body interpretation of Article XX was significant in *Shrimp-Turtle*. Public international law can be used to assist in the interpretation of the WTO agreements especially in the relation to Article XX and XXI of GATT. However, public international law is not, in itself, the law to be directly applied. As Trachtman states, Article 31.3(c) of the Vienna Convention only "indicates" what materials should be taken into account in interpreting a treaty and does not indicate anything concerning the direct application of international law. [246] Although the WTO cannot apply non-WTO law directly it is not, however, a system closed and separate from public international law since it opens the door to other international systems by way of exception clauses and, in the case of extraterritorial measures, by allowing non-WTO countermeasures such as blocking statutes. The next chapter will examine how the WTO contributes to the resolution of extraterritorial disputes and how effective that contribution is in international legal system.

FAIRNESS IN INTERNATIONAL LAW AND INSTITUTIONS (1998).

[245] Marceau, *supra* note 128, at 89.

[246] *Id.*; Trachtman, *The Domain of WTO Dispute Resolution*, *supra* note 206, at 343.

IV. The Effectiveness and Function of WTO Dispute Settlement Procedures in the Case of Disputes over Extraterritorial Application

A. Effectiveness of WTO Dispute Settlement Procedures in Extraterritorial Disputes

The extraterritorial application of law is assumed to result from a "unilateral measure" since it does not respect "reciprocity" that is the basis of public international law.[247] Unilateral measures often seek to achieve certain goals in international society or challenge "gray zones" in international law. The objectives often sought by unilateral measures fundamentally lie in non-WTO law. States are attracted to take unilateral extraterritorial measures since consensus takes time to achieve in international law.[248] A lack of alternative substantive law triggers extraterritorial measures as the Director General of the WTO has noted.[249] States affected by such measures often claim that such measures are not acceptable and that they should be withdrawn. Dispute resolution concerning such measures, therefore, involves clarifying the rules applicable to the measure or in seeing to it that the measure is rescinded.

Is the WTO DSB an effective forum before which to undertake an examination and resolution of disputes arising from such unilateral extraterritorial acts? This is an important issue since it is difficult for states to have access to other judicial organs or forums in terms of jurisdiction as discussed in the previous chapter.

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[247] General Council, *Unilateral Trade Measures by States (Communication from India)*, Dec. 16, 1998, WT/GC/W/123, *available in* WTO Online Document Website (visited Aug. 1, 2001) <http://www.docsonline.wto.org>.
[248] Bianchi, *supra* note 32, at 88.
[249] Ruggiero, *supra* note 169.

Disputes over extraterritorial measures have hitherto not been argued in international judicial (or quasi-judicial) proceedings except within the GATT/WTO framework. States have taken several steps in order to block the adverse effects of extraterritorial measures and to ease the tension created by them.

First, affected states protest through diplomatic channels against the offending extraterritorial measures, alleging violation of international law. Diplomatic protests are unilateral expressions of complaints against actions taken by other states and have the character of civil complaints filed in private litigation.[250] Reacting to the Helms-Burton Act, the EC Commission Vice-President Sir Leon Brittan expressed the EC's opposition to the US Department of State claiming that the right of recourse to civil action under the Act would seriously interfere with EC interests and stating that the EC would seek to protect its interests under the WTO.[251] A lack of diplomatic protest is considered as indicating acquiescence to extraterritorial application.[252]

States also bring extraterritorial issues before international and regional political forums. The Juridical Committee of the Organization of American States stated its opposition to the Helms-Burton Act, noting that the exercise of jurisdiction over acts of "trafficking in confiscated property" did not conform to international norms.[253] The Committee pointed out that the act of "trafficking" did not have any connection with US territory nor with the protection of its essential sovereign interests.[254] The UN GA also

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[250] THOMAS R. VAN DERVORT, INTERNATIONAL LAW AND ORGANIZATION: AN INTRODUCTION 465 (1998).
[251] Letter dated 15 March 1995 from the Vice-President of the Commission of the EC to U.S. Secretary of State, *reprinted in* 35 I.L.M. 399 (1996).
[252] Bianchi, *supra* note 32, at 88 note 240.
[253] Opinion of the Inter-American Juridical Committee, *supra* note 124, para. 9.
[254] *Id.*

adopted a resolution in November 1995 urging the US to take the necessary steps to repeal the legislation.[255] However, neither the opinion nor the resolution is of binding effect. Such actions by international organizations merely present the position of states against extraterritorial measures.

Secondly, when affected states fail to force states to withdraw extraterritorial measures through diplomatic protest or through the acts of international organizations, they often enact blocking statutes to eliminate the impact of extraterritorial measures on their domestic policies. Canada, Mexico and the EC amended or enacted blocking statutes in order to protect their domestic policies after diplomatic actions failed in disputes over the Helms-Burton and D'Amato-Kennedy Acts.[256] Blocking statutes are considered ways of enforcing the non-interference principle.[257] The Chamber of Senators of Mexico asserted, when it enacted a blocking statute against both Acts in 1996, that the extraterritorial application of laws such as contained in the Helms-Burton Act constituted an "intolerable aggression to the sovereignty of nations."[258]

Blocking statutes have common structures. For example, the Canadian blocking statute, the Foreign Extraterritorial Measures Act, forbids compliance of Canadians with US extraterritorial measures.[259] If the Attorney General finds that any foreign judgement significantly affects Canadian trading interests and infringes Canadian sovereignty and

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[255] G.A. Res. 50/10, U.N. GAOR, 50th Sess., U.N. Doc. A/50/L.10 (1995), 35 I.L.M. 483 (1996).
[256] Council Regulation 2271/96, *supra* note 30; Foreign Extraterritorial Measures Act as amended by Bill C-54 (1996)(Can.), 36 I.L.M. 117 (1997)[hereinafter FEMA]; "Ley de Proteccion," *supra* note 239.
[257] Gerber, *supra* note 133, at 219.
[258] Senado de Republica, *Comisiones Unidas de Relaciones Exteriores; Comercio; Fomento Industrial y Estudios Legislativos*, Cuarta Seccion, 2-3 (Sep. 18, 1996), *translated in* 36 I.L.M. 133 (1997).
[259] FEMA, *supra* note 256, § 5.

that, therefore, the enforcement of such foreign judgement should be blocked in Canadian courts, the Canadian defendant to such foreign action has the right to sue in a Canadian court to recover an equivalent amount of damages against the person who took action in the foreign court.[260] Even if a final judgement has not been entered against a Canadian defendant, that defendant is permitted to institute proceedings against the "Helms-Burton plaintiff."[261] This so-called "claw-back" clause has often been used in extreme circumstances to block the adverse effects of extraterritorial measures. The EC and Mexico also possess similar provisions and claw-back clauses in order to block the adverse effects of similar extraterritorial measures on their domestic policies.[262]

Thirdly, states that try to apply law extraterritorially can adopt the "balance of interests" approach developed by US jurisprudence.[263] This approach means that when domestic courts or executive branches believe it unreasonable to apply law extraterritorially, they should refrain from extending jurisdiction over a person or activity having connection with another state. Reasonableness is determined by evaluating several factors and "Restatement (Third)" embodies such factors. According to Section 403 (2) of "Restatement (Third)," the reasonableness of extraterritorial application needs to be examined by reference to all of the following relevant factors:

> (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, or economic activity, between the

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[260] FEMA originally had a clawback provision for anti-trust and competition law but it was amended in order to cover the Helms-Burton Act. *Id.* § 8 & 9.
[261] *Id.* § 9 (1.1)
[262] Council Regulation 2271/96, *supra* note 30, art. 6; "Ley de Proteccion", *supra* note 166, art. 5.
[263] *See, e.g.*, Timbrelane Lumber Co. v. Bank of America, 549 F.2d. 597 (9th Cir. 1976); Mannington Mills v. Congoleum Corp., 595 F2d. 1287 (3d Cir. 1979).

