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Timothy Meyer

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Consumption Governance: The Role of Production and Consumption in International Economic Law

Timothy Meyer[*]

Over the last decade, international economic conflict has increased dramatically. To name only a few examples, the European Union banned the import of products from deforested land and is poised to impose duties on carbon-intensive imports; the United States banned Chinese imports made with forced labor; and countries the world over threatened to impose digital services taxes on U.S. corporations, leading to a new multilateral agreement on apportioning income tax revenue among countries.

This Article argues that these conflicts represent a shift in norms governing the authority to tax and regulate international commerce. Different fields within international economic law describe the limits of state authority to tax and regulate international commerce in diverse ways. But I argue that a trans-substantive set of principles underlies the varied doctrines in international trade, international tax, and international antitrust. Throughout the twentieth century, international law's jurisdictional limitations rested on the notion that production could be taxed and regulated primarily, and often only, by the producing country (what this Article terms "Production Jurisdiction"). As a result, international law often prohibited consuming nations from imposing taxes or regulations on imported goods and services if the taxes or regulations depended on the circumstances of foreign production. By contrast, nations today increasingly claim jurisdiction to tax and regulate foreign production based on their interest in controlling the kinds of

* Richard Allen/Cravath Distinguished Professor in International Business Law, Duke University School of Law. For helpful conversations and comments, thanks to Julian Arato, Kathleen Claussen, Steve Dean, George Dimitropoulos, Lothar Ehring, Stavros Gadinis, Nicholas Lamp, Katerina Linos, Stratos Pahis, Ganesh Sitaraman, Ingrid Wuerth and participants at workshops at UC Berkeley Law, Brooklyn Law, and the American Society of International Law's Research Forum. Tris Cox and Regina Maze provided excellent research assistance.

activity that consumption within their borders supports (what this Article terms "Consumption Jurisdiction").

This Article makes three contributions. First, I describe the ongoing shift from Production Jurisdiction to Consumption Jurisdiction in international antitrust law, international tax, and international trade. Second, I argue that the shift from Production to Consumption Jurisdiction does not mean the end of globalization or the rise of protectionism. Rather, it reflects a change in states' views on the role that national policy should play in creating a nation's comparative advantage in the global economy. Third, I discuss the implications of the shift from Production to Consumption Jurisdiction.

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INTRODUCTION

Global economic conflict is on the rise. The Trump administration used tariffs to limit the import of foreign steel and aluminum, as well as most products from China.[1] Starting with biofuels and expanding to all goods, the European Union (EU) restricted the import of products from recently deforested land, drawing complaints from developing nations like Indonesia and Malaysia.[2] In a bid to capitalize on the digital economy, a range of nations around the world imposed or contemplated digital services taxes on companies like Google, Amazon, and Facebook.[3] The United States, where all of these companies are headquartered, responded with threats of trade sanctions on any country that imposed such taxes.[4] Even the current war in Ukraine has brought with it serious economic disputes as nations have tried to cut off Russia's access to global financial and trading systems.[5] These conflicts are often between traditional geopolitical adversaries, but not exclusively. Disputes over digital services taxes, for example, have pitted the United States against its traditional European allies.

These new and diverse economic conflicts share a common cause: an ongoing shift in the limits international law imposes on states' authority to tax and regulate imported goods and services based on the manner of production overseas. Throughout most of the twentieth century, a nation's economic welfare hinged on what the nation could produce. U.S. hegemony rested on the United States'

1. Ana Swanson, *Trump's Tariffs, Once Seen as Leverage, May Be Here to Stay*, N.Y. TIMES (May 14, 2019), http://www.nytimes.com/2019/05/14/us/politics/trump-tariffs-china.html.

2. *Proposal for a Regulation of the European Parliament and of the Council Concerning Deforestation-Free Products*, COM (2021) 706 final (Nov. 17, 2021) [hereinafter *Proposal for a Regulation on Deforestation-Free Products*], https://ec.europa.eu/environment/publications/proposal-regulation-deforestation-free-products_en.

3. Jim Tankersley, *How Tech Taxes Became the World's Hottest Economic Debate*, N.Y. TIMES (Oct. 12, 2020), http://www.nytimes.com/2020/01/23/business/tech-taxes-debate.html.

4. Thomas Kaplan, *The U.S. Imposes—And Suspends—Tariffs on Six Countries Over Digital Taxes*, N.Y. TIMES (June 2, 2021), http://www.nytimes.com/2021/06/02/business/us-tariffs-digital-tax.html.

5. *Fact Sheet: United States, G7 and EU Impose Severe and Immediate Costs on Russia*, THE WHITE HOUSE (Apr. 6, 2022), https://www.whitehouse.gov/briefing-room/statements-releases/2022/04/06/fact-sheet-united-states-g7-and-eu-impose-severe-and-immediate-costs-on-russia.

role as the "arsenal of democracy."[6] Post-war policy in Europe and Japan focused on rebuilding war-ravaged economies through manufacturing, a play backed by a U.S. foreign policy that aimed to reduce trade barriers globally.[7] Later in the twentieth century, developing countries like South Korea and Taiwan pursued a policy of export-oriented growth, seeking to develop manufacturing and productive capacities that would help them join the ranks of wealthy nations globally.[8]

With economic policy focused on domestic production, nations jealously guarded the advantages that their choice of domestic production policies conferred when they exported goods and services. They did so by adopting rules that limited states' ability to tax and regulate imported goods and services based on the manner of their production in *other* countries. I refer to this norm, instantiated through various doctrines across international economic law, as "Production Jurisdiction." Under Production Jurisdiction, nations retain the right to tax and regulate imported goods and services for most reasons. But they generally cannot tax or regulate imported goods and services based on the manner of foreign production. In other words, taxes and regulations that depend on the manner of production required a territorial link to production, a link that importing countries lack. For instance, the United States Supreme Court refused to apply U.S. antitrust laws to an anticompetitive conspiracy by U.S. companies because the conspiracy targeted productive activity that occurred overseas.[9] Under international trade law, nations generally surrendered the right to condition access to their own markets on the manner in

6. President Franklin D. Roosevelt, Fireside Chat 16: On the "Arsenal of Democracy" (Dec. 29, 1940), (transcript available at UVA Miller Center).

7. *See* Thomas W. Zeiler, *Managing Protectionism: American Trade Policy in the Early Cold War*, 22 DIPLOMATIC HIST. 337, 354–56 (1998) (quoting U.S. President Harry Truman and Secretary of Defense James Forrestal as arguing that trade liberalization was a key tool in winning the Cold War); *see also* Timothy Meyer & Ganesh Sitaraman, *Trade and the Separation of Powers*, 107 CALIF. L. REV. 583, 597–610 (2019) (arguing that U.S. trade law and policy operated within a foreign affairs paradigm during the Cold War).

8. *See, e.g.*, George Aseniero, *South Korean and Taiwanese Development: The Transnational Context*, 17 REVIEW 275 (1994) (describing the industrialization of South Korea and Taiwan).

9. American Banana Co. v. United Fruit Co., 213 U.S. 347 (1909).

which products were produced overseas.[10] Through bilateral tax treaties, nations relinquished the right to tax the income of non-resident companies that lacked a physical presence in their territories, even if those companies generated income within their borders.[11]

These rules used different terminology depending on the field of international economic law and were adopted in different forms: multilateral treaties in international trade, bilateral treaties in international tax, and customary international law in international antitrust. But the underlying principle was the same: nations lacked authority to condition access to their markets on foreign compliance with domestic taxes and regulations aimed at foreign production. This principle was a critical, but heretofore overlooked, component of the neoliberal international legal order that prevailed during the twentieth century. By granting producer nations an exclusive right to tax or regulate the production of goods and services traded globally, as well as income generated in international commerce, the nations of the world leveraged domestic production policies to compete and to attract businesses. Lower production costs resulted, which drove economic growth and ensured a steady decline in prices for consumers.

But beginning in the last decades of the twentieth century, nations began to abandon limits on their authority that rested on a territorial nexus with production. Today, nations regularly claim that the consumption of foreign goods and services provides a sufficient nexus to impose taxes and regulations that depend on the way imported goods and services are produced. I refer to this jurisdictional norm as "Consumption Jurisdiction." Antitrust law was the canary in the coal mine. In the mid-twentieth century, the United States adopted an "effects" test that allowed it to regulate overseas anticompetitive conduct if that conduct had an effect (usually on consumers) in the United States.[12] That test was

10. *See* Panel Report, *United States – Restrictions on Imports of Tuna*, WTO Doc. DS21/R-39S/155 (Sept. 3, 1991) [hereinafter *Tuna-Dolphin Panel Report*] (not adopted) (finding that the United States violated trade rules by conditioning market access on whether tuna was caught in a dolphin-safe manner).

11. Rebecca M. Kysar, *Unraveling the Tax Treaty*, 104 MINN. L. REV. 1755 (2020) (discussing tax treaties); Steven A. Dean, *A Constitutional Moment in Cross-Border Taxation*, 1 J. ON FIN. FOR DEV. 1 (2021) (describing bilateral tax treaties as a "bill of rights" to the international tax constitution).

12. *See* United States v. Aluminum Co. of Am., 148 F.2d 416 (2d. Cir. 1945).

eventually adopted by other nations.[13] In the last several years, nations have renegotiated the rules of international tax, especially as applied to digital service providers like Google and Facebook. The new rules allow countries to tax income if it is generated by consumers within their jurisdiction, regardless of the location in which the services are produced.[14] And in international trade, nations, led by the EU, have begun to roll out measures that limit imports of carbon-intensive products.[15] Driving this jurisdictional shift is states' increasing use of international economic law to pursue a range of public policy goals that are incompatible with the production-prioritizing policies that Production Jurisdiction encouraged.

This Article makes three contributions. Part I defines more specifically the concepts of Production and Consumption Jurisdiction and sets out the Article's core theoretical claim. In the early twentieth century, nations allocated authority among themselves with the goal of increasing the economic efficiency of production. By denying importing countries the authority to tax or regulate imported goods and services based on the manner of foreign production, international law allowed states to use public policy to develop or enhance their comparative advantage in the production of particular goods or services.[16] Domestic production policies, in other words, functioned as part of a nation's comparative advantage.

With the advent of Consumption Jurisdiction, domestic production policies are no longer treated as part of a nation's comparative advantage. Legally, nations that consume goods and services, and generate income for foreign companies by doing so,

13. *See infra* Section II.C.

14. Organization for Economic Cooperation and Development [OECD], *Statement on a Two-Pillar Solution to Address the Tax Challenges Arising from the Digitalisation of the Economy*, OECD/G20 Base Erosion and Profit Shifting Project (Oct. 8, 2021) [hereinafter *Two-Pillar Solution*], https://www.oecd.org/tax/beps/statement-on-a-two-pillar-solution-to-address-the-tax-challenges-arising-from-the-digitalisation-of-the-economy-october-2021.htm.

15. Ewa Krukowska & John Ainger, *How Europe Will Tax CO2 Emissions Beyond Its Borders*, WASH. POST (Oct. 2, 2023), https://www.washingtonpost.com/business/energy/2023/10/02/how-eu-s-carbon-border-adjustment-mechanism-works-and-what-the-critics-say/2c0db842-6102-11ee-b406-3ea724995806_story.html.

16. For a basic presentation of the idea of comparative advantage, see JOOST H.B. PAUWELYN, ANDREW T. GUZMAN & JENNIFER A. HILLMAN, INTERNATIONAL TRADE LAW 12–16 (3rd ed. 2016).

are entitled to tax and regulate the manner of overseas production of goods, services, or income (when the good, service, or income recipient is within their borders), regardless of the production policies chosen by the producing nation. Practically, Consumption Jurisdiction allows nations to use the leverage their consumption creates to influence the overseas production of goods, services, or income. The EU's regulation on "deforestation-free" products provides an illustration.[17] The measure prohibits sale within the EU of products produced on land deforested after December 31, 2020.[18] The regulation aims to reduce the amount of global deforestation that happens as a result of EU consumption.[19] But the EU has neither a territorial nexus to the productive activity, nor does deforestation cause a direct effect in the EU.[20] Rather, the EU is claiming jurisdiction based on the global effects of its own consumptive activities.[21]

Consumption Jurisdiction is driven by, and supports the pursuit of, a broad set of policy goals extending beyond economic growth and low prices. Objectives include classic economic goals like ensuring the competitiveness of markets or preventing the erosion of the national tax base. But nations are also increasingly focused on environmental and social goals. Carbon border adjustments, bans on products from deforested land, and an emphasis on equitable outcomes for workers and small- and medium-sized enterprises have taken center stage. In this way, Consumption Jurisdiction reflects a change in the underlying premises of globalization, rather than critics' feared rejection of an integrated global economy.[22]

17. *Proposal for a Regulation on Deforestation-Free Products*, *supra* note 2.

18. *Id.* arts. 2(8), 3.

19. An EU Legal Framework to Halt and Reverse Deforestation, EUR. PAR. DOC. PE 658.207, at 5 (Nov. 2020) (ENVI Webinar Briefing). According to an EU report, the EU consumes approximately ten percent of the world's "deforestation productions" from tropical forests, and one-sixth of the carbon footprint of the average EU citizen's diet can be traced to deforestation in tropical countries. *Id.* at 3.

20. Deforestation has indirect effects in the EU, to be sure. The contribution to climate change and the loss of biodiversity, for example, are effects felt globally.

21. *See* Sonia E. Rolland, *Are Consumer-Oriented Rules the New Frontier of Trade Liberalization?*, 55 HARV. INT'L L.J. 361 (2014) (discussing the interaction of consumer protection rules and international trade law).

22. Some scholars have noted in other contexts that the increased use of unilateral domestic laws governing international trade and investment in recent years does not

Part II makes the Article's primary descriptive contribution. I show that a trans-substantive set of principles underlies the varied doctrines that international trade, international tax, and antitrust law use to describe the limits on state authority, but that those principles have shifted in recent years.[23] Initially, each of these areas had rules that allocated primary or exclusive jurisdiction to the country in which production was located. But the rules in each of these areas have evolved, and continue to evolve, to grant consuming nations the right to tax, regulate, or restrict market access based on policies and conditions in the producing country. At the outer limit of this approach, the consumption of a good or service creates a sufficient nexus for a country to impose tax or regulatory conditions on production anywhere in the world. This shift is a seismic change in the allocation of authority in the global economy.

Part III analyzes the implications of the turn toward Consumption Jurisdiction. I highlight three specific implications. First, I argue that, whereas Production Jurisdiction enabled a race to the bottom in tax and regulation, Consumption Jurisdiction enables a race to the top by encouraging producers to comply with higher standards adopted in major markets to which they export or in which they are located and pay taxes. Consumption Jurisdiction creates this incentive by expanding the scope for nations to have concurrent jurisdiction to tax and regulate productive activities. Countries are increasingly free to condition access to their markets on compliance with their own standards, creating multiple sets of rules with which private enterprises must comply in order to operate globally. This overlapping jurisdiction mitigates the incentive for private actors to relocate production to nations with the lowest standards or tax rates. Put differently, a globalization that rests on Consumption Jurisdiction is one that avoids the pitfalls of the tax and regulatory race to the bottom that has plagued the

fundamentally challenge the global economy as much as it heralds a shift in how and where (internationally or domestically) the terms of globalization are defined. *See* Georgios Dimitropoulos, *The Right to Hospitality in International Economic Law: Domestic Investment Laws and the Right to Invest*, 22 WORLD TRADE REV. 90 (2023); Julien Chaisse & Georgios Dimitropoulos, *Domestic Investment Laws and International Economic Law in the Liberal International Order*, 22 WORLD TRADE REV. 1 (2023).

23. The doctrines use terms such as "border adjustability" in international trade law; "source" and "residence" in international tax law; and "territoriality" and "effects" in general public international law (drawing on antitrust law). *See infra* Part II.

production-focused model. Second, this race to the top is likely to have negative distributional consequences for small and developing economies. Large consuming nations should be sensitive to these effects and take steps to ameliorate them.

Lastly, states may wish to develop limits on Consumption Jurisdiction as a means of reducing global economic conflict. I argue that limits on consumption-based authority are unlikely to emerge from existing international institutions. Well-developed institutions like the World Trade Organization (WTO) have struggled to accommodate the shift to Consumption Jurisdiction, while less institutionalized areas like international tax and competition law have adjusted with relatively little damage to international cooperation. This pattern is the opposite of the prediction that comes from international relations theory, namely that international institutions reduce the transaction costs to bargaining and managing conflict among states. The solution to this puzzle is that as institutions make states' obligations more credible and tie obligations together through institutional arrangements, they also make renegotiation more difficult. For this reason, mature international institutions can be successful at mediating state conflict in ordinary times, but they will struggle to mediate conflict amidst seismic shifts in norms, like the turn to Consumption Jurisdiction. As an alternative to institutions, states can develop the principle of proportionality to provide an overarching limit on invocations of Consumption Jurisdiction.

I. TOWARD A CONSUMPTION-BASED ECONOMIC ORDER

The shift to Consumption Jurisdiction is one of the most profound changes in international economic law since the end of the Cold War. It is both a consequence of globalization and a major stress on the economic interdependence that so many have taken for granted since the 1990s. The symptoms of the shift—the destabilization of norms limiting state authority across a range of economic areas and a resulting surge in international economic conflict—are decried as a threat to the prosperity of recent decades. In the trade context, critics call border adjustments protectionist.[24]

24. *See, e.g.*, Shuting Pomerleau, *Be Wary of Protectionism When Addressing Climate Change in Trade*, NISKANEN CTR. (Feb. 24, 2022), https://www.niskanencenter.org/be-wary-of-protectionism-when-addressing-climate-change-in-trade.

In the tax and antitrust realms, many criticize efforts to shift to a consumption-based model of jurisdiction as a pernicious form of unilateralism.[25] At the other extreme are those who see these changes as a sign that the neoliberal era—which they associate with the prioritization of market liberalization and deregulation domestically and internationally—is coming to an end.[26]

While they draw opposite conclusions, both sides share a similar faulty premise: that Consumption Jurisdiction is inherently antagonistic to the globally integrated economy that emerged in the twentieth century. The production-based model of jurisdiction is self-limiting. It allows nations to make domestic policy a component of comparative advantage in global economic relations. As economic interdependence increases, consuming nations will impose tax and regulatory policies that seek to neutralize producing nations' domestic policies as a source of comparative advantage. These measures rest on political economy dynamics to which globalization itself has contributed. But these changes do not threaten globalization as such; they merely redefine the global market's contours to take into account twenty-first century concerns.

