EXTRA-TERRITORIALITY IN THE CONTEXT OF WTO LAW

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“Unmanaged environmental problems become trade problems”  
Konrad von Moltke

I. INTRODUCTION

I.1. Territory and Trade

Historically, trade connected both communities and societies before they conceived of themselves as nations within more or less defined territorial-boundaries under the control of sovereigns. Sovereignty as a device for the allocation of competence became established as a result of the Treaty of Westphalia, at first primarily as a defensive concept deployed against the assertion of expansive power by the papacy (cuius regio eius religio). The Westphalian project was essentially one which aimed at destroying hierarchies and establishing horizontal equality.1 As a result, geography and jurisdiction were seen to coincide. State power became identified with defensible – terrestrial, aerial and maritime – space: territory and citizens were placed under the jurisdiction and control of sovereigns.2

As a corollary, the concept of extra-territoriality emerged, as was illustrated in the Lotus Case decided by the Permanent Court of Justice in 1927.3 Public international law, therefore, has been based upon a manifestly retentive stance towards the subject of territorial sovereignty. The exercise of extra-territorial jurisdiction, consequently, is limited only by a concrete prohibition, by international treaty or custom, as long as there is a sufficient nexus to the state. The reasoning underlying the “Lotus-principle” was that the consensual nature of international law established

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3 The Steamship Lotus (Fr. v Trk.), Judgment No.9, 1927, P.C.I.J., Series A, No. 10.

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limits for any restrictions upon the sovereign independence of states.\footnote{Ibid.} However, as various kinds of community interests are being vindicated, criticism of this principle has been articulated lately. Already in his 1994 Hague Lectures, Bruno Simma defined community interest as “a consensus according to which respect for certain fundamental values is not to be left to the free disposition of States, individually or \textit{inter se}, but is recognised and sanctioned by international law as a matter of concern to all States”.\footnote{B Simma, “From Bilateralism to Community Interest in International Law”, (1994) 250 Recueil des Cours, pp 217–348, at 233; see, also, C Schreuer & U Kriebaum, “From Individual to Community Interest in International Investment Law”, in: U Fastenrath, R Geiger, D-E Khan, A Paulus, S von Schorlemer & C Vedder (eds), \textit{From Bilateralism to Community Interest – Essays in Honour of Bruno Simma}, (Oxford, Oxford University Press, 2011), pp 1079–1096.} As notable examples of such community interests, he identified, \textit{inter alia}, the protection of the environment. More recently, and in his judicial capacity, Judge Simma distanced himself from “the old tired view ... [as well as] ... anachronistic, extremely consensualist vision of international law, expressed in the Lotus judgment”,\footnote{Declaration of Judge Simma concerning the ICJ advisory opinion of 22 July 2010 on the accordance with international law of the unilateral declaration of independence in respect of Kosovo.} according to which that which is not actually prohibited remains permissible.

Be that as it may, in a globalised and globalising world, the contemporary status and scope of the concept of extra-territoriality deserves to be re-examined. The present chapter offers such an analysis in the context of WTO law.

The GATT, the first multilateral treaty establishing certain trade policy disciplines for the conduct of trade relations between its contracting parties, embodies essentially traditional reciprocal trade bilateralism writ large by virtue of the principle of non-discrimination, especially that of the Most Favoured Nation Standard (MFN).\footnote{Article I of the General Agreement on Tariffs and Trade (GATT) reads, under the Title “General Most-Favoured-Nation Treatment”: “…any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties.”} It seeks to secure market access in the territory of contracting parties for products originating in the territories of other countries. The import, export and transit of these products originate in, transit through, are destined for, and enter the territory of, contracting parties, customs unions or free-trade areas formed by them