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.[264]

Paragraphs (a) and (b) require the examination of territorial and national links with the state and paragraphs (e) – (h) describe the manner in which the needs of the international system are important in considering the nature of extraterritorial measures.[265] Even if a state seems to be justified on the basis of one criterion it should not extend jurisdiction over another state when that other state's interest is greater after considering all the above factors. "Restatement (Third)" adopts this approach as a principle of international law.[266]

However, these actions have not contributed to the resolution of extraterritorial disputes and do not offer rule-based protection from the intrusion of policies adopted by foreign states. These actions are all "unilateral" in nature. Diplomatic protests and blocking statutes are mere declarations of the position adopted by states against extraterritorial measures and are assumed to be conduct resisting acquiescence to the application of extraterritorial measures. They have the character of civil complaints filed in private litigation.[267] Diplomatic protests and blocking statutes are expressions of the non-interference principle and can only provide the legal context within which the many

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[264] RESTATEMENT (THIRD), *supra* note 10, § 403.
[265] Harold G. Maier, *Extraterritorial Jurisdiction at a Crossroads: An Intersection Between Public and Private International Law*, 76 AM. J. INT'L L. 280, 302 (1982). *See also* Jens van den Brink, *Helms-Burton: Extending the Limits of US Jurisdiction*, 64 NETH. INT'L L. REV. 131, 143 (1997).
[266] RESTATEMENT (THIRD), *supra* note 10, § 403 cmt. a.

factors alluded to above have to be assessed.[268] Blocking statutes aim at protecting "the interests of the affected state" from the interference of disguised extraterritorial measures taken by other states, and do not overcome the underlying concerns that surround extraterritorial measures including the lack of international law on the issue. Affected states, therefore, also submit questions to international forums such as the WTO. The tension caused by the extraterritorial application of laws continues. After enacting a blocking statute against the Helms-Burton Act, the EC pursued settlement before the DSB although it earlier suspended the proceedings in an attempt to reach a consensus on the issue with the US.[269] Blocking statutes are seen as reprisals against extraterritorial measures and they can be seen as a unilateral effort by states to defend their interests formerly protected by international law (*e.g.* by the non-interference principle and by the WTO agreements), and to regain a balance between the interests of the affected states and the extraterritorial states.[270]

Several questions arise concerning the effectiveness of blocking statutes. Given the public policies embodied in extraterritorial measures, it is questionable whether the courts of the state taking the original extraterritorial measures would permit the enforcement of the claw-back judgements in their jurisdiction.[271] Claw-back clauses, therefore, are only effective when the defendant has assets within the jurisdiction of the state adopting the claw back legislation. Moreover, blocking statutes such as the EC Regulation 2271/96 contain exceptions allowing for non-compliance of the statute where such compliance

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[267] VAN DERVORT, *supra* note 250, at 465.
[268] Bowett, *supra* note 13, at 24.
[269] See Smis & Van der Borght, *supra* note 119 for the EU response to the Act.
[270] DE MESTRAL & GRUCHALLA-WESIERSKI, *supra* note 18, at 27; Gerber, *supra* note 133, at 220.
[271] Peter Glossop, *Canada's Foreign Extraterritorial Measures Act and U.S. Restrictions on Trade*

may result in serious damages to persons.[272] These concerns may hamper the effectiveness of blocking statutes.

The "interest balancing approach" has been criticized for failing to provide an effective method for the settlement of disputes over extraterritorial application. First, the interests balancing approach is not considered to form a part of international law, despite recognition given to the "Restatement (Third)", since it has proven impossible to achieve a uniform approach to its use between states.[273] The discretion of national courts varies between legal traditions and the courts that operate in states with a civil law tradition are more restrictive than those states with a common law tradition that tend to be more willing to allow the wide discretion that is called for by the balancing approach.[274] However, the approach is still controversial even in the US despite the fact that the approach was developed as part of US jurisprudence. In the *Hartford Fire Case*, Justice Souter did not consider the approach to be part of international law but a comity even though Justice Scalia, in his dissenting opinion, did consider it to be part of customary international law.[275] Since Justice Souter found that there was no "true conflict" between the regulations of the US and England, he saw no need to apply the balance of interests test and simply admitted extraterritorial jurisdiction over foreign persons.[276] This approach seems to lack an appreciation of "legal obligation" so important to customary international law. This approach, therefore, does not provide any guidance in dealing with

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with Cuba, 32 INT'L LAW. 93, 101 (1998).

[272] Council Regulation 2271/96, *supra* note 30, art. 7-8.

[273] Gerber, *supra* note 133, at 205-06.

[274] *Id.* at 208; Craig R. Giesze, *Helms-Burton in Light of the Common Law and Civil Law Legal Traditions: Is Legal Analysis Alone Sufficient to Settle Controversies Arising under International Law on the Eve of the Second Summit of the America?*, 32 INT'L LAW. 51, 64-69 (1998).

[275] *Hartford Fire,* 509 U.S. at 799; *Id.* at 818-89 (Scalia, J., dissenting).

extraterritorial issues but instead hands a wide discretion to national courts concerning the question of whether they chose to apply the balance of interests test or not. Secondly, no hierarchy between factors indicating reasonableness is provided for and, even if extraterritorial measures are not consistent with international practices, a national court can place great emphasis on domestic interests as provided for paragraph (c) of the "Restatement (Third)." In such a case, there is concern that this approach lends itself too readily to the justification of extraterritorial measures.[277] Thirdly, not only legal interests but also political, economic, and social interests need to be considered and much controversy surrounds the manner in which these concerns are left to domestic courts.[278] The greatest concern in this situation is how judges in domestic jurisdictions can properly evaluate those, often competing, interests. It also seems to run counter to the principle of sovereign equality to have national courts declining foreign claims and interests.[279] In the *Mitchell* case, which involved the application of MMPA (1972) to US nationals in Bahaman waters, the court stated that the balancing of Bahaman interests against those of the US was more appropriately undertaken as part of an international negotiation process.[280] Domestic courts cannot adequately deal with the underlying extraterritorial issues.