Section I.A begins by defining more precisely the concepts of Production and Consumption Jurisdiction. Section I.B then explains how the shift from the former to the latter alters the way in which domestic policies influence global economic relationships.

A. Production vs. Consumption

Nations tax and regulate products and services without controversy all the time. As a matter of international law, if a

25. *See, e.g.*, Mac Kerwin P. Visda, *The Danger of Unilateral Digital Services Tax*, BUS. WORLD (Mar. 10, 2021, 7:28 PM), https://www.bworldonline.com/economy/2021/03/10/349544/the-danger-of-unilateral-digital-services-tax.

26. *See generally* Peter Enderwick & Peter Buckley, *Rising Regionalization: Will the Post-COVID-19 World See a Retreat from Globalization?*, 27 TRANSNAT'L CORPS. 99 (2020); Rohinton P. Medhora, *Is Globalization in Reverse?*, CTR. FOR INT'L GOVERNANCE INNOVATION (Feb. 9, 2017), https://www.cigionline.org/articles/globalization-reverse; Jeremy Lent, *Coronavirus Spells the End of the Neoliberal Era. What's Next?*, OPEN DEMOCRACY (Apr. 12, 2020, 6:20 PM), https://www.opendemocracy.net/en/transformation/coronavirus-spells-the-end-of-the-neoliberal-era-whats-next; George Eaton, *Is the Neoliberal Era Finally Over?*, NEW STATESMAN (June 16, 2021), https://www.newstatesman.com/business/economics/2021/06/neoliberal-era-finally-over.

person, entity, product, or service is present within a nation's territory, that nation has plenary authority to prescribe rules governing its behavior or use.[27] In particular, nations regularly tax and regulate production activities within their borders. For example, a value-added tax (VAT) requires a producer to pay the government a percentage of the value created by producing a new product.[28] A whole host of regulations—from minimum-wage and maximum-hour laws to environmental standards and licensing regimes—govern the production of goods and services within a given territory.

Similarly, nations tax and regulate the use and consumption of goods and services within their territories. A nation might, for instance, impose a tax on the sale of unhealthy products or the income of its residents. Or a nation might require that products meet certain standards, such as fuel efficiency standards for automobiles. Sonia Rolland describes these types of laws as consumption measures.[29] However, in these cases, the legal authority to tax or regulate does not come from the act of consumption itself. Rather, it flows from a nation's plenary authority to tax or regulate activities, people, and things within its territory.[30] Consumption, like production, is just an act that occurs within some nation's territory and is thus subject to that nation's authority.

A much more complicated issue—and the central concern of this Article—arises when taxation or regulation is conditioned on something that occurs in a foreign nation's territory. For example, a government might impose a tax based on the costs of producing a product overseas,[31] or it might limit access to its markets to products that are produced in a manner that is consistent with regulations governing the production of the same product in the

27. RESTATEMENT (FOURTH) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 408 (AM. LAW INST. 2018).

28. *See generally* ALAN SCHENK, VICTOR THURONYI & WEI CUI, VALUE ADDED TAX: A COMPARATIVE APPROACH (Peter Harris ed., 2d ed. 2015).

29. Rolland, *supra* note 21, at 363.

30. RESTATEMENT (FOURTH) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 408 (AM. LAW INST. 2018).

31. J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394 (1928) (upholding the constitutionality of such a statute against a nondelegation challenge).

importing nation.[32] The potential problem with these measures is that they involve one nation taxing or regulating conduct that is permitted or taxed at a lower rate in the foreign country where the conduct took place. The United States, for instance, might prevent the sale of a Chinese-made product in the United States due to concerns about the labor conditions of the workers who produce it in China.[33] The European Union might impose a tax on products due to the amount of carbon emitted during its production in the United States.[34]

There are two general views regarding these kinds of measures. The first is that the measures are impermissible under international law. They are, in the usual telling, "extraterritorial" because the conduct they seek to tax or regulate—the production of the product or service—does not occur within the territory of the regulating state.[35] Under a pure Production Jurisdiction approach, only the state in whose territory production occurs may tax or regulate a product or service *based on the manner or characteristics of its production*. Thus, these measures are impermissible under a theory of Production Jurisdiction.

To be clear, Production Jurisdiction does not dictate that countries in which a good or service is sold cannot tax or regulate it. They can. But taxes or regulations cannot be conditioned on features of extraterritorial production, such as production cost, foreign environmental regulations, or wages paid to foreign workers. Under Production Jurisdiction, only the producing country may impose taxes or regulations that are conditioned on the nature of production, and the producing country has the primary jurisdiction to regulate the income generated from that production.

The second view, Consumption Jurisdiction, is that a country may tax or regulate the production of a good or service if the good or service is used and consumed within its borders.

32. Marine Mammal Protection Act of 1972 § 101(a)(2), 16 U.S.C. § 1371 (requiring an embargo of foreign fish caught in a manner that poses a greater risk to marine mammals than that posed by U.S. fishing fleets under domestic law).

33. Uyghur Forced Labor Prevention Act of 2021, Pub. L. No. 117-78, 135 Stat. 1525.

34. *Proposal for a Regulation of the European Parliament and of the Council Establishing a Carbon Border Adjustment Mechanism*, COM (2021) 564 final (July 14, 2021).

35. *See generally* Hannah L. Buxbaum, *The Practice(s) of Extraterritoriality*, *in* EXTRATERRITORIALITY/L'EXTRATERRITORIALITÉ 3 (Hannah L. Buxbaum & Thibaut Fleury Graff eds., 2022).

Consumption Jurisdiction can be grounded in certain effects on domestic consumers (traditional "effects" jurisdiction), but the concept is also more expansive. Under effects jurisdiction, an effect on consumers within the regulating nation provides the jurisdictional nexus. Consumption Jurisdiction does not require any such effect or territorial nexus beyond the act of consumption. Consumption Jurisdiction supports the expansive claims nations have made to control the kinds of extraterritorial conduct that consumption within their borders supports.[36] Consumption Jurisdiction thus can, but need not, rest on demonstrable harm to consumers. Instead, Consumption Jurisdiction rests on the premise that nations can use their place in the global economy to advance or defend their national policy goals, regardless of the territorial implications of those goals.

B. Comparative Advantage under Production and Consumption Jurisdiction

Production Jurisdiction allows nations to use the taxation and regulation of production to create comparative advantage in the global economy. Consumption Jurisdiction, by contrast, allows states to negate the role of foreign governments' policies in creating comparative advantage. The shift toward Consumption Jurisdiction is necessary if nations wish to use international economic law to pursue a range of policy goals beyond mere economic growth and low prices.

1. Comparative Advantage Under Production Jurisdiction

Production Jurisdiction's benefit is that it allows countries to choose their domestic production policies to take advantage of global market access.[37] Allocating primary authority to the

36. *See* Nico Krisch, *Jurisdiction Unbound: (Extra)territorial Regulation as Global Governance*, 33 EUR. J. INT'L L. 481 (2022) (arguing that despite seeming stable, the law of jurisdiction has fundamentally changed from a system of horizontal relationships to a form of hierarchical global governance).

37. Production Jurisdiction was in this sense a key component of the twentieth century's neoliberal paradigm of economic regulation, with its focus on reducing government intervention in markets. *See, e.g.*, DAVID HARVEY, A BRIEF HISTORY OF NEOLIBERALISM 3 (2007) (defining neoliberalism as the doctrine that "market exchange [is] 'an ethic in itself, capable of acting as a guide for all human action'"(quoting Paul Treanor, *Neoliberalism: Origins, Theory, Definitions* (Dec. 2, 2005), http://web.inter.nl.net/users/Paul.Treanor/neoliberalism.html)).

producing country ensures that production is regulated by the nation that stands to gain the most *from* production. It also grants the greatest rewards in the international economic system to producing nations. Those rewards come not only in the form of the power to regulate, but perhaps more importantly in the ability to tax the resulting profits. Private producers and their governments thus share an interest in enhancing their comparative advantage in producing a particular good or service by establishing a legal framework that benefits domestic producers who sell overseas. The result is production-friendly policies for domestic producers and minimal taxation or regulation of production-related activities abroad.

The idea of comparative advantage was introduced by David Ricardo in 1817.[38] It holds that in the absence of barriers to trade, nations will produce the goods and services that they are best at producing and trade for everything else. As a result of this specialization, production should become cheaper and more efficient, and consumers should benefit from reduced prices.

The idea of comparative advantage by itself, though, does not have much to say about *why* a country has a comparative advantage in producing a particular good or service. In some cases, comparative advantage may stem from the presence of natural resources or the availability of a cheap labor force.[39] In other cases, though, relatively cheap production costs may result from poor environmental practices or tax rates so low that the government cannot meet its fiscal commitments.[40] In the latter case, Production Jurisdiction turns government policies that make production cheaper into part of a nation's comparative advantage. Under a system of Production Jurisdiction, consuming nations cannot tax or regulate the conditions of production for imported goods and services consumed within their borders, any more than they can tax or regulate the supply of labor or availability of natural resources in foreign countries. Production Jurisdiction thus allows

38. DAVID RICARDO, ON THE PRINCIPLES OF POLITICAL ECONOMY AND TAXATION (3d ed. 1821).

39. *See, e.g.*, Jon Harkness, *Factor Abundance and Comparative Advantage*, 68 AM. ECON. REV. 784 (1978).

40. *See, e.g.*, E. Wesley F. Peterson & Siva Rama Krishna Valluru, *Agricultural Comparative Advantage and Government Policy Interventions*, 51 J. AGRIC. ECON. 371 (2000) (analyzing environmental and agricultural policies as a component of nations' comparative advantage in agriculture).

governments to use public policy as a tool to create comparative advantage in specific economic sectors.

Production Jurisdiction is sensible when economic growth is the overarching justification for globalization, as it was in the late nineteenth and twentieth centuries. Indeed, developed countries' adoption of Production Jurisdiction, described in more detail in Part II, was a product of its time. The Industrial Revolution had turned Europe and the United States into the world's major manufacturers. During the 1950s in particular, the United States explicitly viewed globalization, especially the elimination of trade barriers, through the lens of promoting economic growth.[41] Rebuilding Europe and Japan economically was critical not only for those nations' sakes, but also to ensure that they did not fall into the Soviet orbit during the Cold War.[42] By treating domestic tax and regulatory policy as part of a nation's comparative advantage, consumers also benefitted from cheaper goods and services. At the same time, the international tax treaty system worked to reduce the tax burden multinational companies faced by allocating taxing authority primarily to producing countries.

Production Jurisdiction supported the twin goals of economic growth and lower consumer prices by limiting the amount of taxation and regulation productive activities faced. Only one jurisdiction—the producing country—had authority to tax and regulate production and the income arising therefrom. If the producer could persuade that government not to tax or regulate, it could evade taxation and regulation entirely.[43]

Production Jurisdiction was thus consistent with the neoliberal emphasis on reducing taxation and regulation globally.[44] In a world with declining barriers to the mobility of goods, services, and capital, firms could select the location of production in order to maximize their advantage in the global economy. Countries tailored their policies to attract investment. Across a range of policy

41. Meyer & Sitaraman, *supra* note 7, at 585–86.

42. *Id.* at 602.

43. The same basic dynamic was at work in the United States during the late nineteenth and early twentieth centuries, although the issue there was about whether the federal government could limit access to interstate markets based on production standards within a state. *See* Hammer v. Dagenhart, 247 U.S. 251 (1918).

44. John Williamson, *Lowest Common Denominator or Neoliberal Manifesto? The Polemics of the Washington Consensus*, *in* CHALLENGING THE ORTHODOXIES 13, 14–15 (Richard M. Auty & John Toye eds., 1996) (listing the prescriptions characterized as the Washington Consensus).

areas—from labor and environmental standards in trade agreements[45] to the taxation of pharmaceutical and digital service providers[46]—this jurisdictional competition put downward pressure on tax and regulatory standards applied to production globally.

Today, developing countries continue to adopt policies that rely on the combination of Production Jurisdiction (i.e., limits on foreign taxation and regulation of production as a condition of market access) and low barriers to trade and capital mobility. For example, policies that lower the cost of natural resources domestically while raising them internationally have become an important part of development strategies in countries like China, Indonesia, Malaysia, and Brazil.[47] Similarly, cheap labor costs have long been thought of as a key benefit of open markets, one that developing countries have sought to maintain through policies discouraging labor organizing and unionization.[48]

While this tax and regulatory competition is well understood, the legal structure supporting it and the legal impediments to reversing it are not. Governments not only adopted rules encouraging the free movement of goods, services, and capital, they also tied their own hands to prevent competition via the specific doctrines I describe in Part II. Thus, the calling card of Production Jurisdiction is a focus on making access to a globally integrated economy largely unconditional with respect to production location, conditions, or policy.

2. Rising Consumption and Changing Rules

Production Jurisdiction, however, is unstable in a world in which low barriers to trade and capital mobility cause nations to consume an increasing amount of foreign goods and services. Economic interdependence makes exclusive or primary claims to

45. North American Agreement on Environmental Cooperation, Sept. 8–14, 1993, 32 I.L.M. 1480; North American Agreement on Labor Cooperation, Sept. 14, 1993, 32 I.L.M. 1499.

46. *Two-Pillar Solution*, *supra* note 14.

47. These policies have in turn led to a series of challenges to these measures, either via unilateral policies or at the WTO. *See* Appellate Body Report, *China – Measures Related to the Exportation of Rare Earths, Tungsten and Molybdenum*, WTO Doc. WT/DS431/AB/R (Aug. 7, 2014); Appellate Body Report, *European Union – Anti-Dumping Measures on Biodiesel from Argentina*, WTO Doc. WT/DS473/AB/R (Oct. 6, 2016); Panel Report, *European Union – Anti-Dumping Measures on Biodiesel from Indonesia*, WTO Doc. WT/DS480/R (Jan. 25, 2018).

48. *See* Desiree LeClercq, *The Disparate Treatment of Rights in U.S. Trade*, 90 FORDHAM L. REV. 1, 24–26 (2021).

jurisdiction over production untenable. Low tax and regulatory standards in one country can undermine other nations' commitments to certain domestic and social policies.[49] For example, taxing carbon emissions in the European Union does little to reduce climate change if consumers buy imported products made in countries without a carbon tax.[50] The erosion of a nation's tax base when its companies move offshore can threaten its ability to fund its most basic social policies.[51] Only by taxing and regulating overseas production consumed within its borders can nations guarantee that their consumption does not undermine national policy goals. Consumption Jurisdiction, in other words, rests on the notion that public policies should not play a major role in shaping producers' comparative advantage internationally.

The shift toward Consumption Jurisdiction has its roots in domestic political movements in developed democracies. These movements push for new tax and regulatory measures aimed at influencing foreign production. The motivations for these movements vary widely, but most are related to an increasing awareness of global problems like climate change, human and labor rights violations, or the trading system's turn in the 1970s toward reducing "non-tariff barriers" to trade, a trend that many saw as code for deregulation internationally.[52] In addition, the increased consumption of foreign goods and services can create new political coalitions domestically.[53] Exporters may have once prevailed in keeping barriers to trade and capital mobility low at home in order

49. *See* Gregory Shaffer, *Retooling Trade Agreements for Social Inclusion*, 2019 U. ILL. L. REV. 1 (2019). This same problem is also present in federal systems. Contests over the scope of the Commerce Clause in U.S. constitutional law, for instance, frequently dealt with a similar shift: from a theory of state autonomy to choose production policies without compromising market access, to a view that consumers outside of a state have an interest in the state's production policies. *See* Hammer v. Dagenhart, 247 U.S. 251 (1918).

50. *See* Krukowska & Ainger, *supra* note 15.

51. Jared Bernstein, *Protecting the Tax Base: Why It's Important to Block Tax Inversions*, WASH. POST (Nov. 19, 2015, 2:51 PM) https://www.washingtonpost.com/posteverything/wp/2015/11/19/protecting-the-tax-base-why-its-important-to-block-tax-inversions.

52. *See, e.g.*, U.N. CONF. ON TRADE AND DEV., NON-TARIFF MEASURES TO TRADE: ECONOMIC AND POLICY ISSUES FOR DEVELOPING COUNTRIES 37, 69–70 (2013) (describing efforts to remove non-tariff barriers as deregulation).

53. *See generally* Timothy Meyer, *The Political Economy of WTO Exceptions*, 99 WASH. U. L. REV. 1299 (2022) (describing the process of these coalitions forming in response to international legal rules as "channeling").

to induce reciprocally low barriers in overseas markets.[54] But rising imports may foster political coalitions among, on the one hand, domestic producers seeking protection from overseas competition, and on the other hand, public interest groups that object to overseas production standards that, for instance, harm the environment or take advantage of vulnerable populations.[55] Both of these groups are mobilized by rising levels of foreign consumption—the product of a globalization influenced by Production Jurisdiction. As a result, governments of consuming countries (especially large, developed countries) are more likely to enact Consumption Jurisdiction-based policies.

For instance, in banning Russian energy imports and outbound investment in the Russian energy sector, the Biden Administration sought to ensure that "American companies and American investors are not underwriting Vladimir Putin's efforts to expand energy production inside Russia."[56] In 2021, Congress passed legislation banning imports from the Chinese province of Xinjiang over concerns that such products are made with the forced labor of the Muslim Uighur minority that resides there. In marking the bill's passage, Senator Jeff Merkley, one of the bill's sponsors, said "[g]etting this bill over the finish line and into law ensures that American consumers and businesses can buy goods without inadvertent complicity in China's horrific human rights abuses."[57]

These policies are anathema in a production-based system of jurisdiction because they explicitly infringe on other nations'

54. Joost Pauwelyn, *New Trade Politics for the 21st Century*, 11 J. INT'L ECON. L. 559, 560 (2008).

55. Examples of these kinds of coalitions among domestic producers and consumer groups abound. They include the U.S. efforts to exclude seafood caught with methods that endanger other forms of marine life such as dolphins or sea turtles. These efforts benefitted an environmental cause but also offered protection to U.S. fishing fleets from foreign competition. Similarly, European efforts to keep biodiesel from deforested lands out of their markets both protect European biodiesel producers while also ensuring that consumers do not use their purchasing power to support the destruction of forests.