The DSB is better equipped, potentially at least, to deal with extraterritorial issues than more limited domestic forums. While past approaches to dispute settlement were "unilateral" in nature and did not contribute to the proper resolution of disputes, the DSB

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[276] *Id.*
[277] Debra L.W. Cohn, Note, *Equal Employment Opportunity for Americans Abroad*, 62 N.Y.U. L. REV. 1288, 1316-24 (1987).
[278] Bowett, *supra* note 13, at 22.
[279] Bianchi, *supra* note 32, at 86.

has the advantage of subjecting the positions of the two parties directly involved to a more objective evaluation.[281] Due to the automaticity of establishing jurisdiction in the DSB, the achieving of a non-unilateral solution is secured. This enhances the likelihood of achieving effective settlements of extraterritorial disputes. As Article 3:7 of the DSU provides, the WTO member must exercise its judgement as to whether any action before the WTO would be "fruitful" prior to bringing its case to the WTO.[282] It also states that "a solution mutually acceptable to the parties to a dispute and consistent with the covered agreements is clearly to be preferred."[283] Thus, each Member should accept, as a premise, that any extraterritorial dispute settlement before the WTO must be acceptable and effective for "both" parties. If an extraterritorial dispute is brought before the DSB and if the DSB establishes a panel the effectiveness of the dispute resolution is, in principle, secured.

It is important to establish what it is that affected states seek from the settlement of extraterritorial disputes. Under public international law, states that suffer from the effects of illegal acts can seek monetary damages, compensation, reparation etc. against the offending state. In the case of extraterritorial issues, it is considered that tactics used to block extraterritorial effects, such as blocking statutes and "claw-back" clauses, in essence do not really seek compensation or monetary damages from unfair extraterritorial measures. Instead, states hope that the existence of blocking statutes will discourage the initiation of lawsuits or applications of the law by resisting judgements handed down in

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[280] U.S. v. Jerry D. Mitchell, 553 F.2d. 996, 1002 (5th Cir. 1977).
[281] See Bowett, *supra* note 13, at 25-26 for an evaluation of the consultation technique as exists in the GATT for extraterritorial dispute resolution.
[282] DSU, *supra* note 5, art. 3:7.
[283] *Id.*

foreign jurisdictions and by granting claw-back damages and costs thereby rendering the extraterritorial law ineffective.[284] The enactment of blocking statutes does not generally mean the resolution of a dispute and affected states continue to request the suspension or withdrawal of offending extraterritorial measures.[285] A resolution of the UN GA in November 1996 requested that states taking extraterritorial measures "repeal or invalidate" those measures as soon as possible.[286] In fact, since April 1997, the EC has suspended proceedings in the DSB relating to the Helms-Burton Act in the light of the US commitment to suspend the application of the Act to the EC. This indicates that the suspension or withdrawal of extraterritorial measures is resulting in the settlement of some disputes concerning extraterritorial application.

It seems that, in light of the above, the DSB can provide effective remedies for illegal extraterritorial application. The purpose of the dispute settlement in the WTO lies in the maintenance of a proper balance between the rights and obligations of Members under the WTO agreements.[287] Therefore, the WTO dispute settlement does not aim at imposing compensation for illegal acts or at declaring the illegality of the act but rather aims at eliminating the illegal measures in the future.[288] Article 3:7 of the DSU states as much:

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[284] Forsythe, *supra* note 42, at 113. *Cf.* Gerber, *supra* note 133, at 219-20.
[285] *See supra* Part II.
[286] G.A. Res. 51/17, para.3, U.N. GAOR, 5th mtg., U.N. Doc. A/51/L.15 (1996).
[287] *Id.* Article 3:3. In *Shrimp-Turtle,* the Appellate Body notes that Article XX "embodies the recognition on the part of WTO Members of the need to maintain balance of rights and obligations between the right of a Member to invoke one or another of the exceptions of Article XX... on the one hand, and the substantive rights of the other Members under the GATT 1994 on the other hand." *Shrimp-Turtle AB Report, supra* note 77, para. 156.
[288] KOTERA, *supra* note 175, at 58; Joost Pauwelyn, Note and Comment, *Enforcement and Countermeasures in the WTO: Rules are Rules – Toward a More Collective Approach,* 94 AM. J. INT'L L. 335, 337-38 (2000). In general, the decisions or recommendations of dispute settlement in the international economic organizations do not have binding effect and an explicit provision to give their decisions such effect is necessary. There is no provision in the WTO agreements that give binding effect to the recommendation of the DSB.

> In the absence of a mutually agreed solution, the first objective of the dispute settlement mechanism is usually to secure the withdrawal of the measures concerned if these are found to be inconsistent with the provisions of any of the covered agreements. The provision of compensation should be resorted to only if the immediate withdrawal of the measure is impracticable and as a temporary measure pending the withdrawal of the measure which is inconsistent with a covered agreement. The last resort which this Understanding provides to the Member invoking the dispute settlement procedures is the possibility of suspending the application of concessions or other obligations under the covered agreements on a discriminatory basis vis-à-vis the other Member, subject to authorization by the DSB of such measures.[289]

"Withdrawal" of the measures concerned is usually requested by complaining Members and it is the first objective of the DSB mechanism.[290] Article 22 also states that the suspension of concessions and compensation are only temporary measures and that the full implementation of a recommendation to bring a measure into conformity with the WTO agreements is preferred.[291] This is one of the unique features of the WTO dispute settlement system. In the case of extraterritorial disputes, a state affected by the extraterritorial reach of another state tries to eliminate those effects and seeks to protect its domestic policies through the use of blocking statutes. With this objective in mind, affected states first protest and commence negotiations with the offending state aiming at the "suspension or withdrawal" of the offending measures.[292] The Appellate Body in *Shrimp-Turtle* recommended that the US bring certain of its measures that were inconsistent with the WTO agreements "into conformity with the obligations of the US

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[289] DSU, *supra* note 5, art. 3:7.
[290] *See Overview of the State-of-play of WTO Disputes*, *supra* note 7.
[291] DSU, *supra* note 5, art. 22.
[292] See Jorge A. Vargas, Introductory Note, *Mexico: Act to Protect Trade and Investment From Foreign Norms That Contravene International Law*, 36 I.L.M. 133, 134-36 (1997) (describing details of bilateral negotiations between the U.S. and Mexico concerning the application of the Helms-Burton Act).

under that Agreement."[293] At the DSB meeting after the recommendation, the US noted that it had issued revised guidelines implementing Section 609 that were intended to (i) introduce greater flexibility in considering the comparability of foreign programmes and the US programme and (ii) elaborate a timetable and procedures for certification decisions.[294] The US also noted that it had undertaken and would continue to make efforts to initiate negotiations with the governments of the Indian Ocean region on the protection of sea turtles in that region.[295] States complaining of the US measures did not claim compensation on account of the US measures. Therefore, it can be concluded that the WTO may provide effective solutions or remedies in extraterritorial disputes since DSB dispute settlement objectives are similar to those relating to extraterritorial issues.

B. The WTO Agreements and Extraterritorial Application

Although the DSB offers effective mechanisms for disputes over extraterritorial application, it is crucial that the WTO agreements and DSB rulings are supported by substantial rules. Without such rules the effective resolution of disputes would become impossible.

It is true that the WTO agreements do not directly attempt to regulate extraterritorial application itself. Nor do they limit explicitly the jurisdictional scope of the WTO agreements, especially Articles XX and XXI of the GATT. The Panel in *Tuna II* held that states are not, in principle, barred from regulating the conduct of their nationals with

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[293] *Shrimp-Turtle AB Reports*, *supra* note 77, para. 188.
[294] *See Overview of the State-of-play of WTO Disputes*, *supra* note 7.
[295] *Id.*

respect to persons, animals, plants and natural resources outside of their territory.[296] The effect of this statement would permit states to take extraterritorial measures according to the nationality principle, which inevitably entails extraterritorial application. The Appellate Body in *Shrimp-Turtle* did not attempt to place limits on the jurisdictional scope of Article XX and left open the possibility of the adoption by Members of unilateral measures within the WTO system.[297] The second Panel in *Shrimp-Turtle* in July 2000, however, made this position clear noting that states could take unilateral action without international consensus. The second Panel was established following a complaint by Malaysia. Argument before the Panel revolved around the question of whether the US revised guideline relating to Section 609 (implementing the DSB recommendation of *Shrimp-Turtle*) still infringed upon the WTO agreements. Malaysia argued that unilateral measures were prohibited under the WTO system. The second Panel found that the Appellate Body required the US to engage in "negotiation" not "conclusion" of an agreement and noted that "if the Appellate Body had intended to imply that no measure could be adopted outside the framework of an international agreement on the protection and conservation of sea turtles, it would not have continued with its review of the unilateral measure applied pursuant to Section 609."[298] The Panel then concluded that recourse to a unilateral measure could not *a priori* be excluded under GATT Article XX and that states could set unilateral limitations on the market access if such limitations did not force other Members to take essentially the same measures.[299] Thus, it is assumed

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[296] *Tuna II Panel Report*, *supra* note 69, para. 5.17.
[297] *Shrimp-Turtle AB Report*, *supra* note 77, para. 133.
[298] United States - Import Prohibition of Certain Shrimp and Shrimp Products, Recourse to Article 21.5 by Malaysia, June 15, 2001, para.5.64, WT/DS58/RW [hereinafter *Shrimp-Turtle Second Panel*].
[299] *Id.* para. 5.65.

that the WTO system does not prohibit extraterritorial application itself but allows its Members to act in accordance with their own international obligations and understandings of the jurisdictional issues involved.[300] Rules surrounding the exercise of state jurisdiction are obviously fundamental since they express state expectations concerning the strength and reach of sovereign powers.[301]

The DSB does not possess a general jurisdiction for determining international disputes and the application of international non-trade rules is limited to supplementing the provisions contained in the WTO agreements.[302] However, taking into account the fact that there is no established rule nor is there any available international institution in existence for checking the legitimacy of extraterritorial issues in the current international legal system, the WTO agreements and the reports issued by the DSB can give direction to the future development of the law dealing with extraterritorial issues. The Appellate Body in *Gasoline* noted that the WTO agreements could not be read in clinical isolation from the rest of public international law. To put this statement the other way around, WTO law is part of international law and can contribute towards the creation of customary norms and international consensus concerning extraterritorial measures.[303] The WTO agreements and DSB reports can lead to the clarification of state practices and to the formulation of an *opinio juris* in the field of extraterritorial dispute resolution. It is important to remember that the WTO agreements are also the applicable law concerning

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[300] Mattoo & Mavroidis, *supra* note 131, at 331.
[301] Harold G. Maier, *Interest Balancing and Extraterritorial Jurisdiction*, 31 AM. J. INT'L L. 579, 584 (1983).
[302] *See supra* Part III B.
[303] Jackson mentions that the *Gasoline* case and later practices suggest an endorsement of the rule-oriented system of the WTO. JACKSON, *supra* note 1, at 89.

extraterritorial application.[304]

For DSB extraterritorial dispute resolution to be effective, it is essential that the WTO agreements contain substantial rules concerning extraterritorial application. Although the WTO agreements do not directly regulate extraterritorial application, it is considered that the agreements do prescribe the "manner" or "purpose" of extraterritorial application.[305] De Mestral & Gruchalla-Wesierski note that:

> The GATT does not expressly deal with extraterritorial export controls. Yet it does restrict the purposes for which export controls may be imposed. The result is that the GATT restricts the bases of international law upon which a state may impose extraterritorial export controls. The GATT also requires that a state demonstrate the purposes of its export controls and thus justify any extraterritorial export controls.[306]

It is, therefore, possible to apply substantial rules derived from the WTO agreements to regulate the purpose and manner of extraterritorial application. First, states are free to take extraterritorial measures without violating WTO obligations. The WTO agreements only restrict the manner of such extraterritorial application. For instance, trade measures should not discriminate between states (GATT Article XIII) and quantitative restrictions are not permitted except in cases when certain goods are in short supply (Article XI and XII(2)(a)). Other important restrictions are that states should grant national treatment for foreigners (Article III) and that favorable treatment granted to one party should be automatically extended to other parties (Article I).

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[304] Pauwelyn notes that the WTO is one source of international rules and that states have an obligation to take measures that are consistent with the WTO rules if the DSB finds it inconsistent with the WTO rules. Pauwelyn, *supra* note 288, 341-42.

[305] Francioni suggests that the proper application of the non-discriminatory principle and of the necessity test can control abuses of Article XX without recourse to rules of extraterritorial application since states have obligation *erga omnes* in matters such as environmental protection and human rights protection. Francioni, *supra* note 34, at 130. The necessity test is not examined in this paper since not all paragraphs of Article XX and XXI contain the word "necessity."

[306] DE MESTRAL & GRUCHALLA-WESIERSKI, *supra* note 18, at 44-45.

Secondly, however, such extraterritorial measures should not give rise to conflicts among states that may otherwise occur due to the unilateral nature of extraterritoriality.[307] Because extraterritorial measures are often taken in order to achieve non-trade goals, they tend to violate the WTO agreements. It is difficult for states to impose extraterritorial economic sanctions against other states in order to make them conform to certain procedures without discriminating against the targeted states. Trade embargoes, for example, are defined as the "discriminatory governmental restriction on foreign trade, ordered in reaction to unlawful or objectionable conduct by another State with the intention of forcing this State to adopt a certain course of conduct by inflicting damage."[308] The purpose of such sanctions is to target particular states so as to place them at a disadvantage. Japan objected to the Massachusetts Myanmar Act as a violation of the WTO agreements identifying the core of the problem as that law's discriminatory provisions and its extraterritorial application. Japan noted that the Myanmar Act stipulated that even if a company doing business with the government of Myanmar tenders the lowest bid, a company that has no dealings with Myanmar should win the contract if it tenders a bid that does not exceed the other company's bid by more than 10 %.[309] In the Helms-Burton argument, the EC claimed that the right to sue foreigners and the denial of visas constituted a violation of the national treatment requirement because only foreigners were to be subject to the provisions.[310] Therefore, as shown in Chapter II, the issue becomes one of whether such measures are exempt from the

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[307] *See supra* pp. 46-47.
[308] Hans G. Kausch, *Embargo, in* 2 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW, *supra* note 15, at 58, 59.
[309] *Japan's Position Regarding the Problem of Massachusetts State Government Procurements, supra* note 106.

obligations under the WTO agreements or whether the purpose and manner of the extraterritorial application fall under one or other of the exception clauses.