56. *Fact Sheet: United States Bans Imports of Russian Oil, Liquefied Natural Gas, and Coal*, THE WHITE HOUSE (Mar. 8, 2022), https://www.whitehouse.gov/briefing-room/statements-releases/2022/03/08/fact-sheet-united-states-bans-imports-of-russian-oil-liquefied-natural-gas-and-coal.

57. Catie Edmondson, *Congress Passes Ban on Goods from China's Xinjiang Region over Forced Labor Concerns*, N.Y. TIMES (Dec. 16, 2021), https://www.nytimes.com/2021/12/16/us/politics/congress-uyghur-forced-labor.html.

production policies.[58] Yet it is producing nations' success in using government policy to enhance their comparative advantages that has caused consuming nations to respond. Low barriers to trade and capital mobility, combined with Production Jurisdiction, result in consuming nations' inability to choose which activities they support and even to implement tax and regulatory policies at home.[59]

Significantly, Consumption Jurisdiction is not just an example of "effects" jurisdiction, under which a nation can regulate overseas activity that produces an effect within its territory. Policies that rest on Consumption Jurisdiction often turn on effects that low production standards have in the consuming nation, but they need not rest solely on that. At its outer limits, Consumption Jurisdiction rests on the global effects—that is, the extraterritorial effects—that a nation's consumption has. Just as a state can regulate the conduct of its own people when they travel overseas, Consumption Jurisdiction is the idea that nations can regulate the effects that their people's economic behavior has overseas. In this way, Consumption Jurisdiction has as much in common with traditional notions of nationality jurisdiction as it does with notions of territorial or effects jurisdiction.

Consumption Jurisdiction also means that exporters in the global economy will likely face multiple standards governing their production if they wish to access multiple markets. Under Production Jurisdiction, this kind of complexity itself has often been treated as a barrier to commerce that should be minimized or eliminated. States' embrace of the shift to Consumption Jurisdiction thus entails a greater degree of comfort with complexity in the global tax and regulatory environment. It also creates the potential for greater economic conflict among nations imposing competing or conflicting policies, an issue to which I return in Part III.

Despite the increase in taxation, regulation, and complexity that Consumption Jurisdiction entails, it is misguided to think that the shift to Consumption Jurisdiction is motivated by economic protectionism or a desire for deglobalization. To be sure, domestic producers competing with imports are often among the staunchest

58. *See* Steve Charnovitz, *The Law of Environmental "PPMs" in the WTO: Debunking the Myth of Illegality*, 27 YALE J. INT'L L. 59, 62 (2002) ("The quarrel . . . is about the use of trade measures with an outwardly directed purpose.").

59. *See* Shaffer, *supra* note 49.

political supporters of policies resting on Consumption Jurisdiction.[60] But their interests in economic protection have always been a fixture of national politics. The real change, both as a matter of domestic political economy and as a matter of the intellectual justification for globalization, is in rejecting the notion that in a globalized economy, tax and regulatory policies affecting production should be solely or primarily the purview of the producing country.

Instead, Consumption Jurisdiction prioritizes the consuming nations' preferences about production standards.[61] It also places state control over the economy ahead of businesses' interest in bargaining for tax and regulatory policies of their choosing. In this sense, the shift to Consumption Jurisdiction might be an attempt to restore the balance struck by what John Ruggie described as embedded liberalism—the compromise between creating an open economy and a nation's interest in providing generous social welfare programs.[62]

To be sure, there is a tension between these two goals. Emphasizing state control over the economy in the name of vindicating state policies may entail higher barriers to global economic mobility on the margins.[63] But it does not require changing the rules that promote an open economy. Legal guarantees against high tariffs, discriminatory regulations, and

60. Consumption Jurisdiction could allow nations to impose conditions on market access that apply to foreign producers but not domestic producers. *See generally* Joshua Elliott, Ian Foster, Samuel Kortum, Todd Munson, Fernando Pérez Cervantes & David Weisbach, *Trade and Carbon Taxes*, 100 AM. ECON. REV. 465 (2010). India's digital services tax, for example, applied only to non-resident firms, and Indian officials stated that their intent was to tax foreign companies. U.S. TRADE REPRESENTATIVE, EXEC. OFF. OF THE PRESIDENT, REPORT ON INDIA'S DIGITAL SERVICES TAX, at 12–13 (Jan. 6, 2021).

61. One might argue that the spread of industrial policy to the United States and the EU reintroduces an element of Production Jurisdiction. The United States, for instance, has introduced arguably discriminatory subsidies as part of the Inflation Reduction Act. However, subsidizing one's own producers is not synonymous with favoring Production Jurisdiction. The real issue is whether foreign countries are allowed to take steps to counteract the impact of those policies within their own markets. Antidumping and countervailing duties have long performed that role in the trade space, while in the context of U.S.-China competition, scholars such as Gregory Shaffer have called for a broader settlement of the appropriate response to such policies. *See* Gregory Shaffer, *Governing the Interface of U.S.-China Trade Relations*, 115 AM. J. INT'L L. 622 (2021).

62. John Gerard Ruggie, *International Regimes, Transactions, and Change: Embedded Liberalism in the Postwar Economic Order*, 36 INT'L ORG. 379 (1982).

63. *Id.* at 386 (discussing the balance between "authority" and "the market").

double taxation can all continue to exist and operate consistent with Consumption Jurisdiction. In this sense, a world predicated on Consumption Jurisdiction is no more protectionist than a world predicated on Production Jurisdiction. Rather, Consumption Jurisdiction embodies the norm that the economy's openness does not have priority over all other policy goals.

II. CHANGING NORMS

This Part traces the development of jurisdictional principles across three areas of international law: trade, tax, and competition (antitrust). Within each area, I first describe the production-based approach that prevailed until the late twentieth century. I then describe the shift toward a consumption-based approach. Throughout, I demonstrate the existence of a common set of principles first limiting (in the case of Production Jurisdiction) and then expanding (in the case of Consumption Jurisdiction) state authority to tax and regulate overseas production.

A. International Trade

International trade law is the field in which the march from Production Jurisdiction to Consumption Jurisdiction is both most clear and has also been the most fraught. In the aftermath of World War II, states used the General Agreement on Tariffs and Trade (GATT) as the legal framework to reduce both tax and regulatory barriers to international commerce. The GATT succeeded by imposing limits on tariffs (i.e., taxes) on imports,[64] prohibiting other kinds of restrictions on imports,[65] and requiring that domestic laws treat imports no less favorably than domestic products.[66] Until the 1990s, these rules were largely applied to prevent countries from taxing and regulating on the basis of productive activities that occur abroad. Beginning with the creation of the WTO in 1995, however, states and WTO tribunals began to interpret and apply WTO rules in a way that allowed countries to condition market access—i.e., consumption—on the manner of foreign production. Initially, this shift occurred through measures targeting individual

64. General Agreement on Tariffs and Trade art. II, Oct. 30, 1947, 61 Stat. A-22, 55 U.N.T.S. 194 [hereinafter GATT].

65. *Id.* at art. XI.

66. *Id.* at art. III.

products. Today, though, states claim the authority to impose economy-wide measures limiting market access on the basis of overseas production. These states explicitly cite an interest in controlling the kinds of extraterritorial effects that their consumption has in other countries. The nexus for jurisdiction is thus not necessarily a harmful effect that extraterritorial conduct has in the consuming nation. Rather, states are interpreting international trade rules to allow them to limit the harmful overseas effects of their own consumption.

1. The Production Approach

Under GATT/WTO law, taxes and regulations are classified as either border measures (meaning that they apply to imports) or domestic measures (meaning they apply to all products within circulation in the domestic economy).[67] Domestic measures, whether framed as taxes or regulations, are subject to the principle of national treatment.[68] Although the precise formulation of the tests differ, the general rule is that imports must be treated no less favorably than like domestic products.[69] In other words, GATT/WTO rules permit nations to tax and regulate products domestically however they see fit, so long as they do so in a nondiscriminatory fashion.[70]

By contrast, GATT/WTO law imposes severe restrictions on border measures. The GATT generally prohibits regulations that restrict imports at the border.[71] The GATT permits tariffs so long as the tariff charged is "no less favourable than that provided for in"

67. *See, e.g.*, Cory Adkins & David Singh Grewal, *Two Views of International Trade in the Constitutional Order*, 94 TEX. L. REV. 1495, 1524 (2016) (distinguishing tariffs from "behind the border" measures).

68. GATT, *supra* note 64, at art. III.

69. GATT, *supra* note 64, at arts. III.2 (taxes) & III.4 (regulations); *see also* Appellate Body Report, *European Communities—Measures Affecting Asbestos and Asbestos-Containing Products*, ¶ 99, WTO Doc. WT/DS135/AB/R (Mar. 12, 2001) (establishing that the scope of "like" products under art. III.4, governing domestic regulations, is similar to the scope of "like" products under art. III.2 governing domestic taxes).

70. Petros C. Mavroidis, THE GENERAL AGREEMENT ON TARIFFS AND TRADE: A COMMENTARY 127–28 (2005).

71. GATT, *supra* note 64, at art. XI.1 ("No prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licenses or other measures, shall be instituted or maintained by any contracting party on the importation of any product . . . .").

a nation's individual schedule of tariff limits.[72] In practice, repeated rounds of negotiations on reducing tariffs over the last seventy-five years have resulted in significant limits on tariffs, especially for developed countries.

Therefore, much hinges on a measure's classification as either a border measure or a domestic measure. Domestic measures must only be applied evenhandedly, while border measures are either prohibited if they are regulations, or circumscribed if they are tariffs. Put differently, a measure that applies evenhandedly to imports and domestic products is legal if it is treated as a domestic measure, but it is likely illegal if treated as a border measure. For instance, a country might have a regulation that bans the import of a certain type of product, such as tuna caught in a manner deemed risky for dolphins.[73] If the ban on imports is treated as a border measure, it violates GATT rules even if there is a similar ban in place for domestic production. If it is treated as part of a domestic prohibition on the sale of dolphin-unsafe tuna, it is GATT-consistent so long as it applies evenhandedly to both domestic and imported products.

From the creation of the GATT in 1947 until its transformation into the WTO in 1995, taxes and regulations conditioned on overseas production were treated as border measures, and hence almost always unlawful under the GATT. In the parlance of trade law, taxes and regulation on production were not "border adjustable."[74] As a result, countries generally lacked the authority

72. GATT, *supra* note 64, at art. II.1(a).

73. *See Tuna-Dolphin Panel Report*, *supra* note 10.

74. Border adjustability is the concept that determines whether a measure is treated as a domestic measure (and thus likely consistent with GATT/WTO rules) or a border measure (and thus likely inconsistent with those rules). In this way, border adjustability governs the scope of a GATT/WTO member's ability to tax or regulate. But when is a tax or regulation border adjustable?

The GATT parties initially addressed this distinction in the 1960s and 1970s in the area of taxes, although the same concept has since been applied to regulations. The distinction they arrived at was between "indirect" taxes and "direct" taxes. GATT Secretariat, *Report by the Working Party on Border Tax Adjustments*, WTO Doc. L/3464 (Nov. 20, 1970); CONG. RSCH. SERV., BORDER-ADJUSTED TAXES AND THE RULES OF THE WORLD TRADE ORGANIZATION: THE DISTINCTION BETWEEN DIRECT AND INDIRECT TAXES (PART I) (2017). Indirect taxes are taxes on the product itself, such as sales taxes and value-added taxes (VAT), and are border adjustable. *See* Agreement on Subsidies and Countervailing Measures, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1869 U.N.T.S. 154 [hereinafter SCM Agreement] (The category of "indirect" taxes is similar to the to tax or regulate products consumed in their own markets based on aspects of those products' production processes.[75] Trade law allocated authority to tax and regulate production to the country in which production occurred.

The twentieth century consensus around a production-based approach during the GATT's early decades was confirmed in a dispute between the United States and European nations over taxing corporate activity.[76] In 1967, as part of the process of European integration, European countries "took major steps to harmonize [their] 'value added tax[es]'" (VATs), including by adjusting VAT at the border.[77] For instance, if France collected a VAT on a product produced in France, it would rebate the VAT upon export to Germany. Germany would then collect its VAT upon import, just as it would if the product had been produced in Germany. The VAT was thus "adjusted" at the border, so that the VAT was ultimately paid in the destination country.

The policy problem was that the United States did not have a VAT, nor did it employ a sales tax at the federal level, which would also have been border adjustable.[78] Instead, federal revenues came

category of "consumption" taxes, the phrase that a 1968 OECD report used to describe taxes eligible for border adjustment. OECD, REPORT ON TAX ADJUSTMENTS APPLIED TO EXPORT AND IMPORTS IN OECD MEMBER COUNTRIES (1968)). Direct taxes, by contrast, are taxes on the production of a product, that is, non-consumption or production taxes. SCM Agreement, *supra*, at Annex 1. Direct taxes are not border adjustable. MICHAEL DALY, WTO, THE WTO AND DIRECT TAXATION, 9 (2005), https://www.wto.org/english/res_e/booksp_e/discussion_papers9_e.pdf. Examples of direct taxes include income or payroll taxes.

This distinction between indirect and direct taxes encodes the production-based approach to jurisdiction into international trade law. Nations may freely impose taxes or regulations on a nondiscriminatory basis if the tax falls on the product itself, present in the regulating country's territory. If the tax or regulation falls on the producer, or more accurately on the productive activity, located in another country, then it is likely to run afoul of GATT rules.

75. *See, e.g.*, Charnovitz, *supra* note 58.

76. GATT Council Minutes of Meeting, 8, GATT Doc. C/M/46 (Apr. 5, 1968) ("Tax systems had changed considerably since the GATT provisions on border adjustments had been drafted and a more sophisticated view of the effects of these would be taken today."); *see also* ALICE PIRLOT, ENVIRONMENTAL BORDER TAX ADJUSTMENTS AND INTERNATIONAL TRADE LAW: FOSTERING ENVIRONMENTAL PROTECTION 21 (2017).

77. John H. Jackson, *The Jurisprudence of International Trade: The DISC Case in GATT*, 72 AM. J. INT'L L. 747, 750 (1978).

78. This state of affairs remains true today and remains a source of consternation for some U.S. policymakers. *See* Shawn Tully, *It's Americans, Not Mexicans, Who Will Pay the*

primarily from income taxes. Unlike VATs and sales taxes, which apply to products when they are sold, income taxes are imposed on producers based on the revenue they earn producing things. They are, in other words, taxes on production. As a result, European exports to the United States received a rebate of VAT paid in Europe but were not assessed a comparable tax on import into the United States. U.S. exports, by contrast, did not receive any tax rebate upon export (because there was no federal sales tax) but were assessed VAT upon import into European countries. U.S. officials worried that this system disadvantaged U.S. producers both domestically and abroad.

In response, in 1971 Congress passed legislation authorizing the Domestic International Sales Corporation (DISC).[79] The legislation allowed a U.S. subsidiary of a U.S. company that generated ninety-five percent of its revenue from export sales to defer income tax on fifty percent of its profits.[80] The statute thus allowed U.S. exporters to reduce substantially the income taxes they paid on revenue from exports. From the U.S. point of view, the DISC legislation put U.S. companies on even footing with European companies: both enjoyed tax exemptions on exports. But from the European point of view, the DISC legislation unlawfully privileged U.S. subsidiaries of U.S. companies over foreign subsidiaries. Foreign subsidiaries would owe income taxes if the income came back to the United States, while qualifying U.S. subsidiaries' income would be reduced on exports and could be reinvested in productive activities in the United States.[81]

U.S. trading partners objected vehemently to this arrangement. The European Economic Community formally initiated a GATT dispute in 1972.[82] The United States responded by initiating disputes over similar tax programs in the Netherlands, France, and Belgium.[83] The primary question presented by these disputes was whether the tax exemptions constituted impermissible subsidies

Border Tax, FORTUNE (Feb. 27, 2017) (discussing support among U.S. politicians for a "border adjustment tax").

79. *See* Revenue Act of 1971, Pub. L. No. 92-178, §§ 501–507, 85 Stat. 497, 535–53 (1971).

80. In practice, the deferral was often substantially less because the IRS adopted intercompany transfer pricing policies that did not allow a DISC company to treat the full profit as its own for tax purposes. Jackson, *supra* note 77, at 752–53.

81. *Id.* at 751.

82. *Id.* at 761.

83. *Id.*

for exports.[84] In the background lurked the questions that had spurred the United States to enact the DISC legislation in the first place: Were the taxes at issue on products, like the VAT, and thus eligible for lawful rebate? Or were they instead taxes on production, and thus ineligible?

The panel's conclusion that the DISC measures, as well as the challenged European measures, were unlawful subsidies also implicitly determined that income taxes fall on production.[85] Because income taxes are production taxes, they could only be assessed in the producing country. But the producing country had a corollary obligation to apply its production taxes in a nondiscriminatory fashion. Reducing a U.S. company's income earned on exports unfairly distorted the conditions of competition.

Later cases confirmed that the production-based approach applied to regulations as well. The challenge arose in the context of regulations that applied to products based on how they were produced.[86] The central case during this period was the so-called *Tuna-Dolphin* dispute.[87]

That dispute arose from efforts in the 1970s to protect marine mammals like dolphins and whales. The U.S. Marine Mammal Protection Act (MMPA) of 1972 requires the government to "ban the importation of commercial fish or products from fish which have been caught with commercial fishing technology which results in the incidental kill or incidental serious injury of ocean mammals in excess of United States standards."[88] More specific provisions apply to tuna. In parts of the Pacific Ocean, dolphins often follow schools of tuna, so fishermen would lower purse-seine nets over dolphins in an effort "to catch the tuna underneath"—a practice known as "setting on dolphins."[89] The technique was effective, but it often seriously injured or killed the dolphins. To discourage this practice, the 1990 version of the MMPA banned the

84. *Id.* at 764–65.

85. Panel Report, *United States Tax Legislation (DISC)*, WTO Doc. L/4422-23S/98 (adopted Dec. 7, 1981); Jackson, *supra* note 77, at 767.

86. These measures are often called processes and production method regulations, or PPMs. An extensive literature on the subject exists. *See, e.g.*, Charnovitz, *supra* note 58; CHRISTIANE R. CONRAD, PROCESSES AND PRODUCTION METHODS (PPMS) IN WTO LAW: INTERFACING TRADE AND SOCIAL GOALS (2011).

87. *Tuna-Dolphin Panel Report*, *supra* note 10.

88. Marine Mammal Protection Act, § 101(a)(2), 16 U.S.C. § 1371.

89. *Tuna-Dolphin Panel Report*, *supra* note 10, ¶¶ 2.2., 2.4.

import of yellowfin tuna from relevant regions of the Pacific Ocean unless the Secretary of Commerce determined that

> the government of the harvesting country has a program regulating taking of marine mammals that is comparable to that of the United States, and . . . the average rate of incidental taking of marine mammals by vessels of the harvesting nation is comparable to the average rate of such taking by United States vessels.[90]

This measure regulated imports for reasons related to production—the risk to dolphins—rather than reasons related to the tuna itself.

Pursuant to this provision, the United States imposed an embargo on yellowfin tuna imports from Mexico in 1990.[91] Mexico challenged the ban before a GATT panel.[92] The key issue in the case was whether the U.S. measure, which banned imports based on production processes that occurred outside U.S. territorial jurisdiction, should be evaluated as a domestic measure subject only to nondiscrimination rules, or as a border measure. Put differently, the question in the case was whether the United States could limit market access—that is, regulate the tuna available in its domestic market—based on production conditions in Mexico. Because the import ban was tied to satisfying U.S. standards applicable to domestic fishing fleets, the measure might well have been lawful if it was a domestic measure, but it would be an unlawful import ban if viewed as a border measure.

Adopting the production-based view of jurisdiction, a GATT panel decided that the measure was a border measure and hence an import ban. The panel reasoned that the issue presented was analogous to a border tax adjustment, citing the 1970 GATT Working Group Report.[93] As in the tax context, the panel held regulations were domestic measures only if they "applied to the product as such . . . . Regulations governing the taking of dolphins incidental to the taking of tuna could not possibly affect

90. *Id.* ¶ 2.5.

91. *Id.* ¶ 2.7. The embargo initially applied also to Venezuela, Vanuatu, Panama, and Ecuador. The scope of the embargo changed over the ensuing months due to actions by the relevant governments, the Commerce Department, and the courts, before eventually taking the form of an embargo against Mexico in February 1991. *Id.*

92. *Id.* ¶¶ 3.1–.5

93. *Id.* ¶ 5.13.

tuna as a product."[94] The measure sought to ban imports based on the conduct of Mexican fishing vessels.[95] That the MMPA treated Mexican fishing vessels similarly to U.S. fishing vessels was irrelevant.

2. The Consumption Approach

Tuna-Dolphin reflected the high-water mark for the production-based view of jurisdiction within trade law. With the creation of the WTO in 1995, Production Jurisdiction began to give way almost immediately. The WTO's newly created Appellate Body (AB) began upholding measures based on governments' interests in regulating the production of products consumed within their borders, regardless of where that production occurred. As a doctrinal matter, exceptions to GATT rules provided the initial vehicle for this shift toward Consumption Jurisdiction. Only more recently has the shift begun to show up in how measures are characterized—either as domestic measures likely to survive review under nondiscrimination rules or as border measures that are likely unlawful.

More important than the doctrinal vehicle through which the AB moved to Consumption Jurisdiction is the scope of the measures it has upheld. Early cases involved challenges to measures governing discrete products, such as shrimp or gasoline. Today, the measures in question often apply economy-wide, making them of considerably greater economic significance.

a. Measures About Individual Products. The earliest evidence of a shift came in the WTO's second case, *United States—Gasoline*.[96] In that case, the WTO's AB said that U.S regulations aiming to reduce air pollution from gasoline by regulating gasoline's chemical composition fell within the scope of the WTO's exception for measures related to the conservation of exhaustible resources.[97] The United States was denied the exception only because the regulation

94. *Id.* ¶¶ 5.14–.15.

95. *Id.* ¶ 5.15.

96. Appellate Body Report, *United States—Standards for Reformulated and Conventional Gasoline*, WTO Doc. WT/DS2/AB/R (adopted May 20, 1996).

97. *Id.* at 22.

discriminated against imported gasoline by applying stricter standards for its chemical composition.[98]

The 1998 *Shrimp-Turtle* decision provided an even clearer example of the shift toward a consumption-based approach.[99] That case essentially presented a rerun of *Tuna-Dolphin*. Regulations issued under the Endangered Species Act in 1987 required U.S. shrimpers to use "turtle-excluding devices" in order to protect endangered sea turtles during shrimping.[100] In 1989, Congress sought to level the playing field between U.S. and foreign shrimpers by prohibiting the import of shrimp harvested with technology that potentially harmed sea turtles unless the harvesting nation was certified by the President as having a regulatory program comparable to that of the United States.[101] Following *Tuna-Dolphin*, the United States did not contest that the import ban was an unlawful border measure.[102] But it argued the measure was justified as "relating to the conservation of exhaustible natural resources[,]" one of the GATT article XX exceptions.[103]

The AB agreed.[104] In so doing, it addressed whether the United States required a territorial nexus to the sea turtles. The AB

98. *Id.* at 29. The exceptions in GATT article XX contain their own nondiscrimination rule, which requires that measures justified under the exception are "not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail . . . ." *Id.* at 13.

99. Appellate Body Report, *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, WTO Doc. WT/DS58/AB/R (adopted Nov. 6, 1998) [hereinafter *Shrimp-Turtle*].

100. 50 C.F.R. § 223.207 (2024).

101. Act of Nov. 21, 1989, Pub. L. No. 101-162, § 609, 103 Stat. 988, 1037. The law also required the government to negotiate international agreements on the protection of sea turtles. *Id.*

102. *See* Panel Report, *United States—Import Prohibition on Certain Shrimp and Shrimp Products*, ¶ 3.3, WTO Doc. WT/DS58/R.

103. GATT, *supra* note 64, at art. XX(g).

104. Although the AB agreed that the measure was related to the conservation of exhaustible natural resources, it rejected the United States' article XX defense on the grounds that the U.S. measure was arbitrarily and unjustifiably discriminatory among nations insofar as it required nations to adopt essentially the same policies to protect sea turtles as the United States and distinguished among countries in terms of the amount of aid and time the United States gave to come into compliance. *Shrimp-Turtle*, *supra* note 99, ¶¶ 161–186. However, the United States made some modifications to its regulations to increase the flexibility nations have in satisfying the U.S. requirements and to negotiate with nations on the possibility of aid, and the AB ultimately upheld the revised measure. Appellate Body Report,

ultimately decided that the United States had the requisite jurisdictional nexus, not because sea turtles were present within the United States, but because they were a migratory species that might at some point pass through U.S. waters.[105] Although the decision was expressly limited to a migratory species like sea turtles, it preserved the right of the United States to regulate access to its market based on foreign productive activities that left no trace on the product actually present within the U.S. territory.

The 2014 *EU—Seals* case consolidated and extended the move toward a consumer approach to jurisdiction in two ways.[106] First, the challengers, Canada and Norway, framed their challenge as opposition to a discriminatory domestic measure, rather than to a per se unlawful border measure. The EU regulation they challenged prohibited the import and sale of seal products on animal welfare grounds unless the seals had been harvested either by indigenous communities or as part of sustainable seal population control efforts.[107] The EU's regulation thus imposed a criterion related to foreign productive activities on the import and sale of seal products. Under either *Tuna-Dolphin* or *Shrimp-Turtle*, Canada and Norway might have challenged the measure as an unlawful ban on imports because the regulation was production focused, not product focused. But Canada and Norway instead chose to accept that a measure banning imports based on the manner of foreign production could be analyzed as a domestic measure and thus would only be unlawful if it was discriminatory.[108] They accepted the EU's authority to regulate access to its market based on foreign productive activities as long as it did so in a nondiscriminatory manner.

Second, the AB accepted the EU's argument that its ban could be justified as "necessary to protect public morals . . . ."[109]

United States—Import Prohibition of Certain Shrimp and Shrimp Products, Recourse to Article 21.5 of the DSU by Malaysia, WTO Doc. WT/DS58/AB/RW (adopted Nov. 21, 2001).

105. *Shrimp-Turtle*, *supra* note 99, ¶ 133.

106. Appellate Body Report, *European Communities—Measures Prohibiting the Importation and Marketing of Seal Products*, WTO Doc. WT/DS400/AB/R, WT/DS401/AB/R (adopted June 18, 2014).

107. European Parliament and Council Regulation 1007/2009, art. 3, 2009 O.J. (L. 286) 36, 38. A third exception applied to products that were carried by travelers for personal use. *Id.*

108. As it happened, the EU regulation was discriminatory because the exceptions, as applied, permitted the sale of Swedish seal products (Sweden is an EU member).

109. GATT, *supra* note 64, at art. XX(a).

This finding allowed the EU to ban a product from its market based explicitly on the sentiment of its consumers about an activity occurring overseas.[110] Under the traditional production-based view, such bans would have been unlawful import prohibitions under GATT article XI. But under the new consumption-focused view adopted in *EU-Seals*, such a ban could in principle be lawful as a domestic measure under GATT article III, and in any event, could be sustained under the GATT's exceptions.

b. Economy-Wide Measures. *Shrimp-Turtle* and *EU-Seals* dealt with individual products. Whatever the legal significance of the decisions, the measures upheld had little global economic significance. By contrast, the United States and the EU have recently adopted measures with considerably greater significance for the global economy that implicitly rest on Consumption Jurisdiction.

Carbon border adjustments (CBAs) are the best example. CBAs are typically fees paid on imports into countries that have costly domestic carbon regulations or taxes. The purpose of CBAs is to ensure that imports are not cheaper than carbon-equivalent domestic products just because they are produced and exported from countries that do not meaningfully tax or regulate carbon emissions during production.[111] Because domestic carbon taxes or regulations raise production costs, CBAs level the playing field between imports and domestic products.[112] In effect, they remove the competitive advantage that producing nations gain by declining to impose a carbon price or expensive climate regulations on industry.

110. Trade lawyers have long pondered, for instance, the extent to which a country could ban imports based on labor standards or human rights concerns—concerns not expressly authorized in the GATT. *See, e.g.*, Robert L. Howse & Jared M. Genser, *Are EU Trade Sanctions on Burma Compatible with WTO Law?*, 29 MICH. J. INT'L L. 165 (2008).

111. Many commentators include in the definition a requirement that the CBA equalize the cost of carbon faced by imports and domestic products. *See, e.g.*, James Bacchus, *Legal Issues with the European Carbon Border Adjustment Mechanism*, 125 CATO INST. 1, 1 (Aug. 9, 2021) ("The aim [of a CBA] is to apply a carbon price to imported products that is equivalent to the carbon price applied to products manufactured in the [importing country]."). This equality, though, is a requirement to be consistent with WTO nondiscrimination rules. It is not an element of whether the measure is border adjustable.

112. Jennifer A. Hillman, *Changing Climate for Carbon Taxes: Who's Afraid of the WTO?*, 2013 GERMAN MARSHALL FUND 1.

Proposals for CBAs have been around for some time but have never been adopted, in part out of concern for their legality.[113] During 2009–10, for example, multiple bills in Congress would have imposed a CBA on imports into the United States.[114] Yet the EU's CBA Mechanism (CBAM), which came into effect in 2023, is the first such proposal to gain the force of law. When fully phased in, the EU's CBAM will require importers of a number of key industrial products, such as steel and chemicals, to buy certificates covering emissions during the production process. The price of the certificates will be determined by the price charged for emissions on the EU's domestic Emissions Trading Scheme (ETS).[115]

By governing carbon emissions in foreign countries, the EU's CBAM dramatically expands the reach of the EU's climate measures. The EU is effectively conditioning access to its consumers on compliance with EU production regulations. The EU vetted this approach over a decade ago when it first proposed a CBA for emissions from aircraft flying in the EU.[116] Controversially at the time, the proposal would have required airlines to pay for emissions during the full duration of international flights starting or ending in the EU, including those portions of the flight that occurred outside of the EU.

The European Court of Justice ultimately upheld this measure against a challenge from foreign airlines. The Court reasoned that the EU has "unlimited jurisdiction" over airplanes at EU airports, including jurisdiction to charge them for activities that occurred before they entered the EU's territory.[117] In essence, the Court held that the EU can regulate the provision of services occurring outside EU territory (flights originating outside the EU) as a condition of

113. *Id.*; Robert Howse & Antonia L. Eliason, *Domestic and International Strategies to Address Climate Change: An Overview of the WTO Legal Issues*, *in* INTERNATIONAL TRADE REGULATION AND THE MITIGATION OF CLIMATE CHANGE 48 (Thomas Cottier, Olga Nartova & Sadeq Z. Bigdeli eds., 2009).

114. Stephen Kyo, Bernd G. Janzen & Holly M. Smith, *Border Adjustment Measures in Proposed U.S. Climate Change Legislation – "A New Chapter in America's Leadership on Change?"*, 9 SUSTAINABLE DEV. L. & POL'Y 12, 16 (2009).

115. *Proposal for a Regulation of the European Parliament and of the Council Establishing a Carbon Border Adjustment Mechanism*, COM (2021) 564 final (July 14, 2021).

116. European Parliament and Council Directive 2008/101/EC, 2009 O.J. (L 8) 3.

117. *See* Case C-366/10, Air Transp. Ass'n of Am. v. Sec'y of State for Energy and Climate Change , 2011 E.C.R. I-13833, I-13892.

accessing the EU market for the provision of air travel services.[118] The consumption of goods and services within the EU, in other words, provides a sufficient basis to tax and regulate the production of those goods and services before they arrive in the EU.

Nor is the EU CBA an isolated example. Then-candidate Joe Biden proposed a U.S. CBA during the 2020 presidential campaign, and during his administration multiple bills imposing CBAs have been introduced in Congress.[119] Meanwhile, the United Kingdom, Canada, and Japan have all begun exploring their own CBAs.[120] The Biden administration and the EU have also launched a Global Arrangement on Sustainable Steel and Aluminum Trade, which contemplates the United States, the EU, and other interested countries restricting access to their markets for high-carbon steel and aluminum while imposing domestic measures on decarbonization in the metal sector—in effect, a multilateral CBA.[121]

The EU has also adopted measures limiting imports of products produced on deforested land. The EU's 2018 revised Renewable Energy Directive, for instance, creates incentives for states to use biodiesel fuels in the transportation sector but denies those

118. Despite this favorable legal ruling, the EU suspended the application of the ETS to flights originating overseas in light of strong diplomatic pressure.

119. *See* Ari Natter, Jennifer A Dlouhy & David Westin, *Biden Exploring Border Adjustment Tax to Fight Climate Change*, BLOOMBERG (Apr. 23, 2021, 1:50 PM), https://www.bloomberg.com/news/articles/2021-04-23/biden-exploring-border-adjustment-tax-to-fight-climate-change; Clean Competition Act, S. 4355, 117th Cong. (2022); FAIR Transition and Competition Act of 2021, H.R. 4534, 117th Cong.

120. Rachel Morison & Anna Edwards, *U.K. Considers Carbon Border Tax to Protect Domestic Industry*, BLOOMBERG (May 28, 2021, 2:21 AM), https://www.bloomberg.com/news/articles/2021-05-28/u-k-considers-carbon-border-tax-to-protect-domestic-industry; *Exploring Border Carbon Adjustments for Canada*, GOV'T OF CAN. (June 2, 2023), https://www.canada.ca/en/department-finance/programs/consultations/2021/border-carbon-adjustments/exploring-border-carbon-adjustments-canada.html; Shiho Takezawa, *Japan Mulls Carbon Border Tax for Polluters, Nikkei Says (1)*, BLOOMBERG TAX (Feb. 10, 2021, 6:31 PM), https://news.bloombergtax.com/daily-tax-report-international/japan-mulls-carbon-border-tax-for-biggest-polluters-nikkei-says.

121. *Fact Sheet: The United States and European Union to Negotiate World's First Carbon-Based Sectoral Arrangement on Steel and Aluminum Trade*, THE WHITE HOUSE (Oct. 31, 2021) https://www.whitehouse.gov/briefing-room/statements-releases/2021/10/31/fact-sheet-the-united-states-and-european-union-to-negotiate-worlds-first-carbon-based-sectoral-arrangement-on-steel-and-aluminum-trade; *see also* Todd N. Tucker & Timothy Meyer, *A Green Steel Deal: Toward Pro-Jobs, Pro-Climate Transatlantic Cooperation on Carbon Border Measures*, ROOSEVELT INST. (June 3, 2021), https://rooseveltinstitute.org/wp-content/uploads/2021/06/RI_GreenSteelDeal_WorkingPaper_202106.pdf (proposing that the U.S. and EU replace existing national security tariffs on steel with a common external tariff on high-carbon steel).

incentives to biofuels that create a high risk of "indirect land-use change."[122] In November 2021, the EU also announced plans to restrict imports from land deforested post-2020.[123]

The EU has explicitly justified these measures on the grounds that the EU has a right to regulate the extraterritorial effects caused by its own consumption. As Frans Timmermans, the European Commission's vice president, put it in the context of the import ban tied to deforestation, "EU demand for commodities like palm oil, soy, wood, beef, cocoa, and coffee are strong drivers of deforestation."[124] Similarly, the European Commission has written that

> [a]s a major economy and consumer of these commodities linked to deforestation and forest degradation, the EU is partly responsible for [deforestation] . . . This initiative will provide a guarantee to EU citizens that the products they consume on the EU market do not contribute to global deforestation and forest degradation.[125]

For its part, the United States has banned imports tied to human rights violations, as well as from Russia in response to its invasion of Ukraine. The Uyghur Forced Labor Prevention Act, signed into law in 2021, establishes a rebuttable presumption that goods made in the Xinjiang region of China—home to the Uyghur population that has been the subject of human rights violations by the Chinese government—are made with forced labor and hence may not be imported into the United States.[126] Bans on the import of Russian goods and services have been adopted throughout the world,

122. European Parliament and Council Directive 2018/2001 O.J. (L 328) 82, 94.

123. Bryan Pietsch, *E.U. Seeks to Block Import of Commodities that Drive Deforestation*, WASH. POST (Nov. 17, 2021, 5:04 PM) https://www.washingtonpost.com/world/2021/11/17/eu-commodity-imports-deforestation.