The exception clauses in Articles XX and XXI of the GATT are considered as such to restrict the "objectives" or "purposes" of extraterritorial measures. Environmental measures taken that gave rise to the *Tuna* and *Shrimp-Turtle* disputes can be exempted from WTO obligations if they are necessary for the protection of human, animal, or plant life or health (Article XX(b)) or if they relate to the conservation of exhaustible natural resources (Article XX(g)). It is also permissible for states to take extraterritorial measures consistent with UN obligations under the security exceptions and to take action necessary for the protection of its vital security interests in time of war or other emergency arising out of international relations (Article XXI (b) & (c)).[311] However, as no case has been determined concerning the wording of Article XXI by a Panel, it is not possible to state what kind of extraterritorial measures fall within these purposes. Thus, it is up to the Panels and the Appellate Body to decide individual cases in accordance with customary international rules used for the interpretation of treaties.

Can states take any unilateral measures for purposes other than those listed in Article XX and XXI? It has been suggested that the protection of human rights, especially labor standards, should feature in WTO considerations by giving a wide interpretation to the exception clauses. Some insist that extraterritorial measures aimed at the protection of human rights fall within the meaning of the term "human life" as contained in paragraph

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[310] *See supra* pp. 26-27.

[311] De Mestral and Gruchalla-Wesierski note that justification under Article XXI is admissible only with respect of the protective principle. DE MESTRAL & GRUCHALLA-WESIERSKI, *supra* note 18, at 49.

(a) and (b) of Article XX.[312] According to this argument, the minimal international labor standards such as freedom of association and the prohibition against forced labor are basic human rights standards in international law and are moral standards that few countries would contest.[313] It might also, therefore, be possible to include those human rights standards under the "moral standards" exception in paragraph (a). However, Mattoo and Mavroidis suggest that the list of objectives in Article XX is exhaustive and that trade measures, other than those listed, can be taken only when they do not discriminate.[314] They also suggest that the "judicial activism" as in the EC legal system that might lead courts to interpret the Article XX list broadly is not welcomed in the context of the WTO Panel.[315]

States cannot justify their extraterritorial measures solely on the basis of their objectives in the general exceptions. Such extraterritorial measures need also to be consistent with the chapeau of Article XX. In the *Gasoline* case, the Appellate Body held that:

> In order that the justifying protection of Article XX may be extended to it, the measure at issue must not only come under one or another of the particular exceptions... listed under Article XX; it must also satisfy the requirements imposed by the opening clauses of Article XX. The analysis under Article XX is, in other words two-tiered: first, provisional justification by reason of characterization of the measure under XX(g); second, further appraisal of the same measure under the introductory clauses of Article XX.[316]

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[312] Salman Bal, *International Free Trade Agreements and Human Rights: Reinterpreting Article XX of the GATT*, 10 MINN. J. GLOBAL TRADE 62, 79-87 (2001). However, some have criticized the inclusion of human rights protection as part of trade since only domestic authorities can determine the appropriate subject matter of labor regulation and that extraterritorial measures in the labor field would allow states to mask protectionist measures as welfare legislation. John O. McGinnis & Mark L. Movsesian, Commentary, *The World Trade Constitution*, 114 HARV. L. REV. 511, 587-88 (2000).

[313] *See, e.g.*, Virginia A. Leary, *Workers' Rights and International Trade*, *in* 2 FAIR TRADE AND HARMONIZATION: LEGAL ANALYSIS 221 (Jagdish Bahgwati & Robert E. Hudec eds., 1996).

[314] Mattoo & Mavroidis, *supra* note 131, at 335.

[315] *Id.*

[316] *U.S. Gasoline AB Report*, *supra* note 209, at 12.

The chapeau of Article XX restricts the "manner" of extraterritorial application and can therefore restrict the use of extraterritorial measures.[317] The chapeau prescribes that:

> Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures....[318]

The chapeau contains two important criteria for determining the legitimacy of unilateral measures. First, it prohibits arbitrary or unjustifiable discrimination where the same conditions prevail; secondly, trade measures that are "disguised restrictions on international trade" are precluded.[319] The Appellate Body in *Shrimp-Turtle* found that Section 609 constituted arbitrary or unjustifiable discrimination since it required other member states to take essentially the same regulations as those applied in the US and the US failed to enter into serious negotiations to conclude agreements before imposing a unilateral import ban.[320] The Appellate Body found it unnecessary to rule on the second question of whether the US measures were a disguised restriction on international trade.[321] It is suggested that this reasoning of the Appellate Body on arbitrary or unjustifiable discrimination establishes requirements for unilateral trade measures to be acceptable before the WTO.[322] According to this reasoning, members are obliged to

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[317] It is suggested that principles set in Article XX can minimize the protectionist abuse of trade sanctions. Bal, *supra* note 312, at 107; Howse & Trebilcock, *supra* note 121, at 216-17.
[318] GATT, *supra* note 79, art. XX.
[319] The Appellate Body in *Gasoline* did not distinguish between the two requirements in the chapeau and stated that unjustifiable discrimination and disguised restriction may be read side-by-side, while the Appellate Body in *Shrimp-Turtle* separated these two requirements. *U.S. Gasoline AB Report, supra* note 209, para.25.
[320] *Shrimp-Turtle AB Report, supra* note 77, para. 169-186.
[321] *Id.* para. 184.
[322] Thomas J. Schoenbaum, *The Decision in the Shrimp-Turtle Case*, 1998 Y.B. INT'L ENVTL L. 36,

make *bona fide* efforts to negotiate the conclusion of agreements with other members before taking unilateral or extraterritorial measures. This criterion seems to be particularly important in the settlement of extraterritorial disputes since the lack of negotiations and reciprocity in the adoption of extraterritorial measures creates tensions between states. In light of criticism leveled against the DSB concerning the settlement of non-trade disputes, this requirement should be considered necessary in dealing with extraterritorial disputes.[323] Howse and Trebilcock suggest that trade sanctions, including extraterritorial measures, should only be legal under the WTO framework where serious efforts at a cooperative, negotiated solution have failed.[324] This position is consistent with Principle 12 of the Rio Declaration. Principle 12 does not prohibit extraterritorial application itself but expresses a preference for a multilateral approach to environmental protection. Giving extraterritorial measures legitimacy requires a prescriptive rule-based justification for resort to such measures as shown in the creation of EEZ. A framework of neutral principles, such as a possibility of international consensus, can provide a basis for the acceptance of extraterritorial measures and for the possibility of the formulation of international consensus.[325] Thus, before taking extraterritorial measures, states need first to make efforts to negotiate with other states in order to be justified in possible later unilateral action.