124. European Commission Speech SPEECH/21/6085, Press Conference by Executive Vice-President Frans Timmermans and Commissioner Sinkevičius on a Package of Proposals on Soil, Waste and Deforestation (Nov. 17, 2021).

125. European Commission Questions and Answers QANDA/21/5919, Questions and Answers on New Rules for Deforestation-free Products (Nov. 17, 2021), https://ec.europa.eu/commission/presscorner/detail/en/qanda_21_5919.

126. Uyghur Forced Labor Prevention Act, *supra* note 33.

including not only the United States and the EU, but also Canada, Japan, and the United Kingdom.[127]

Trade policies like CBAs, the import ban tied to deforestation, and the ban on imports tied to forced labor are difficult to imagine under the production-based approach to jurisdiction that prevailed in the twentieth century. To be sure, these measures face near-certain legal challenge at the WTO. Indonesia and Malaysia have already challenged the EU's approach to deforestation in the context of its Renewable Energy Directive, and challenges to the EU's CBA are likely to come once the CBA is fully implemented in 2026. But the willingness of many of the world's largest economies to adopt measures taxing and regulating foreign production of goods and services consumed within their borders reflects the most important change in international economic regulation thus far in the twenty-first century.

B. International Tax

International tax law, an often overlooked but increasingly important site of innovation in international law,[128] has followed an arc similar to international trade law. As described above, international trade law itself governs tax to some extent, so I focus in this section on jurisdiction to tax income or revenue. The main problem is allocating taxing authority among multiple nations that all might plausibly claim a connection to the underlying economic activity. Like international trade law, international tax law has not used the categories of production and consumption to describe authority to tax—international tax law uses the concepts of "source countries" and "residence countries"[129]—and scholars have not typically focused on these categories either. Yet international tax originally followed a system based primarily on the location of production. The last few years, on the other hand, have seen a shift toward Consumption Jurisdiction with the agreement on a

127. *Sanctions and Export Controls on Russia*, INT'L TRADE ADMIN., https://www.trade.gov/russia-sanctions-and-export-controls (last visited Mar. 5, 2024) (listing countries imposing sanctions on Russia).

128. *See* Ruth Mason, *The Transformation of International Tax*, 114 AM. J. INT'L L. 353 (2020) (arguing that recent efforts to reform international tax law have fundamentally remade the system).

129. *See, e.g.*, Reuven S. Avi-Yonah, *International Tax as International Law*, 57 TAX L. REV. 483, 483 (2004); Mason, *supra* note 128, at 355–56.

consumption-based formula for allocating jurisdiction to tax the income of the world's largest companies.

1. The Production Approach

Traditionally, nations claim two distinct bases for taxing revenue: source and residence. In general, international law permits nations to tax their corporate residents' incomes from anywhere in the world, as well as any income sourced within their borders.[130] In principle, source jurisdiction might cover both productive and consumptive activities. But during the twentieth century, the definition developed more of a focus on productive activities. Moreover, tax treaties emphasized residence jurisdiction over source jurisdiction, which perpetuated the Production Jurisdiction norm.[131]

Before globalization, the same country would normally exercise both source and residence jurisdiction because actors and their activities were located within the same country. Conflicts of dual jurisdiction were rare. In the late nineteenth and early twentieth centuries, however, the increased economic integration associated with the Industrial Revolution meant that companies increasingly sourced income from countries in which they were not residents. This development created overlapping tax jurisdictions.[132] Nations could tax their residents' income, as well as non-residents' income sourced within their borders. Dual jurisdiction, in turn, created the possibility of double taxation.[133] The same income might be taxed in two or more jurisdictions, either because it was non-resident income domestically sourced or because countries had different views about where the income was sourced or who qualified as a resident.

130. Mason, *supra* note 128, at 355; Avi-Yonah, *supra* note 129, at 490 ("The right of countries to tax income arising in their territory is well established in international law.").

131. Mason, *supra* note 128, at 356 ("[T]ax treaties shift tax revenue from source to residence by constraining source tax entitlements . . . .").

132. CRISTIAN ÓLIVER LUCAS-MAS & RAÚL FÉLIX JUNQUERA-VARELA, TAX THEORY APPLIED TO THE DIGITAL ECONOMY: A PROPOSAL FOR A DIGITAL DATA TAX AND A GLOBAL INTERNET TAX AGENCY 1 (2021).

133. Rebecca M. Kysar, *Unraveling the Tax Treaty*, 104 MINN. L. REV. 1755, 1760 (2020) ("The primary predicament underlying international taxation is whether income should be taxed by the country in which the taxpayer resides (the residence country) or by the country where the income is earned (the source country).").

Businesses operating internationally objected to double taxation. In the 1920s, governments responded with treaties designed to eliminate double taxation by resolving conflicts between source and residence jurisdiction.[134] Today, the modern international tax system consists of a series of hundreds of bilateral tax treaties, as well as customary international law.[135] Although tax treaties are bilateral, and therefore unique to the parties, most treaties are based on the OECD's model.[136]

Tax treaties resolve the conflict between residence and source jurisdiction in two ways. First, they clarify residence and sourcing rules. Second, they assign one jurisdiction priority in the taxation of particular income types.

Definitionally, tax treaties defer to each nation's residency laws.[137] National laws, in turn, tend to define corporate residence by some combination of place of incorporation, management, and control.[138] These criteria, of course, mean that corporations have substantial discretion to choose their residence—and thus the residence-based tax-rate they pay—through incorporation or choice of headquarters location.[139]

The definition of source is considerably more complex.[140] As a legal concept, source relies on notions of territoriality—nations tax income created within their borders.[141] This formulation, however,

134. *Id.* at 1760–61; *see also* Steven A. Dean, *Philosopher Kings and International Tax: A New Approach to Tax Havens, Tax Flight, and International Tax Cooperation*, 58 HASTINGS L.J. 911, 939–47 (2007) (arguing that double tax treaties have been more successful than one would expect because they "provide valuable benefits to a limited number of taxpayers"); Mitchell A. Kane, *A Defense of Source Rules in International Tax*, 32 YALE J. ON REGUL. 311, 313 (2015). The treaties also clarify priority of taxing rights when a person is a resident of two states. *See* OECD MODEL TAX CONVENTION ON INCOME AND ON CAPITAL, art. 4.2 (2017), https://www.oecd.org/ctp/model-tax-convention-on-income-and-on-capital-full-version-9a5b369e-en.htm [hereinafter OECD MODEL TAX TREATY].

135. Mason, *supra* note 128, at 355.

136. *Id.* at 356; OECD MODEL TAX TREATY, *supra* note 134.

137. *Id.* at art. 4.1 ("[T]he term 'resident of a Contracting State' means any person who, under the laws of that State, is liable to tax therein . . . .").

138. *See generally* Omri Marian, *Jurisdiction to Tax Corporations*, 54 B.C. L. REV. 1613 (2013) (discussing domestic definitions of corporate tax residence).

139. Although corporations are the most significant objects of international tax from a governance perspective, the residency of actual people is typically determined by the amount of time during the year a person spends in the jurisdiction. Avi-Yonah, *supra* note 129, at 485–86.

140. *See generally* Kane, *supra* note 134.

141. *Id.* at 331 (defending geographic source rules).

simply invites the question what it means for income to be created within a particular jurisdiction. For instance, if a subsidiary in France pays a dividend to its parent corporation in the United States, is that income sourced in France where the payment originated, or in the United States, where it is received?[142] Are royalties on the use of intellectual property "sourced" in the country in which the intellectual property is used, or in the country from which the owner licensed the use of the property and in which it receives the payment?[143]

For many sources of income, treaties and national tax legislation might deem the income sourced in the country of consumption or use. For example, the OECD Model Tax Treaty treats royalties as arising in the country of use.[144] Likewise, interest payments received by lenders arise in the country of the payer (that is, the debtor), rather than in the country in which the interest payments are received.[145]

However, in other important instances, source rules evolved to focus on the location of production. The clearest example is the set of source rules governing the provision of services. Services are generally considered sourced from the place of performance, rather than the place the services are received or used.[146] This rule is especially significant in the Internet age. Falling telecommunication costs generally, and the rise of digital service providers like Google and Facebook specifically, means that an increasingly large portion of the services economy is provided from outside the countries in which those services are used. As services reflect a growing portion of global trade, especially in developed countries,[147] source rules for services have allocated a larger percentage of income to the place of production, rather than consumption.

142. OECD MODEL TAX TREATY, *supra* note 134, at art. 10.

143. *Id.* at art. 12.

144. *Id.* at art. 12.1 ("Royalties arising in a Contracting State and beneficially owned by a resident of the other Contracting State shall be taxable only in that other State.").

145. *Id.* at art. 11.5 ("Interest shall be deemed to arise in a Contracting State when the payer is a resident of that State.").

146. Stephen E. Shay, J. Clifton Fleming, Jr. & Robert J. Peroni, *The David R. Tillinghast Lecture: "What's Source Got to Do with It?" Source Rules and U.S. International Taxation*, 56 TAX L. REV. 81, 140 (2002) ("The general source rule for services is the place of performance.").

147. *See Total Trade in Services*, UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT HANDBOOK OF STATISTICS 2023 fig. 1, https://hbs.unctad.org/total-trade-in-services (last visited Mar. 5, 2024).

More important than definitional issues is the way in which tax treaties have allocated the right to tax income among residence countries and source countries. In general, tax treaties shift taxing rights from source countries to residence countries.[148] This shift privileges the location of productive actors over any conception of source.

Tax treaties prioritize residence-based taxation over source-based taxation in two ways. First, they grant countries of residence primary taxing authority over income from investments and other kinds of intangible activities.[149] Thus, even when source is defined as the country of use, as it is with royalties, tax treaties allocate taxing rights to the country in which payment is received; that is, in which the actor owning the right to profit from production is located.[150] Second, while tax treaties grant source countries jurisdiction over business income, they only do so to the extent that the business has a physical presence within the country.[151]

In practical terms, then, source countries gave up much of their right to tax the income non-residents generated in-country without a physical presence. Whatever the merits of this division of authority in the mid-twentieth century, the rise of e-commerce and the digital economy, along with a decline in brick-and-mortar shopping, has molded the tax landscape in favor of residence countries.[152] Because many of the largest multinational corporations no longer require a physical presence in countries in order to sell products and services there, the tax rights of source countries under tax treaties have lost even more value. The result is a tax system that, especially with respect to services and the digital economy, privileges jurisdictions in which the productive actor resides over those in which consumption occurs. And because corporations can often choose their residence, this system is highly manipulable.

148. Mason, *supra* note 128, at 356 ("[T]ax treaties shift tax revenue from source to residence by constraining source tax entitlements . . . .").

149. OECD MODEL TAX TREATY, *supra* note 134, arts. 10.1–2, 11.1–2 (providing countries of residence primary taxing authority over dividends and interest payments); Kysar, *supra* note 133, at 1761–62.

150. OECD MODEL TAX TREATY, *supra* note 134, at art. 12.1.

151. OECD MODEL TAX TREATY, *supra* note 134, at art. 7.1; Kysar, *supra* note 133, at 1761–62.

152. Mason, *supra* note 128, at 356.

2. The Consumption Approach

The difficulty with the Production Jurisdiction model in tax is its manipulability. Global companies are able to exploit the production-based model to choose the country in which their profits will be taxed.[153] Firms that generate income from intangible rights such as intellectual property or through the supply of services, especially over the Internet, are most able to take advantage of the loopholes the productive model creates.[154] As noted above, the simplest version of this problem comes from the growth in digital services. Under Production Jurisdiction, countries cannot tax profits generated by, for example, their citizens' use of Google or Facebook within their own territories.[155]

A more complicated version of the problem involves firms creating subsidiaries in low-tax jurisdictions or tax havens.[156] Firms that do this can assign their intellectual property rights, often the most valuable assets that these companies own, to these subsidiaries.[157] Subsidiaries or parent corporations located in higher-tax jurisdictions can then license intellectual property rights or purchase services from corporations in low-tax jurisdictions.[158] This practice—known as transfer pricing because it involves related enterprises setting prices for goods, services, or rights at artificially

153. *See* Reuven S. Avi-Yonah, Kimberly A. Clausing & Michael C. Durst, *Allocating Business Profits for Tax Purposes: A Proposal to Adopt a Formulary Profit Split*, 9 FLA. TAX. REV. 497, 500 (2009); Samuel Kortum & David Weisbach, *The Design of Border Adjustments for Carbon Prices*, 70 NAT'L TAX J. 421, 426 (2017).

154. LUCAS-MAS & JUNQUERA-VARELA, *supra* note 132, at 3.

155. Reuven Avi-Yonah, Young Ran (Christine) Kim & Karen Sam, *A New Framework for Digital Taxation*, 63 HARV. INT'L L.J. 279, 280 (2022) ("Because tech giants such as Google, Facebook, and Amazon are now able to generate revenue from market countries entirely online, without ever establishing a physical presence, they can avoid paying sufficient taxes to those market countries.").

156. LUCAS-MAS & JUNQUERA-VARELA, *supra* note 132, at 3; Avi-Yonah et al., *supra* note 153, at 516.

157. LUCAS-MAS & JUNQUERA-VARELA, *supra* note 132, at 3 ("The ease of communication via the internet, combined with the ability to attribute significant values to intangible assets and rights, opened the door for multinational enterprises to minimize their taxes by shifting profits out of host countries by means of transfer pricing: subsidiaries or permanent establishments in higher-tax jurisdictions could "buy" services or rights from related enterprises in the same multinational group located in low-tax jurisdictions.").

158. *Id.*; Avi-Yonah et al., *supra* note 153, at 511; *see also* Brad W. Setser, *The Irish Shock to U.S. Manufacturing?*, COUNCIL ON FOREIGN RELS. (May 15, 2020), https://www.cfr.org/blog/irish-shock-us-manufacturing.

high or low prices—allows firms to realize profits based on their intellectual property or services in low-tax jurisdictions.[159]

Pharmaceutical and tech companies provide illustrations of the basic strategy. Pfizer, for instance, has historically sold or licensed its patents developed in the United States to Pfizer Ireland Pharmaceuticals, which then produced the drugs that the Irish subsidiary sold back to Pfizer and its affiliated entities in the United States.[160] As a result, income flowing from the production and sale of Pfizer's drugs was realized in Ireland, a low-tax jurisdiction, rather than the United States.

Apple's decision to shift some of its intellectual property to Ireland in 2015 inflated Ireland's GDP by twenty-six percent that year without any change in Ireland's actual economic activity.[161] Similarly, Allergan's Botox patents, Facebook's rights to its social media technology, Nike's trademark in its iconic Swoosh, and Uber's intellectual property in its ride-hailing app have all been owned by shell companies located in Bermuda and Grand Cayman.[162]

This phenomenon, enabled by the underlying reliance on Production Jurisdiction norms in existing international income tax, spurred countries to negotiate a shift toward consumption-based jurisdiction to tax. The shift proceeded in two ways. The first was multilateral negotiations at the OECD. The 1998 Ottawa Taxation Framework and the 2005 OECD report on electronic commerce were early efforts to think through the tax implications of e-commerce, but they stopped short of calling for reallocation of tax

159. *See* Aitor Navarro, *Simplification in Transfer Pricing: A Plea for the Enactment of Rebuttable Predetermined Margins and Methods Within Developing Countries*, 22 FLA. TAX REV. 755, 760 (2019) ("[T]hrough transfer pricing adjustments, income is allocated among related entities as if they were independent parties conducting the same transaction in order to guarantee equality in tax treatment . . . .").

160. Tom Bergin & Kevin Drawbaugh, *How Pfizer Has Shifted U.S. Profits Overseas for Years*, REUTERS (Nov. 16, 2015, 10:03 AM), https://www.reuters.com/article/idUSKCN0T51ZS.

161. Paul Krugman, *Leprechaun Economics Key to Understanding U.S. Corporate Tax Proposal*, THE IRISH TIMES (Apr. 9, 2021, 8:45 PM). https://www.irishtimes.com/business/economy/leprechaun-economics-key-to-understanding-us-corporate-tax-proposal-1.4533410.

162. Jesse Drucker & Simon Bower, *After a Tax Crackdown, Apple Found a New Shelter. For Its Profits*, N.Y. TIMES (Nov. 6, 2017), https://www.nytimes.com/2017/11/06/world/apple-taxes-jersey.html.

jurisdiction.[163] The financial crisis of 2007–08 changed matters, though, as it created more pressure on governments to find sources of tax revenue.[164]

Thus, in 2013, at the behest of the Group of 20 (G20), the OECD launched its project on Base Erosion and Profit Shifting (BEPS).[165] Initially, the idea was to require multinational enterprises to report their income where "value creation" occurred.[166] As Shaviro points out, this could "refer either to production countries where IP is created and maintained, and/or to the market countries where consumers or users are located, or to some unspecified combination of the two."[167] But the prevailing view among scholars quickly coalesced around a consumer-oriented conception of where value creation occurs.[168]

States soon adopted that view as well, producing the second track toward Consumption Jurisdiction's development in international tax. Many states began to unilaterally shift toward a consumer-based model of taxation in the form of digital services taxes—taxes on advertising revenue, data transfer, and online marketplace sales—imposed based on where services were consumed, rather than where the service provider was located.[169]

A number of countries—including Brazil, the Czech Republic, France, India, Indonesia, Italy, Spain, Turkey, and the United Kingdom—adopted or proposed digital services taxes.[170] Although these taxes varied in structure, French policy provides a good

163. Aitor Navarro, *The Allocation of Taxing Rights Under Pillar One of the OECD Proposal*, *in* OXFORD HANDBOOK OF INTERNATIONAL TAX LAW 951, 953 (Florian Haase & Georg Kofler eds., 2023).

164. *Id.* at 954.

165. *See, e.g.*, *BASE EROSION AND PROFIT SHIFTING PROJECT*, *OECD*, *ADDRESSING THE TAX CHALLENGES OF THE DIGITAL ECONOMY*, ACTION 1: 2015 FINAL REPORT (2015).

166. *See, e.g.*, Stanley Langbein & Max R. Fuss, *The OECD/G20-BEPS-Project and the Value Creation Paradigm: Economic Reality Disemboguing into the Interpretation of the Arm's Length Standard*, 51 INT'L LAW. 259 (2018).

167. Daniel Shaviro, *Digital Services Taxes and the Broader Shift from Determining the Source of Income to Taxing Location-Specific Rents*, NYU LAW AND ECONOMICS RESEARCH PAPER NO. 19-36 at 4 (2020), https://papers.ssrn.com/sol3/Papers.cfm?abstract_id=3448070.

168. *Id.*

169. William Alan Reinsch, Carlota Martinez-Don & Jack Caporal, *What's Behind USTR's New Digital Services Tax Investigation?*, CTR. FOR STRATEGIC & INT'L STUD. (June 19, 2020), https://www.csis.org/analysis/whats-behind-ustrs-new-digital-services-tax-investigation.

170. *Id.*; Lilian V. Faulhaber, *Taxing Tech: The Future of Digital Taxation*, 39 VA. TAX REV. 145, 156 (2019).

example. It assessed a three percent tax on the portion of global advertising and social media use income attributable to France.[171] Nominally, the approach relied on reconceptualizing the provider's presence as "digital presence."[172] In practice, "digital presence" was a fiction designed to allow French taxes on digital services based on the percentage of the digital service provider's user base located in France.

The United States, home to many of the world's leading digital service providers, objected strenuously. The U.S. Trade Representative (USTR) initiated investigations into digital services taxes, beginning with France in 2019 and then extending to a range of other countries in 2020.[173] USTR concluded that digital services taxes were unreasonable or discriminatory and burdened U.S. commerce, triggering USTR's ability to impose trade sanctions under Section 301 of the Trade Act of 1974.[174] The U.S. was concerned that the French tax applied extraterritorially because it was based on a portion of global revenue, that it taxed revenue instead of income, and that it targeted U.S. companies specifically because, in practice and intent, it only applied to a small number of large digital services companies headquartered in the United States.[175] USTR ultimately imposed a retaliatory twenty-five percent tariff on certain French products, but suspended the application of the tariffs while it sought a negotiated resolution.[176]

That negotiation concluded in 2021. The OECD announced an agreement, a "Two-Pillar Solution," that would reallocate tax rights largely on a consumption-based theory.[177] Over 130 nations have since agreed to the OECD's framework, including,

171. KPMG, TAXATION OF THE DIGITALIZED ECONOMY: DEVELOPMENTS SUMMARY 12 (2024), https://kpmg.com/kpmg-us/content/dam/kpmg/pdf/2023/digitalized-economy-taxation-developments-summary.pdf.

172. *Id.*; *see also* Faulhaber, *supra* note 170, at 158.

173. Notice of Initiation of a Section 301 Investigation of France's Digital Services Tax, 84 Fed. Reg. 34042 (July 16, 2019); Notice of Initiation of Section 301 Investigations of Digital Services Taxes, 85 Fed. Reg. 34709 (June 5, 2020).

174. Notice of Determination and Request for Comments Concerning Action Pursuant to Section 301: France's Digital Services Tax, 84 Fed. Reg. 66956 (Dec. 6, 2019).

175. U.S. TRADE REPRESENTATIVE, REPORT ON FRANCE'S DIGITAL SERVICES TAX 30 (2019), https://ustr.gov/sites/default/files/Report_On_France%27s_Digital_Services_Tax.pdf.

176. Notice of Action in the Section 301 Investigation of France's Digital Services Tax, 85 Fed. Reg. 43292 (July 16, 2020).

177. *Two-Pillar Solution*, *supra* note 14.

importantly, Ireland.[178] Although many of the specific accounting rules were left for future negotiation, and implementation today remains a work in progress, the basic structure of the agreement was settled.

The first pillar reallocates taxing rights by allowing countries in which a qualifying company has more than €1 million in sales to tax a portion of that company's profits.[179] The tax base of each company subject to this formula is twenty-five percent of profits above a ten percent profit margin.[180] The portion of that base that each country may tax will be determined using consumption-based criteria to be worked out, likely relying on local consumption.[181] The second pillar of the framework is a fifteen percent global minimum tax.[182] Critical to getting the United States on board was an agreement that countries with digital services taxes would drop those taxes once the OECD framework was fully implemented.[183]

International tax law has thus seen a shift toward a consumer-oriented approach to jurisdiction similar to what has occurred in international trade law. To be sure, the trend is perhaps more nascent than in trade law. Nations still have to implement their new tax agreements. But the shift is seismic, reflecting a fundamental reorientation of the central means through which modern nations fund the range of their operations, from defense to the social safety net. In this sense, the adoption of the Two-Pillar

178. Naomi Jagoda, *Ireland Joining International Agreement on Global Minimum Tax*, THE HILL (Oct. 7, 2021, 2:15 PM), https://thehill.com/policy/finance/575790-ireland-joining-international-agreement-on-global-minimum-tax.

179. OECD, SECRETARY-GENERAL TAX REPORT TO G20 FINANCE MINISTERS AND CENTRAL BANK GOVERNORS 8 (2021), https://www.oecd.org/tax/oecd-secretary-general-tax-report-g20-finance-ministers-july-2021.pdf. Qualifying companies are those with over €20 billion in annual revenue and a 10% profit margin, with companies in the extractive and financial services sectors exempted. *Id.*

180. *Id.* This amount is known as "Amount A." Pillar One also has an "Amount B" providing for a streamlined method for calculating taxes owed on in-country distribution and marketing services. The details of this amount remain to be negotiated. *Two-Pillar Solution*, *supra* note 14, at 2–3.

181. Navarro, *supra* note 163, at 957.

182. *Two-Pillar Solution*, *supra* note 14, at 4. The global minimum tax (Pillar Two) applies to many more companies than Pillar One. To qualify for Pillar Two, a company need only have €750 million in annual revenue. *Id.*

183. *Id.* at 3; Alan Rappeport, *Finance Leaders Reach Global Tax Deal Aimed at Ending Profit Shifting*, N.Y. TIMES (Oct. 8, 2021), https://www.nytimes.com/2021/06/05/us/politics/g7-global-minimum-tax.html.

Solution is akin to trade policies like carbon border adjustments in that it fundamentally reorients the regulation of the global economy.

C. Competition Law

Competition law (antitrust law in the United States) has also experienced a major shift from production to Consumption Jurisdiction. I leave competition law for last both because its shift toward consumption starts much earlier than that of international trade or tax, and because its economic significance in the modern world is the smallest of the three.

Competition law is worth considering alongside tax and trade for two reasons. First, jurisdictional principles in competition law have heavily influenced the development of jurisdiction in general international law and U.S. foreign relations law. In particular, the effects test was developed within competition law. Second, Consumption Jurisdiction in competition law today affects many of the same enterprises, especially large digital service providers, impacted by changes in international trade law and tax law.

1. The Production Approach

The early U.S. approach to antitrust predated the existence of competition law in most of the world.[184] It followed what is commonly described as a territorial approach. In fact, jurisdiction rested on a territorial nexus with productive activities. The Supreme Court set forth the approach in its 1907 decision in *American Banana Co. v. United Fruit Co.*[185] There, Justice Holmes wrote that

> the general and almost universal rule is that the character of an act as lawful or unlawful must be determined wholly by the law of the country where the act is done . . . . For another jurisdiction, if it should happen to lay hold of the actor, to treat him according to its own notions rather than those of the place where he did the

184. The Sherman Act was enacted in 1890, making the United States the earliest mover in competition law. Only about twenty countries had competition law policies by 1960, and Europe did not adopt a continent-wide competition law until 1957. Although today roughly 130 countries have competition laws, most of those laws are of relatively recent vintage, influenced by the United States and the EU. *See* Anu Bradford, Adam Chilton, Katerina Linos & Alexander Weaver, *The Global Dominance of European Competition Law Over American Antitrust Law*, 16 J. EMPIRICAL LEGAL STUD. 731, 736, 744 (2019).

185. American Banana Co. v. United Fruit Co., 213 U.S. 347 (1907).

> acts, not only would be unjust, but would be an interference with the authority of another sovereign, contrary to the comity of nations, which the other state concerned justly might resent.[186]

The case involved two American companies. The plaintiff owned a banana plantation in Panama and attempted to construct a railroad to facilitate export of the bananas.[187] The United Fruit Company, the defendant, allegedly instigated the Panamanian and Costa Rican governments to interfere with and ultimately expropriate the plaintiff's assets located in those countries.[188] The plaintiff alleged that United Fruit's actions were part of a concerted effort to quash competitors in the banana trade and raise U.S. prices in violation of the Sherman Act.[189]

Writing for the Court, Justice Holmes held that because Costa Rica and Panama had the power to regulate property and productive activities within their own territories, the defendant's efforts to secure those actions could not separately be challenged.[190] For this reason, *American Banana* has long been cited for its strict view of territorial jurisdiction.[191] Because Costa Rica and Panama had territorial jurisdiction over the productive activities in their countries, the United States lacked jurisdiction to regulate them. Costa Rica and Panama thus had exclusive jurisdiction to regulate productive activities in their territories.

But this understanding of *American Banana* is incomplete. The territorial nature *of production* drove the outcome in *American*

186. *Id.* at 356.

187. *Id.* at 354.

188. *Id.* at 357–58.

189. *Id.* at 354–55.

190. *Id.* at 358 ("The fundamental reason why persuading a sovereign power to do this or that cannot be a tort is . . . that it is a contradiction in terms to say that, within its jurisdiction, it is unlawful to persuade a sovereign power to being about a result that it declares by its conduct to be desirable and proper.").

191. *See, e.g.*, Jenny S. Martinez, *New Territorialism and Old Territorialism*, 99 CORNELL L. REV. 1387, 1388 (2014) ("In *American Banana*, the Court announced what has come to be known as the presumption against extraterritoriality in the application of federal statutes . . . ."); Katherine Florey, *Resituating Territoriality*, 27 GEO. MASON L. REV. 141, 170 (2019) ("As various scholars have observed, *American Banana* employs reasoning that echoes the vested rights theory in interstate conflicts. Both, for example, posit sovereigns operating in defined, mutually exclusive territorial spheres." (footnote omitted)); Jeffrey A. Meyer, *Dual Illegality and Geoambiguous Law: A New Rule for Extraterritorial Application of U.S. Law*, 95 MINN. L. REV. 110, 132 (2010) ("With the dawn of a new century, territoriality held steadfast as the paramount rule governing the authority of one state to apply its law to acts occurring in another.").

Banana, rather than a theory of territorial jurisdiction per se. The essence of the plaintiff's claim was that an American firm, presumably at the direction of its officials located in the United States, had enlisted a foreign government to assist in an illegal, anticompetitive practice. The defendant's actions had a firm territorial nexus with the United States, both because of the defendant's presence in the United States and because the effects of the scheme would be felt by consumers in the United States in the form of price increases.[192]

Instead, in rejecting U.S. jurisdiction in *American Banana*, the Supreme Court decided *what kinds* of territorial connections supported jurisdiction. On the facts presented, the Court rejected the idea that effects on consumers or management and control were sufficient.[193] The relevant acts were interference with and expropriation of productive assets in Central America. These acts focused entirely on the production of bananas, ignoring the equally territorial effects the scheme had on consumption in the United States. Neither the planning and instigating of interference with productive activity by American actors, nor the adverse effect on U.S. consumers, provided a legally sufficient jurisdictional basis.[194]

2. *The Consumption Approach*

On the traditional telling, this territorial approach was replaced with an approach based on effects.[195] In reality, the adoption of an effects test, first in the United States in the mid-twentieth century and later in Europe, reflects a shift from a territorial theory grounded in production to a territorial theory in which consumption can also be a jurisdictional basis. In other words, the shift from territory to effects did not change the territorial nature of jurisdiction as much as it changed what acts within a territory provide a sufficient basis for jurisdiction.

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192. The U.S. nationality of the firms could also conceivably have provided a basis for applying.

193. The fact that sovereign government action, rather than purely private action, was involved may also have a played a role in the Court's reasoning.

194. On its own terms, the decision could be read as limited to the situation in which the anticompetitive action is explicitly sanctioned by a foreign government acting within its own jurisdiction. However, the decision has been understood more broadly.

195. *See generally* Roger P. Alford, *The Extraterritorial Application of Antitrust Laws: The United States and European Community Approaches*, 33 VA. J. INT'L L. 1 (1992).

The shift began in 1945. In *United States v. Aluminum Co. of America (Alcoa)*, Judge Learned Hand, writing for the Second Circuit, held that a Swiss corporation's agreements to restrict imports of aluminum into the United States violated the Sherman Act "if they were intended to affect imports and did affect them."[196] The fact that little if any of the planning or execution of the agreements occurred within the United States did not matter.[197] A territorial nexus with productive activity was not necessary under *Alcoa*. If Congress wanted to regulate based on effects felt by U.S. consumers, it could.[198]

The *Alcoa* decision kicked off an aggressive campaign of effects-based enforcement of U.S. antitrust law.[199] Courts in these years generally conceived of effects as an "extraterritorial" basis for jurisdiction.[200] Even as the new effects test focused on consumers, the description of the effects test as "extraterritorial" continued to rely on the production-oriented view of authority that prevailed at the time. The only thing "extraterritorial" about the effects test was the foreign location of production. The "effects" that provided a nexus for jurisdiction—usually in the form of prices—were felt in the territory of the regulating state.[201]

The effects doctrine soon spread internationally. Its proliferation is relatively unsurprising given the fact of U.S. adoption and the focus of competition law. Countries like Germany, Austria, and Switzerland codified the test.[202] As Europe consolidated, the European Court of Justice (ECJ) initially resisted adopting the effects doctrine, although it recognized the need to

196. United States v. Aluminum Co. of Am., 148 F.2d 416, 444 (2d. Cir. 1945). The Second Circuit, in lieu of the Supreme Court, heard the case due to a lack of a quorum among the Justices. The Supreme Court ultimately adopted the effects test in *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 704 (1962).

197. Judge Hand dealt with *American Banana Co.* by treating it essentially as an application of the presumption against extraterritoriality. Aluminum Co. of Am., 148 F.2d at 443.

198. *Id.* ("[T]he only question open is whether Congress intended to impose the liability, and whether our own Constitution permitted it to do so . . . .").

199. Andrew T. Guzman, *Is International Antitrust Possible?*, 73 N.Y.U. L. REV. 1501, 1507 (1998).

200. *See, e.g.*, Timberlane Lumber Co. v. Bank of Am., 549 F.2d 597, 608 (9th Cir. 1976).

201. For this reason, the early Restatements of Foreign Relations Law more accurately characterized effects as a subspecies of territorial jurisdiction. *See supra* Part I.

202. Bernadette Zelger, *EU Competition Law and Extraterritorial Jurisdiction—A Critical Analysis of the ECJ's Judgement in* Intel, 16 EUR. COMPETITION J. 613 (2020).

regulate activities that occurred outside its borders if European competition law was to be effective.[203] Consequently, the ECJ developed a series of doctrines that allowed it to regulate productive activities that occurred extraterritorially, including the single entity doctrine and the implementation doctrine.[204] Eventually, the ECJ embraced the effects doctrine in the *Gencor* and *Intel* cases.[205]

Today, the EU's embrace of consumption-based jurisdiction, in the form of the effects test, has considerably greater global significance than the U.S. adoption. The reason is that, while antitrust enforcement has declined in the United States since the 1970s,[206] the EU continues to robustly enforce its rules. In particular, the EU has used its competition laws to regulate the same digital service providers whose business models have upended the international tax system.

For example, the European Commission has fined Google €8.25 billion across three separate investigations over the last decade.[207] In 2017, the European Commission fined Google €2.42 billion for abusing a dominant position by privileging its own shopping services.[208] In 2018, the Commission went further, fining Google €4.3 billion for imposing restrictions aimed at boosting Google's search business on software developers working

203. *Id.* at 617–18 ("Although popular in US antitrust law for more than half a century, it has not been until recently that the ECJ made clear that the effects doctrine provides a suitable means to establish jurisdiction also in the context of EU competition law." (emphasis omitted)). The ECJ's proper name is now the Court of Justice of the European Union.

204. *See* Case 48/69, *Imperial Chem. Indus. Ltd. v. Commission*, ECLI:EU:C:1972:70 (July 17, 1972); Case 89/85, *Ahlström Osakeyhtiö and Others v. Commission*, ECLI:EU:C:1994:12 (Mar. 31, 1993); *see also* Damien Geradin, Marc Reysen & David Henry, *Extraterritoriality, Comity and Cooperation in EC Competition Law*, in COOPERATION, COMITY, AND COMPETITION POLICY (Andrew T. Guzman ed., 2010).

205. Case T-102/96, *Gencor Ltd. v Commission*, ECLI:EU:T:1999:65 (Mar. 25, 1999); Case C-413/14 P, *Intel Corp. Inc. v. Commission*, ECLI:EU:C:2017:632 (Sept. 6, 2017).

206. *See generally* Filippo Lancieri, Eric A. Posner & Luigi Zingales, *The Political Economy of the Decline of Antitrust Enforcement in the United States* (Nat'l Bureau of Econ. Rsch., Working Paper No. 30326, 2022).

207. Foo Yun Chee, *Google Loses Challenge Against EU Antitrust Decision, Other Probes Loom*, REUTERS (Sept. 14, 2022, 9:46 AM), https://www.reuters.com/technology/eu-courts-wed-ruling-record-44-bln-google-fine-may-set-precedent-2022-09-14.