Thirdly, in dealing with the exception clauses, the Appellate Body in *Shrimp-Turtle*

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[323] However, some insist that a duty to negotiate in *Shrimp-Turtle* is not in accord with a democracy-reinforcing jurisprudence since some states might delay consultations meaning that other states cannot take measures to protect their citizens from adverse effects. *See* McGinnis & Movsesian, *supra* note 312, at 593-94.

[324] Howse & Trebilcock, *supra* note 121, at 221-22.

[325] Fairley & Currie, *supra* note 25, at 143.

enunciated important requirements for extraterritorial measures to satisfy. Without limiting the jurisdictional scope of Article XX(g), it stated that there is a sufficient nexus between sea turtles prescribed in Section 609 and the US for the purpose of Article XX(g).[326] This reasoning seems to have defined the nature and extent of legitimate extraterritorial measures.[327] An identical requirement was proposed as a national security exception by India during discussion on Nicaragua's complaint against US economic sanctions. India's representative stated:

> Under [Article XXI] only action in time of war or other emergency in international relations could be given the benefits of this exception. Clearly, the two Contracting Parties in this case could not be said to be in a state of belligerency. The scope of the term "other emergency in international relations" was very wide. [A] Contracting Party having recourse to Article XXI (b)(iii) should be able to demonstrate *a genuine nexus between its security interests and the trade action taken.* [328] (Emphasis added.)

Although this statement was not recognized at the time it was made, it may nevertheless serve to block an arbitrary invocation of Article XXI. The requirements of "sufficient nexus" between, first, the state and the object of environmental protection and, secondly, between its security interests and the trade action have evolved to play an important part in international law. Brownlie notes that the assertion of extraterritorial jurisdiction is lawful if, and only if, there is a substantial and "*bona fide* connection" between the subject matter and the source of

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[326] *Shrimp-Turtle AB Report, supra* note 77, para. 133.
[327] Qureshi, *supra* note 77, at 204.
[328] GATT Council, *Minutes of Meeting held May 29, 1985*, GATT Doc. C/M/188 (June 28, 1985) at 13, *quoted in* Michael J. Hahn, *Vital Interests and the Law of GATT: An Analysis of GATT's Security Exception*, 12 MICH. J. INT'L L. 558, 576 (1991).

jurisdiction.[329] Mann argues that states must seek "just and reasonable contact" between each other in their approaches to extraterritoriality.[330]

It is safe to say that the terms "connection" and "contact" have the same meaning as "nexus." The nexus requirement between objects to be regulated and states is justified on the most fundamental principle of international law, namely the prohibition of intervention in internal affairs.[331] Many scholars have recently suggested that in international jurisdictional law a state cannot extend its jurisdiction in a manner so as to interfere with the internal affairs of another state.[332] One of the means of showing that there has been no interference in the internal affairs of another state through extraterritoriality is also closely related to the requirement of a "nexus" or "genuine link." Gerber notes, for example, that if a state applies its law extraterritorially it must establish the existence of a nexus, or genuine link, between the act to be regulated and the state.[333] If a state is unable to establish such legitimate nexus or genuine link, the extraterritorial measure is regarded as illegal by virtue of the fact that it interferes with the internal affairs of other states.[334]

However, it is difficult to determine what the nexus is between measures taken and

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[329] BROWNLIE, *supra* note 14, at 313.
[330] Mann, *supra* note 34, at 44.
[331] Hahn also argues that the prohibition against intervention serves to protect the status of the subjects of international law. He continues, however, that the possible limits to state action under Article XXI (b)(iii) is by no means intended to be complete and that rather the notion of state sovereignty would deserve attention in almost every pertinent action. Hahn, *supra* note 328, at 602 n. 182.
[332] BROWNLIE, *supra* note 14, at 313; Gerber, *supra* note 133, at 212; R. Y. Jennings, *Extraterritorial Jurisdiction and United States Antitrust Laws,* 1957 BRIT. Y.B. INT'L L. 153; Mann, *supra* note 34, at 47.
[333] Gerber, *supra* note 133, at 212-213.
[334] *Id.*

the state interests. In *Shrimp-Turtle*, the Appellate Body did not elaborate on what constitutes a sufficient nexus. Moreover, some authors note critically that the undefined nature of the nexus approach allows the extraterritorial application of laws greater range and expands Article XX to encompass a broader range of environmental policies than may be desirable.[335] However, despite these reservations, the nexus requirement has become a premise for the extraterritorial application of law due to the absence of other better-formulated competing jurisdictional principles. Therefore, further definition of the scope of the nexus between the state and the measures taken awaits further WTO formulation resulting from further cases brought before the DSB.

To conclude, it is possible to effectively scrutinize extraterritorial measures through substantive rules generated by the WTO agreements since criteria developed by the GATT/WTO dispute settlement mechanism closely resembles that formulated under general international law concerning the extraterritorial application of laws.

C. Functions of WTO Dispute Settlement in the International Legal Order

Iwasawa distinguishes between dispute resolution and dispute settlement.[336] He points out that dispute resolution means the ending of a "whole" dispute, while dispute settlement indicates the settlement of an issue in a dispute without necessarily involving the resolution of a "whole" dispute.[337] Since WTO dispute settlement is based on the WTO agreements and since dispute settlement does not necessarily mean the resolution of

[335] Ahn, *supra* note 87, at 845-46.
[336] IWASAWA, *supra* note 112, at 15.
[337] *Id.*

the whole dispute, it is important to examine the role that WTO dispute "settlement" plays in the "resolution" of extraterritorial disputes from the perspectives of the wider international legal order.

It is important, at the outset, to remember that extraterritorial application has contributed to the creation of new international norms. Francioni argues, on this point, that it is important to consider the fact that national legislation plays an important role in the development of international law when examining the legitimacy of extraterritorial measures.[338] The extraterritorial reach of state law has been a catalyst behind the creation of much international law. Notable examples include the extension of maritime jurisdictions to include EEZ. The US unilaterally announced the extension of its maritime jurisdiction in 1945 and many states have since followed the US measures. The EEZ concept was then introduced in the UNCLOS.[339]

Another significant example is the extension of Canada's maritime jurisdiction. In 1970, the Canadian Parliament enacted the Arctic Waters Pollution Prevention Act[340] (AWPPA), which asserted jurisdiction over all Arctic waters in a liquid or frozen state for purposes of pollution management.[341] Enacted in response to the passage of an American oil tanker through the Northwest Passage and before the appearance of the 200 nautical-mile offshore zones, the AWPPA asserted functional jurisdiction 100 nautical miles seaward from Canada's coastline.[342] In addition, the AWPPA prohibited the introduction of pollutants of any type into Arctic waters and imposed heavy penalties for

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[338] Francioni, *supra* note 34, at 131.
[339] UNCLOS, *supra* note 157, art. 55-75.
[340] Arctic Waters Pollution Prevention Act, R.S.C., ch. A-12 (1985) (Can.), 9 I.L.M. 543 (1970).
[341] *Id.* § 3 (2).
[342] *Id.* § 3 (1).

violations of the prohibition.[343] The Act also prohibited passage of any ship through the Arctic that did not meet certain safety requirements as prescribed under the Act.[344] To ensure enforcement of AWPPA provisions, pollution prevention officers were empowered to board ships and order them to leave the zones.[345]

At the time, the Canadian assertion of jurisdiction over the Arctic and the accompanying enforcement mechanism were highly controversial departures from the then existing international law.[346] Canada needed to justify its extension of jurisdiction since it had failed to conclude any international agreement concerning the liability regime for pollution on the high seas at the 1969 conference of International Maritime Consultative Organization. One of the justifications that the Canadian government invoked was that its unilateral assertion would result in the creation of desirable customary international law.[347] This justification proved persuasive and the extension of jurisdiction over the Arctic was accepted in the UNCLOS. Article 234 of the UNCLOS prescribes that;

> Coastal States have the right to adopt and enforce nondiscriminatory laws and regulations for the prevention, reduction and control of marine pollution from vessels in ice-covered areas within the limits of the exclusive economic zone, where particularly severe climate conditions and the presence of ice covering such areas for most of the year create obstructions or exceptional hazards to navigation, and pollution of the marine environment could cause major harm to or irreversible disturbance of the ecological balance. Such laws and regulations shall have due regard to navigation and the protection and preservation of the marine environment based on the best available

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[343] *Id.* § 4 (1).
[344] *Id.* § 11.
[345] *Id.* § 14.
[346] Although the Canadian assertion was controversial in international law the AWPPA was criticized since it did not exercise "full" jurisdiction over the Arctic and the failure to claim full sovereignty would weaken Canada's ultimate position with respect of such sovereignty. House of Commons Debates (Apr. 16, 1970) at 5941-43, *quoted in* H. Scott Fairley & John H. Currie, *supra* note 25, at 138.
[347] *Id.* at 137.

scientific evidence.[348]

The inclusion of this provision in a treaty that has been authoritatively acknowledged as reflecting customary international norms lent significant support to the expansion of Canadian jurisdiction that was at that time controversial.[349] Although the US is not a party to the UNCLOS, it also recognized Canadian jurisdiction over the Arctic. After two years of negotiations the two nations reached agreement on a practical solution consistent with Canadian claims to sovereignty over the Arctic.[350] In addition, the US agreed that the Polar Star, a US Coast Guard Cutter, should be allowed to operate "in a manner consistent with the pollution control standards and other standards of the Arctic Waters Pollution Prevention Act and other relevant Canadian laws and regulations."[351]

This extension of Canadian jurisdiction gained widespread support due to the efforts of Canadian negotiators. The Canadian government laid claims to its extraterritorial jurisdiction while making significant efforts in international society to promote the creation of new international norms.

What implications does the settlement of disputes by the WTO have considering the relationship between the legitimacy of extraterritorial measures and multilateral negotiations? It is important to examine practices that follow WTO dispute settlement since those practices can shed light on the function and impact of WTO dispute settlement procedures on international law. As preciously noted, GATT/WTO practices at both Panel and Appellate Body levels mean that unilateral or extraterritorial measures will not be

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[348] UNCLOS, *supra* note 157, art. 234.
[349] Fairley & Currie, *supra* note 25, at 139.
[350] Agreement on Arctic Cooperation and Exchange of Notes Concerning Transit of Northwest Passage, Jan. 11, 1988, Can.-U.S., 28 I.L.M. 144 (1989).
[351] *Id.* at 144.

accepted without prior efforts at negotiating internationally or bilaterally with Members.[352] The second Panel in *Shrimp-Turtle* affirmed this position stating that: "the United States has an obligation to make serious good faith efforts to reach an agreement before resorting to the type of unilateral measure currently in place. We also consider that those efforts cannot be a 'one-off' exercise. There must be a continuous process, including once a unilateral measure has been adopted pending the conclusion of an agreement."[353]

States in *Tuna I*, even though the dolphin was not a species protected by international treaty at the time of the Panel Reports, agreed with the objects pursued by US unilateral measures after the Panel Reports. Although the US blocked the reports, states, including the US, Mexico, and Japan, signed the Agreement for the Reduction of Dolphin Mortality in the Eastern Pacific Ocean in 1992 in light of the Inter-American Tropical Tuna Commission.[354] In addition, the EC signed the Agreement on International Dolphin Conservation Program in May 1999.[355] Both these agreements aim at dolphin conservation meaning that the US was able to achieve its domestic policies through international consensus and no longer needed to pursue unilateral action.

After the adoption of *Shrimp-Turtle* Appellate Body Report, the US announced its intention to implement the recommendation of the DSB[356] noting that it would

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[352] Qureshi notes that the Appellate Body in the *Shrimp-Turtle Case* does not close the door to unilateral measures. He reasoned that the report would seem to imply that "where a member has engaged in serious across-the-board negotiations to obtain bilateral or multilateral consensus but has failed, it might then legislate unilaterally, all things being equal." Qureshi, *supra* note 77, at 205.

[353] *Shrimp-Turtle Second Panel, supra* note 298, para.5.67.

[354] Agreement for the Reduction of Dolphin Mortality in the Eastern Pacific Ocean, June 1992, 33 I.L.M. 936 (1994).

[355] For EC signature of the Agreement on International Dolphin Conservation Program, see 36 I.L.M. 1698 (1999).

[356] Notice of Proposed Revisions to Guidelines for the Implementation of Section 609 of Public Law

implement it "in a manner which is consistent not only with US WTO obligations, but also with the firm commitment of the US to the protection of threatened and endangered species, including sea turtles."[357] In July 1999, the US Department of State issued Revised Guidelines for the Implementation of Section 609.[358] Since the Appellate Body admitted that the conservation of sea turtles was consistent with Article XX(g), the US continues to make efforts to pursue its measure although not unilaterally. Therefore, it offers technical training in the design, construction, installation and operation of TEDs to any government that requests it.[359] Training programs are scheduled on a "first come, first served" basis although special efforts are made to accommodate nations whose governments make good faith efforts to adopt and maintain nation-wide TEDs programs and who have not previously received such training.[360] In this way, the US tries to create an additional incentive in favor of programs aiming at the conservation of resources without applying unilateral sanctions.

The US has also pursued multilateral efforts to protect sea turtles. States including the US and Malaysia signed the Memorandum of Understanding on the Conservation and Management of Marine Turtles and their Habitats of the Indian Ocean and South-East Asian Region (MOU) in July 2000. Negotiations resulting in the MOU were conducted under the regime of the Convention on the Migratory Species. The objectives of the MOU

101-162 relating to the Protection of Sea Turtles in Shrimp Trawl Fishing Operations, 64 Fed. Reg. 14481 (1999).

[357] *Id.*

[358] Revised Guidelines for the Implementation of Section 609 of Public Law 101-162 Relating to the Protection of Sea Turtles in Shrimp Trawl Fishing Operations, 64 Fed. Reg. 36949-36952 (1999).