208. *Antitrust: Commission Fines Google €2.42 Billion for Abusing Dominance as Search Engine by Giving Illegal Advantage to Own Comparison Shopping Service – Factsheet*, EUROPEAN COMMISSION: PRESS CORNER (June 27, 2017), https://ec.europa.eu/commission/presscorner/detail/en/MEMO_17_1785.

on Google's Android platform.[209] Although European courts have slightly reduced that award, they have by and large upheld the Commission's efforts to rein in U.S. tech firms operating in Europe.[210]

Facebook has also faced scrutiny. In December 2022, the EU notified Facebook parent Meta of its preliminary view, as part of an ongoing investigation, that Meta had violated EU antitrust rules by tying its online classified ad business to its social media business.[211] The EU also fined Facebook €110 million in 2014 for misrepresentations made during its acquisition of WhatsApp and made a preliminary determination that Facebook (now Meta) had distorted the marketplace for online ads by tying its online ad site, Facebook Marketplace, to Facebook itself.[212] Similarly, the European Commission has expressed the preliminary view that Apple abused its dominant position by preventing makers of mobile wallets that might compete with Apple Pay from accessing technology that would be necessary to put the competitors on iPhones.[213]

The shift to Consumption Jurisdiction—from territory to effects, in traditional parlance—has thus had significant implications for the modern economy's regulation, especially the digital economy and technology. Under Production Jurisdiction, the U.S. decision not to aggressively pursue antitrust claims against its major digital and technology exporters would have allowed those companies to escape antitrust scrutiny. Under Consumption Jurisdiction, however, the consumer effects of the tech companies' operations in the EU allow the EU to regulate, despite the EU's lack of a nexus to productive activity. In short,

209. *Antitrust: Commission Fines Google €4.34 Billion for Illegal Practices Regarding Android Mobile Devices to Strengthen Dominance of Google's Search Engine*, EUROPEAN COMMISSION: PRESS CORNER (July 18, 2018), https://ec.europa.eu/commission/presscorner/detail/en/IP_18_4581.

210. Chee, *supra* note 207.

211. *Antitrust: Commission Sends Statement of Objections to Meta over Abusive Practices Benefiting Facebook Marketplace*, EUROPEAN COMMISSION: PRESS CORNER (Dec. 19, 2022), https://ec.europa.eu/commission/presscorner/detail/en/ip_22_7728.

212. Samuel Stolton, *EU to Hit Facebook with New Antitrust Charges*, POLITICO EU (Nov. 9, 2022, 4:12 PM), https://www.politico.eu/article/facebook-to-face-eu-antitrust-charge-sheet-for-marketplace-abuses.

213. *Antitrust: Commission Sends Statement of Objections to Apple Over Practices Regarding Apple Pay*, EUROPEAN COMMISSION: PRESS CORNER (May 2, 2022), https://ec.europa.eu/commission/presscorner/detail/en/ip_22_2764.

Consumption Jurisdiction expands the scope for regulation by creating overlapping jurisdiction to regulate.

This overlapping jurisdiction does, however, create the possibility for conflict. Unlike international trade and international tax, where treaties, multilateral negotiations, and the decisions of international tribunals have provided opportunities to resolve conflicts, competition law lacks any overarching international legal structure. Instead, nations have historically used the doctrine of international comity—a solicitude for the interests of other nations—as the primary check on extraterritorial enforcement.[214] But in *Hartford Fire Ins. Co. v. California*, the Supreme Court limited the application of comity to situations in which a party could not comply with the laws of both countries.[215] The ECJ's conception of comity is similarly limited.[216]

The result is that the expansion of Consumption Jurisdiction, via both the effects test and robust enforcement, creates the potential for conflicts among nations. In response to these concerns, states have developed a range of multilateral arrangements that coordinate their competition law efforts, albeit at a relatively modest level. Historically, most of these regimes have been nonbinding agreements that promote information sharing.[217] The most ambitious of these agreements contain comity provisions, as do the EU's agreements with the United States, Canada, and Japan.[218] These provisions, however, do not obligate nations to take, or refrain from taking, any action. Instead, they simply allow one party to request that another party take action under its own

214. *See, e.g.*, Timberlane Lumber Co. v. Bank of Am., 549 F.2d 597, 613 (9th Cir. 1976).

215. Hartford Fire Ins. Co. v. California, 509 U.S. 764, 799 (1993).

216. Geradin, Reyen & Henry, *supra* note 204, at 11 ("[T]his begs the question of whether comity has ever stopped EC or US authorities, for example, from meddling in a transaction or taking issue with a certain line of conduct because the other party is better placed to deal with it. In our opinion, the answer is that it has not.").

217. Anu Bradford, *International Antitrust Cooperation and the Preference for Nonbinding Regimes*, in COOPERATION, COMITY, AND COMPETITION POLICY (Andrew Guzman ed., 2010); Guzman, *supra* note 199, at 1542.

218. Agreement Regarding Competition Cooperation, U.S.-E.U., Sept. 23, 1991, T.I.A.S 91-923; Agreement on the Application of Positive Comity Principles in Enforcement of Competition Laws, U.S.-E.U., Mar. 6-June 4, 1998, O.J. L 173/28 [hereinafter 1998 U.S.-EU Agreement]; Agreement Concerning Cooperation on Anti-Competitive Activities, E.U.-Japan, July 10, 2003 O.J. L 183/12; Agreement Regarding the Application of Competition Laws, E.U.-Can., July 10, 1999 O.J. L 175/50.

competition laws.[219] In terms of allocating jurisdiction, they create "presumptions" in favor of deferring to another nation's enforcement of competition law in some circumstances, but they stop short of creating a binding allocation of authority.[220]

More recently, free trade agreements have become a vehicle for competition law agreements. The EU has been especially effective at pushing its vision of competition law through its free trade agreements, although the United States has included competition chapters in its recent agreements as well.[221] These institutions do not allocate jurisdiction ex ante, however. Instead, they often require countries to adopt and enforce their own competition laws (in the case of trade agreements) and provide states a place to discuss jurisdictional conflicts as they arise.

III. HOW CONSUMPTION JURISDICTION WILL CHANGE GLOBALIZATION

Consumption Jurisdiction portends a dramatic reallocation of authority to tax and regulate the international economy. As described in Part I and documented in Part II, Consumption Jurisdiction entails significantly greater power for nations to impose conditions on access to their markets, regardless of where production occurs. This authority, in turn, allows nations both to choose what kinds of global effects their consumption supports, as well as to remove the ability of other nations to use domestic production policies (or the lack thereof) to create a comparative advantage in the international economy.

While these changing norms do not reflect the demise of globalization as much as a change in its terms, the rise of Consumption Jurisdiction does have significant consequences for how the globally integrated economy operates. In particular, the shift to Consumption Jurisdiction creates a rise in concurrent jurisdiction among nations to tax and regulate.[222] Under Production

219. *See, e.g.*, 1998 U.S.-EU Agreement, *supra* note 218, at art. III.

220. *Id.* at art. IV.

221. Bradford, Chilton, Linos & Weaver, *supra* note 184, at 755–56.

222. *See* Krisch, *supra* note 36, at 482 ("The result [of changes to the law of jurisdiction] is a jurisdictional assemblage—an assemblage in which a multiplicity of states have valid jurisdictional claims, yet without established hierarchies or priorities between them. In practice, however, this leaves especially major economies with few constraints on their use of extraterritorial economic regulation.").

Jurisdiction, the nation in which production occurs has primary, if not exclusive, authority to tax and regulate productive activities. Under Consumption Jurisdiction, any nation can condition access to its markets on compliance with its tax and regulatory policies, regardless of the policies in the Production Jurisdiction. As a result, the turn to Consumption Jurisdiction is likely to carry with it the increased application of conflicting policies to the same underlying economic activity.

This shift, I argue, has three major implications for twenty-first century globalization. Section III.A argues that Consumption Jurisdiction enables a race to the top in tax and regulation, while Production Jurisdiction often facilitates a race to the bottom. This race to the top, however, has significant distributional implications, allowing developed countries to preserve the large share of the benefits they reap from globalization, an issue I address in section III.B. Finally, section III.C argues that Production Jurisdiction's ongoing demise will force states to devise new techniques for mediating disputes, either through limits on Consumption Jurisdiction or through international negotiations capable of resolving conflicts. In particular, I note that concurrent jurisdiction is likely to lead to legal conflicts that disrupt thicker international institutions, like the WTO, as opposed to thinner international legal frameworks, like those in tax and competition law.

A. Enabling a Regulatory Race to the Top

Scholars and commentators have long worried that globalization leads to a "race to the bottom" in which private parties take advantage of a fractured legal environment and low barriers to trade and capital mobility in order to avoid taxation and regulation.[223] In both tax and trade, locating productive assets in countries with lower levels of environmental, social, or tax policies has arguably facilitated this kind of race to the bottom. The base erosion crisis in tax is perhaps the clearest example of this phenomenon.[224] Another example is the concern that companies avoid regulation by choosing to produce in countries with weak

223. *See, e.g.*, Alvin K. Klevorick, *The Race to the Bottom in a Federal System: Lessons from the World of Trade Policy*, 14 YALE L. & POL'Y REV. 177, 177 (1996) ("The fear expressed is that left to choose their own individual policies without external constraints, the separate entities will engage in 'a race to the bottom.'").

224. *See supra* Section II.0.

labor and environmental policies.[225] On the other hand, some scholars have argued that globalization leads to higher standards when individual countries are able to use diplomatic, legal, and market pressures to induce other countries to adopt higher standards.[226]

Whether nations adopt a production- or consumption-oriented view of their authority to tax and regulate largely determines whether globalization leads to a race to the top or bottom in a given field. Production Jurisdiction does, indeed, encourage a race to the bottom. Because only a single nation's policies apply to production, a producer must only locate production in the lowest tax or regulatory environment in order to cause the global standards that are actually applied to production to fall. For instance, under Production Jurisdiction, shifting production from a higher-tax jurisdiction to a lower-tax jurisdiction (say, the United States to Ireland) causes the amount of tax collected globally to fall because the United States loses taxing rights and Ireland gains them, but imposes lower taxes than the United States.[227] Moreover, because countries compete over global investment, with only one country winning the right to tax production and benefit from the resulting jobs, Production Jurisdiction encourages all countries to lower their tax and regulatory standards in order to attract or retain private sector activities.[228] Production Jurisdiction, in other words, feeds tax and regulatory competition among nations, thereby encouraging a race to the bottom.

Consumption Jurisdiction, by contrast, reduces the incentives for tax and regulatory competition and the resulting race to the bottom. It does so by creating concurrent jurisdiction over productive activities. Instead of one country having the right to tax or regulate the production of goods and service consumed anywhere in the world, any country that consumes a product or service gains the right to tax or regulate that productive activity once the good or service enters its market. The OECD's two-pillar

225. Jeff Faux, *NAFTA, Twenty Years After: A Disaster*, HUFFPOST (Jan. 1, 2014, 12:00 PM), https://www.huffpost.com/entry/nafta-twenty-years-after_b_4528140.

226. *See, e.g.*, ANU BRADFORD, THE BRUSSELS EFFECT: HOW THE EUROPEAN UNION RULES THE WORLD (2020); CHRIS BRUMMER, SOFT LAW AND THE GLOBAL FINANCIAL SYSTEM: RULE MAKING IN THE 21ST CENTURY 22 (2012).

227. *See supra* Section II.B,.

228. *Cf.* Zachary Elkins, Andrew T. Guzman & Beth A. Simmons, *Competing for Capital: The Diffusion of Bilateral Investment Treaties, 1960–2000*, 60 INT'L ORG. 811 (2006) (finding that bilateral investment treaties spread as nations competed for foreign investment).

approach, for instance, gives many countries a claim to tax income previously taxable only (if at all) in the company's home country.[229] Environmental border adjustments, like the EU CBAM, mean that an exporter may have to confront a host of country-specific import policies that apply to its production policies in its home market.[230] And multiple competition law authorities may have to sign off on a merger of two companies that are located in the same country.[231]

The overlapping authority created by Consumption Jurisdiction encourages firms and nations to adopt higher production standards in at least four ways. First, and most obviously, because producers cannot escape taxation or regulation via location, a private party would have to forgo sales in high-tax or high-regulation markets entirely to avoid having to comply with their rules. The result is that goods and services consumed within a nation's borders will have to comply with high production standards. Especially when the consuming nations are large economies, the result will be a reduction in the amount of goods and services produced within low-ambition countries.[232]

Second, in many contexts private parties will choose to comply with the most stringent applicable regulatory standard because complying with one standard is easier than complying with many. In the international context, Anu Bradford has labeled this phenomenon "the Brussels effect" in light of the EU's increasing power to set a wide variety of international standards;[233] in the U.S. context this phenomenon has long been known as the California effect.[234] If companies can only comply with one standard for practical reasons, such as cost, they will comply with the one that gives them the most market access.[235] Bradford has argued that this

229. *Two-Pillar Solution*, *supra* note 14.

230. Timothy Meyer & Todd N. Tucker, *A Pragmatic Approach to Carbon Border Measures*, 21 WORLD TRADE REV. 109 (2021).

231. For example, after review, the United States Justice Department chose not to challenge a proposed merger between General Electric and Honeywell, but the European Commission forbade the merger on competition law grounds despite the fact that both companies were U.S. entities. *See, e.g.*, DEBORAH PLATT MAJORAS, DEP'T OF JUSTICE, GE-HONEYWELL: THE U.S. DECISION (Nov. 29, 2001), https://www.justice.gov/atr/speech/ge-honeywell-us-decision.

232. *See* Krisch, *supra* note 36, at 482.

233. *See* BRADFORD, *supra* note 226.

234. *See* DAVID VOGEL, TRADING UP: CONSUMER AND ENVIRONMENTAL REGULATION IN A GLOBAL ECONOMY (1995) (coining the term "California effect").

235. Anu Bradford, *The Brussels Effect*, 107 NW. U. L. REV. 1, 5 (2012).

effect is particularly likely when governments focus on regulating consumer markets—in other words, access to their consumers—rather than on regulating mobile assets like capital.[236] A focus on regulating and taxing on the basis of consumption within large markets like the EU and the United States can thus encourage those wishing to access those markets to adopt higher standards.[237]

Third, political lobbying as a tactic of reducing taxation and regulation is also a much more expensive proposition when faced with concurrent jurisdiction. As the fight over the OECD's tax reforms show, global companies may be able to enlist one major economic power to support their policy preferences, but they are out of luck unless they get all of the major economies.[238] Unilateral action by consumption-oriented states can negate the value of low ambition policies in the country of production. More concretely, persuading the United States, the EU, China, Japan, Australia, Korea, and major emerging economies like India or Brazil to adopt your preferred regulatory or tax framework is considerably more difficult than persuading Ireland to do so.

Fourth, nations may seek to harmonize their standards, or at least establish mutual recognition regimes for similar levels of taxation and regulation, leading to convergence on higher standards.[239] Concurrent jurisdiction increases the likelihood of significant costs for global firms that now must navigate overlapping and potentially conflicting tax and regulatory systems in each country to which they import. Not all tax and regulatory compliance issues, after all, can be solved just by adopting the highest applicable standard. Firms covered by the EU CBAM, for example, will still have to navigate the paperwork associated with

236. *Id.*

237. The newest iteration of this debate within the United States is a Dormant Commerce Clause challenge to California's ban on the sale of inhumanely raised pork on the grounds that, given the size of California's market, the ban acts as an extraterritorial regulation of pork production throughout the United States. *See* Nat'l Pork Producers Council v. Ross, 142 S. Ct. 1413 (2022) (mem.).

238. *See supra* Section II.B.

239. *See, e.g.*, David Andrew Singer, *Capital Rules: The Domestic Politics of International Regulatory Harmonization*, 58 INT'L ORG. 531 (2004) (arguing that pressure for harmonization comes from efforts to equalize standards across high- and low-ambition jurisdictions); Rachel Brewster, *The Domestic and International Enforcement of the OECD Anti-Bribery Convention*, 15 CHI. J. INT'L L. 84 (2014) (analyzing the success of efforts to harmonize anticorruption enforcement via treaty).

demonstrating their greenhouse gas emissions, as well as any carbon taxes paid in the producing country.

These firms, in turn, will put pressure on their governments to agree on standards that make the process of importing and exporting easier.[240] For instance, despite Brexit, the United Kingdom continues to adhere to many European standards in an effort to make it easier for its firms to continue to access European markets.[241] Free trade agreements frequently include chapters on regulatory harmonization that aim to reduce regulatory barriers to trade between countries.[242] Countries with high standards may hold out mutual recognition as a carrot for other nations to increase their standards. And nations may also choose to target their policies only at the largest firms, thus maximizing their policies' impacts while minimizing their implications for small and medium-sized firms trying to navigate the global marketplace. The OECD's Two Pillar Solution to tax reform takes this approach, with each of its pillars only applying to a set of the largest global firms.[243] Similarly, the EU's CBAM applies only to a handful of essential high-carbon inputs, like steel and cement, rather than to every product in the economy.[244]

Taken together, these trends—rational firm responses to large, developed countries' unilateral regulation of consumer markets, as well as pressure toward harmonization and mutual recognition—suggest that a globalization premised on Consumption Jurisdiction leads to higher tax and regulatory standards across the globe. In so doing, Consumption Jurisdiction addresses one of the glaring complaints that critics of globalization have maintained for

240. Singer, *supra* note 239.

241. *EU Legislation and UK Law*, LEGISLATION.GOV.UK, https://www.legislation.gov.uk/eu-legislation-and-uk-law (last visited Mar. 4, 2024) ("EU legislation as it applied to the UK on 31 December 2020 became part of UK domestic legislation . . . .").

242. *See, e.g.*, Comprehensive and Progressive Agreement for Trans-Pacific Partnership ch. 25, Mar. 8, 2018, 3346 U.N.T.S., https://www.mfat.govt.nz/assets/Trade-agreements/TPP/Text-ENGLISH/25.-Regulatory-Coherence-Chapter.pdf (on regulatory coherence).

243. *Two-Pillar Solution*, *supra* note 14.