[359] *Id.*

[360] *Id.*

are to protect, conserve, replenish and recover marine turtles and their habitats.[361] According to the MOU, signatory states should implement the "Conservation and Management Plan" attached to it which address marine turtle habitat protection, management of direct harvesting and trade, reduction of threats (including fisheries by-catch), research and education, information exchange, and capacity building. The negotiation on the "Conservation and Management Plan" was continuing as of June 2001 in Manila. No final result has appeared.[362] A Secretariat, which will assist in communication, encourage reporting, and facilitate activities between and among signatory States, sub-regional institutions and other interested States organizations, will review the Plan.[363] An Advisory Committee is also established in order to provide scientific, technical and legal advice to the signatory States.[364] After the Appellate Body report, international movements on the protection of marine turtle have taken shape contemporaneously with multilateral negotiations.

The US and EU reached agreement on the Helms-Burton Act dispute along the lines that the US suspend the Act's extraterritorial provisions in exchange for the suspension of proceedings pending before the WTO panel.[365] In the Memorandum, the EU agreed to promote democracy in Cuba, which was one of the purposes of the Act.[366] It seems that the submission of claims to the WTO panel may result in the negotiated settlement and

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[361] Memorandum of Marine Turtles and their Habitats of the Indian Ocean and South-East Asian Region, July 2000, *available in* the Convention on Migratory Species Website (visited on July 28, 2001) <http://www.wcmc.org.uk/cms/Trtles_IndOcean-SEA-MoU.htm>.
[362] See the Convention on Migratory Species Website for the result of negotiations. *Id.*
[363] Memorandum of Marine Turtles and their Habitats of the Indian Ocean and South-East Asian Region, *supra* note 361.
[364] *Id.*
[365] Memorandum of Understanding Concerning the U.S. Helms-Burton Act and the U.S. Iran and Libya Sanctions Act, *supra* note 119.
[366] Helms-Burton Act, *supra* note 88, Title II.

discontinuance of extraterritorial measures previously pursued.

The GATT/WTO dispute settlement procedures, in light of state practices just outlined, achieve two objectives. First, they assist in the formulation of international consensus on issues that extraterritorial measures aim to achieve. Since extraterritorial measures so often try to achieve some international objective on a "power-oriented" basis,[367] the WTO can facilitate multilateral negotiations, and the formulation of a more "rule-based" international consensus.[368] WTO dispute settlement procedures serve to promote the cause of international law reform and progress.[369]

Secondly, WTO Panel or Appellate Body reports can constrain states taking illegitimate extraterritorial measures even if the purpose of those measures may seek to advance the interests of international law by, say, promoting environmental protection and human rights. Despite the fact that the *Tuna* and *Shrimp-Turtle* Reports have been criticized by many scholars and NGOs who argue that the WTO is not an appropriate forum to adjudicate on the legality or otherwise of unilateral measures taken to promote international interests,[370] the US, it must be said, did suspend the unilateral measures it had been taking and adopted a more multilateral cooperative approach to achieve its objectives. The US also, as noted above, suspended the measures it had taken pursuant to the Helms-Burton Act on condition that the EU suspend the proceedings it had brought to the WTO. Considering that affected states have hitherto been unable to deal with the

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[367] Karl M. Meessen, *Drafting Rules on Extraterritorial Jurisdiction*, *in* EXTRATERRITORIAL JURISDICTION IN THEORY AND PRACTICE, *supra* note 17, at 225, 233-35.

[368] PETERSMANN, *supra* note 1, at 127.

[369] Petersmann insists that the WTO agreements can contribute to the improvement of the international legal system due to the established dispute settlement system that is attached to them. In particular, he mentions reform that has occurred in United Nations practices as a result of the WTO agreements and thinks that the WTO can work as a model for international law. *Id.* at 57-65.

extraterritorial effects of unilateral measures taken by states (by legislating blocking statutes or by negotiating individually with extraterritorial states) WTO dispute settlement procedures may be the most effective ones available to deal with the unfair extraterritorial intrusion by one state into the domestic affairs of another state.

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[370] *See, e.g.*, Howse, *supra* note 54, at 73.

V. CONCLUSION

The WTO dispute settlement system plays an important role in the settlement of extraterritorial disputes in international legal order even though extraterritorial application often seeks to achieve non-trade related objectives. It not only offers effective dispute settlement mechanism and substantive rules on the legitimacy of extraterritorial application but also owes a part of creating international norms or accelerating international consensus. This is evident from state practices after the WTO dispute settlement procedures. Thus, it is reasonable to conclude that international norms are developing through economic factors, *i.e.* the WTO law.[371]

The above conclusion does not mean that the WTO is the only or even the most important influence on the development of international law. Nor is the WTO a center of international law making process. Rather, through the examination of effectiveness to resolve extraterritorial issues in the WTO, this thesis concludes that the WTO can "contribute" to accelerate international law-making process, which is crucial to the dispute "resolution" of extraterritorial disputes.

The WTO may be the appropriate forum in which to seek the harmonization of substantive international norms in areas such as human rights and environmental standards.[372] Disputes over extraterritorial application do not occur when states adopt the same standards or pursue the same international objectives in a similar manner. The

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[371] PETERSMANN, *supra* note 1, at 57-65.
[372] Howse & Trebilcock, *supra* note 121, at 231.

extraterritorial extension of jurisdiction becomes unnecessary when states apply the same standards to particular issues. Domestic interests are protected by the legislation adopted by other states.

Another example of the *lex ferenda* in action is the momentum to amend the WTO agreements, especially Article XX and XXI of the GATT in order to adjust to international needs. As noted above, the WTO's jurisdiction on trade is limited yet and WTO law and other important international interests are coordinated through Article XX and XXI of the GATT. The success of the WTO dispute settlement system owes much to the WTO's specialization on trade. Therefore, in order to avoid conflicts between trade and other important policies and to continue to keep the effectiveness of the WTO dispute settlement system, an amendment to these provisions may be desirable to broaden the objectives of extraterritorial measures in the WTO system. The Japanese government in 1999 suggested one such amendment in the context of the relationship between METs and the WTO. It suggested that a new subsection in Article XX should be included and that this new subsection should allow the trade restricted measures taken in accordance with METs. It proposed that the selection of such METs should be authorized by the Ministerial Conference.[373] The Japanese government also recommended that in order to avoid the arbitrary selection of METs, Understandings or Guidelines be prepared.[374] However, the problems of extraterritoriality are not only based on environmental concerns but also other significant international interests such as human rights. These issues are also tried to incorporate in the WTO agreements.

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[373] *Reports on Trade and Environment, available in* Department of Environment of Japan Website (visited on Oct. 20, 2000) <http://www.env.go.jp/press/file-view.php3?=serial=1589&how-id-2112>.
[374] *Id.*

It will take time to amend the WTO agreements in order to adjust to other international interests. Thus, it is important to clarify the function of the WTO dispute settlement system in the international legal society. An effective forum for the settlement of extraterritorial disputes is necessary even if that forum only focuses on one facet of such disputes.

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