244. *See Proposal for a Regulation of the European Parliament and of the Council Establishing a Carbon Border Adjustment Mechanism*, COM (2021) 564 final (July 14, 2021).

decades: that global integration promotes a race to the bottom.[245] Consumption Jurisdiction offers a path toward maintaining and even deepening global integration by ensuring that globalization does not undermine national policies in consuming nations and by spurring higher tax and regulatory standards throughout the world.[246]

B. The Distributional Implications of Consumption Jurisdiction

While reversing the regulatory race to the bottom is a positive feature of Consumption Jurisdiction, the shift toward higher tax and regulatory standards may have negative distributional implications for small and developing economies.[247] In the context of trade in goods, many developing countries have tried to climb the value chain, becoming manufacturers and producers and displacing more expensive production in developed countries. As producers, they favor Production Jurisdiction for the same reasons that leading producing nations in the twentieth century did: Production Jurisdiction allows them to use domestic production policies as part of their comparative advantage in the global economy. But the switch to Consumption Jurisdiction threatens to erode their gains by limiting the market access on which their domestic economic development strategies depend. Their complaint, in effect, is a common one—developed countries climbed the value chain using techniques that they now will not allow developing countries to use.[248]

For example, despite the facial neutrality of the EU's deforestation measures, its distributional impact on market access is clear. Europe and North America largely deforested decades or centuries ago. Modern deforestation occurs in Latin America (especially in the Amazon), Asia, and increasingly in Africa.[249] The

245. Lori Wallach & Jared Bernstein, *The New Rules of the Road: A Progressive Approach to Globalization*, THE AM. PROSPECT (Sept. 22, 2016), https://prospect.org/world/new-rules-road-progressive-approach-globalization (arguing that going forward, globalization needs to incorporate higher standards).

246. *Cf.* Shaffer, *supra* note 49.

247. Krisch describes this trend as the transition from horizontality to oligarchy. Krisch, *supra* note 36, at 504.

248. *See, e.g.*, G.A. Res. 3201 (S-VI) (May 1, 1974) (advocating developing countries' control over natural resources).

249. *Id.* ¶ 2.

EU's deforestation measure, though, only applies to land deforested after 2020.[250] Similarly, a 2018 amendment to the EU's Renewable Energy Directive denied certain incentives for biofuels from products that had a high risk of indirect land use change, i.e., deforestation.[251] The only product found to create such a risk was palm oil-based biodiesel, which mostly comes from Indonesia and Malaysia.[252] The distributional impact of the measure is so clear that Indonesia and Malaysia have challenged it at the WTO as de facto discrimination.[253]

Other similar measures—ranging from carbon border adjustments to the EU's ban on seal products to the U.S. restrictions on tuna and shrimp caught in a manner that creates a risk to other marine life[254]—have similar implications. Explicitly, their purpose is to shape the kinds of products consumed in their countries, reducing the role of their markets in promoting environmental harms overseas. Implicitly, though, large markets like the United States and the EU are incentivizing developing countries to adopt higher environmental standards as a condition of maintaining the market access they currently enjoy.[255] Similarly, the renegotiated North American Free Trade Agreement (NAFTA) (the so-called United States-Mexico-Canada Agreement or USMCA) contains more aggressive labor provisions that seek to tie continued

250. *Proposal for a Regulation of the European Parliament and of the Council on the Making Available on the Union Market as Well as Export from the Union of Certain Commodities and Products Associated with Deforestation and Forest Degradation and Repealing Regulation*, at 11, COM (2021) 706 final (Nov. 17, 2021).

251. Carolyn Fischer & Timothy Meyer, *Baptists and Bootleggers in the Biodiesel Trade: EU-Biodiesel (Indonesia)* 3 (Eur. Univ. Inst., Working Paper No. RSCAS 2019/80, 2019).

252. *See id.* at 13.

253. Request for Consultations by Indonesia, *European Union—Certain Measures Concerning Palm Oil and Palm Crop-Based Biofuels*, WTO Doc. WT/DS593/1 (Dec. 16, 2019); Request for Consultations by Malaysia, *European Union and Certain Member States—Certain Measures Concerning Palm Oil and Oil Palm Crop-Based Biofuels*, WTO Doc. WT/DS600/1 (Jan. 19, 2021).

254. *See supra* Part II.

255. Sometimes the emphasis on changing other nations' behavior is also explicit. The EU Parliament's CBAM website, for example, notes that the CBAM will "encourage partner countries to decarbonise their production processes." *EU Carbon Border Adjustment Mechanism: Implications for Climate and Competitiveness*, EUR. PARLIAMENT (June 2023), https://www.europarl.europa.eu/thinktank/en/document/EPRS_BRI(2022)698889.

market access to adhering to certain minimum labor standards.[256] Although facially applicable to all three USMCA parties, the general expectation is that these provisions will apply primarily to Mexico.[257]

Changes in international tax have a similar distributional impact, although there the implications are more about small versus large economies than they are about developed versus developing countries. As noted above, many small economies on the fringes of large economies have used low tax rates as a way to attract companies that would otherwise have little reason to locate within their borders.[258] In Europe, Ireland has been the most prominent example, with other European nations and the European Commission itself worrying that Ireland's low tax rates undercut the tax base of the rest of Europe.[259] Although Ireland has now joined the OECD's new tax framework, it did so only after extracting a concession that it would not need to impose a corporate income tax above fifteen percent.[260]

The United States and the EU also target small countries that serve as tax havens. Since 2017, the EU has maintained a list of tax havens, or "non-cooperative tax jurisdictions."[261] The EU initially listed seventeen countries, including South Korea, the United Arab

256. *See generally* United States-Mexico-Canada Agreement, ch. 23.9, Nov. 30, 2018, https://ustr.gov/sites/default/files/files/agreements/FTA/USMCA/Text/23%20Labor.pdf; *see also* Kathleen Claussen, *Our Trade Law System*, 73 VAND. L. REV. EN BANC 195, 205 (2020) ("Labor rules in trade agreements, and particularly the enforcement of those rules, have been at the center of debates on new trade agreements.").

257. Ana Swanson & Jim Tankersley, *Trump Just Signed the U.S.M.C.A. Here's What's in the New NAFTA.*, N.Y. TIMES (Jan. 29, 2020), https://www.nytimes.com/2020/01/29/business/economy/usmca-deal.html.

258. *See supra* Section II.B.

259. *See* Silvia Amaro, *EU Appeals Against Apple Ruling in $15 Billion Tax Battle*, CNBC (Sept. 25, 2020, 5:46 AM), https://www.cnbc.com/2020/09/25/eu-appeals-against-apple-ruling-in-15-billion-tax-battle.html; European Commission Press Release IP/16/2923, State Aid: Ireland Gave Illegal Tax Benefits to Apple Worth up to €13 Billion (Aug. 30, 2016).

260. Shawn Pogatchnik, *Ireland to Join Global Pact on Corporate Tax After Winning Concessions*, POLITICO (Oct. 7, 2021, 7:30 PM), https://www.politico.eu/article/ireland-to-join-oecd-pact-on-corporate-tax-after-winning-concessions (Ireland's Finance Minister Paschal Donohoe stated, "Ireland could accept the altered OECD text because it no longer binds signatories to collect 'at least' 15 percent from globally structured firms. That figure is now fixed . . . .").

261. European Commission Fact Sheet MEMO/19/1629, Questions and Answers on the EU List of Non-Cooperative Tax Jurisdictions (Mar. 12, 2019). https://ec.europa.eu/commission/presscorner/detail/en/MEMO_19_1629.

Emirates, Panama, and Bahrain.[262] An additional forty-seven countries—including Hong Kong, Taiwan, Uruguay, Peru, and Jamaica—agreed to modify their tax laws and practices after the threat of being put on the EU blacklist.[263] These countries are notable because, like Ireland, they are small and medium sized countries, not traditionally thought of as tax havens. Yet the EU threatened these countries with sanctions if they did not change their practices.[264] In effect, the EU used access to its markets as a stick to get smaller countries to adopt its preferred tax policies.

Ultimately, reducing the incentive for a race to the bottom in tax and trade is a positive and likely necessary development. Nations cannot, for instance, exercise control over their domestic social policies if international tax competition erodes their ability to tax economic activity within their borders.[265] Climate change, deforestation, and the loss of biodiversity are existential challenges that require major adjustments to the global economy to stave off crisis. But equity considerations, the self-interest developed countries have in maintaining economic ties with developing countries that possess much of the world's natural resources, and the gains that come from cooperating on issues like tax enforcement dictate sensitivity to the distributional concerns accompanying the shift to Consumption Jurisdiction.

Indeed, equitable global growth has long been a central foreign policy goal of the United States. The post-war globalization movement encouraged economic development in countries destroyed during World War II and later in developing countries more broadly. The United States, and later Europe, encouraged that development, however, primarily through market access. A consumption-oriented globalization should not lose sight of the goals of equitable growth across the globe and the foreign policy values that such growth serves. If Consumption Jurisdiction means that twenty-first century market access comes with more

262. Council of the European Union, *Outcome of Proceedings*, Doc. 15429/17 (Dec. 5, 2017), https://www.consilium.europa.eu/media/31945/st15429en17.pdf.

263. Questions and Answers on the EU List of Non-Cooperative Tax Jurisdictions, *supra* note 261.

264. The sanctions were linked to firms from those countries making use of EU banks and financial markets. *Id*.

265. Shaffer, *supra* note 49.

conditions, then developed countries would be wise to help small and developing countries meet those conditions.

Developed countries can help replace some of the benefits that small and developing countries stand to lose under Consumption Jurisdiction directly. Technology transfer and assistance, as has been suggested in the context of the U.S.-EU Global Arrangement on Sustainable Steel and Aluminum, can help developing countries meet the new market access conditions.[266] Reforming global economic rules to permit more robust industrial policy, especially when that development meets agreed standards of sustainability, can also provide nations a way to preserve market access while meeting the stringent production standards imposed by developing countries. Investment in technology within developing countries can also help those nations skip dirty technology in their quest to develop, a win for developed and developing countries alike. Finally, policies like "friend-shoring," which promote economic development by encouraging companies to both diversify their supply chains and locate those supply chains in countries with similar policies and geopolitical outlook, offer an especially promising way to share gains from globalization with developing countries in a manner consistent with Consumption Jurisdiction.[267]

C. Managing Economic Conflict

Finally, the overlapping authority that accompanies Consumption Jurisdiction makes economic conflict among states more likely. Production Jurisdiction has served as a key technique through which nations have reduced economic conflict. Its erosion means that nations impose conflicting policies and will thus face pressure to resolve those conflicts. There are at least two routes through which states might seek to mediate these conflicts. The first is through international institutions. The second is by seeking consensus on the limits of Consumption Jurisdiction via diplomacy. I argue that the latter scenario is more likely.

266. *See* Jennifer Hillman & Alex Tippett, *A New Transatlantic Agreement Could Hold the Key to Green Steel and Aluminum*, COUNCIL ON FOREIGN RELS. (Nov. 19, 2021, 10:13 AM), https://www.cfr.org/blog/new-transatlantic-agreement-could-hold-key-green-steel-and-aluminum.

267. *See, e.g.*, Sarah Kessler, *What is 'Friendshoring'?*, N.Y. TIMES (Nov. 18, 2022), https://www.nytimes.com/2022/11/18/business/friendshoring-jargon-business.html.

1. In the Short Term, International Institutions Are Not Likely to Help

At the outset, I should note that nations do not have to develop consensus on the limits of Consumption Jurisdiction. They can each go their own way, adopting policies that seem best to them and living with the results of any conflicts. As a matter of prediction, however, the persistent pressure from businesses facing conflicting policies and the collateral consequences of ongoing economic conflict mean that nations will face pressure to develop principles defining acceptable uses of consumption-based authority.

It is tempting to look to international institutions, especially highly legalized ones like the WTO, as fora in which a consensus on limits can be negotiated. Counterintuitively, though, well-developed institutions like the WTO have struggled more than thinner institutions like the OECD to adjust to shifting jurisdictional norms. This fact, which is puzzling from the standpoint of international relations theory, suggests that—at least in the near term—more thinly legalized institutions are more promising venues for negotiating the shift to Consumption Jurisdiction.

Since the 1970s, one of the major arguments for international institutions is that they reduce the transaction costs associated with international relations.[268] Yet Part II's discussion of the shift to Consumption Jurisdiction across international trade, tax, and competition law demonstrates higher legal tensions in thicker institutions. In antitrust, Consumption Jurisdiction has been adopted through a series of unilateral actions that, while not always enthusiastically embraced, have not prompted significant legal conflict among states. In the tax context, significant unilateral action spurred an explicit renegotiation of taxing authority under the auspices of the OECD.

In trade, though, the story is less optimistic. The WTO's Appellate Body gradually adapted its rules through caselaw, but its failure to move faster contributed to the United States' decision to block new appointments to the AB, effectively shutting it down. Meanwhile, the WTO has shown little evidence that it functions as

268. ROBERT O. KEOHANE, AFTER HEGEMONY: COOPERATION AND DISCORD IN THE WORLD POLITICAL ECONOMY (1984); Jeffrey L. Dunoff & Joel P. Trachtman, *Economic Analysis of International Law*, 24 YALE J. INT'L L. 1, 22 (1999); Michael J. Gilligan, *The Transaction Costs Approach to International Institutions*, *in* POWER, INTERDEPENDENCE, AND NONSTATE ACTORS IN WORLD POLITICS 50 (Helen V. Milner & Andrew Moravcsik eds., 2009).

a negotiating forum. How should we understand this dynamic in which the most legalized institutions struggle the most to adapt to changed circumstances?

Thicker international institutions will more easily mediate conflicts among member states on non-systemic issues; that is, issues that do not call into question the institution's value. By contrast—and contrary to much of the conventional wisdom on international institutions[269]—thicker institutions will struggle to mediate claims of conflicting authority over systemic issues; that is, concerns like fundamental norms about states' regulatory reach, in which the outcome matters deeply to member states.

This discrepancy has to do with the relationship between the relative costs of commitment and renegotiation across institutions and issue areas. The conventional view in international law and international relations is that international institutions put a thumb on the scale in favor of complying with international rules.[270] They do so by creating costs for violating the shared expectations about what constitutes compliance with international legal norms.[271]

In effect, international institutions allow states to make credible commitments, ones in which states will face costs if they either opportunistically violate the agreement or attempt to renegotiate the terms of the agreement. Critically, though, international law does not have a fully enforceable rule of expectation damages, so international commitments can never be fully credible nor renegotiation proof. States will continue to violate rules when doing so is in their interest.

When a state prefers not to comply with existing rules, it has three choices. It can comply with an existing understanding of the rules, try to negotiate a new rule, or take unilateral action. When a non-systemic issue is involved, international law does a pretty good job of deterring violations and opportunistic efforts to renegotiate rules. If states won't renegotiate, the dissatisfied state

269. Dunoff & Trachtman, *supra* note 268; Joel P. Trachtman, *Economic Analysis of Prescriptive Jurisdiction*, 42 VA. J. INT'L L. 1, 11 (2001).

270. *See* Andrew T. Guzman, *A Compliance-Based Theory of International Law*, 90 CAL. L. R. 1823, 1870 (2002).

271. *See, e.g.*, ANDREW T. GUZMAN, HOW INTERNATIONAL LAW WORKS: A RATIONAL CHOICE THEORY (2008) (discussing the means of inducing compliance via reputation, reciprocity, and retaliation).

often will choose to comply rather than resort to unilateral violations.

But when systemic issues are involved, the story is different. Dissatisfied states will want to renegotiate the rule, and if renegotiation is unsuccessful, unilateral action becomes more likely. Key member states may be willing to persistently violate core commitments, or even outright withdraw from the institution, instead of obeying rules that they feel do not serve their interests. These persistent violations or threats of withdrawal are a renegotiation tactic that takes the status quo off the table.[272] States that prefer the status quo must decide whether they prefer cooperation on renegotiated terms to the breakdown of cooperation.

For example, as nations stand to gain more from taxing digital service providers, they may become less likely to comply with traditional limitations on tax authority.[273] Moreover, if the countries that benefit from Production Jurisdiction—in this case the United States—refuse to renegotiate, consumer countries may take unilateral action, namely the imposition of digital services taxes. That unilateral action may spur conflict in the short term, but it may also encourage successful renegotiation, as it has in the case of the OECD Base Erosion and Profit Shifting project described in Part II.B.

Why might thinner institutions like the OECD be better able to facilitate renegotiation than more heavily legalized institutions like the WTO? Thinly legalized institutions create fewer costs for violation, thus creating weaker commitments.[274] But weaker commitments also make it easier to renegotiate precisely because the status quo is less sticky.[275] Put differently, thinly legalized institutions keep both the cost of violation and the cost of renegotiation lower as a relative matter, thus deterring fewer violations but making renegotiation easier. Thicker institutions, by contrast, create higher costs for both renegotiation and violation. These transaction costs come in several forms.

First, thicker institutions may simply have more members that wield veto power. In thinly institutionalized contexts, there may be fewer states involved and those states may not have veto power

272. Timothy Meyer, *Shifting Sands: Power, Uncertainty and the Form of International Legal Cooperation*, 27 EUR. J. INT'L L. 161 (2016).

273. *See supra* Section II.B.2 (describing the imposition of digital services taxes).

274. *See* GUZMAN, *supra* note 271, at 134.

275. Meyer, *supra* note 272, at 166.

over renegotiation by other states. There is no international institution governing competition law, for instance.[276] Instead, when negotiations have taken place, they have historically been directly between countries and have resulted in nonbinding agreements, which are more easily renegotiated.[277] More recently, provisions on competition have been incorporated into free trade agreements, but those provisions—although confirming the shift away from strictly productive jurisdiction—have not had to modify existing treaties.[278] States are thus free to negotiate in smaller numbers, which by itself reduces transaction costs, and to do so without needing to modify existing agreement.

Tax is more legalized internationally than competition law but remains relatively thin. While the OECD has put out a model tax treaty for nations to use, it does not administer those treaties in the way the WTO administers its agreements. Nations are free to renegotiate their bilateral agreements without needing OECD permission. Bilateral negotiations are, of course, easier than multilateral negotiations. Moreover, the OECD has developed multilateral tools to further reduce the costs of amending bilateral treaties. The Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting (known as the Multilateral Instrument or MLI) establishes a novel matching process, offering nations choices on how to update their tax treaties.[279] Nations then notify the treaty depositary of their choices.[280] Where states have made the same choice, any bilateral tax treaty they have together is automatically updated.[281] This matching procedure significantly reduces renegotiation costs both

276. *See generally* Andrew T. Guzman, *Is International Antitrust Possible?*, 73 N.Y.U L. REV. 1501 (1998).

277. *See* James F. Rill, *A Framework for Cooperation: The Status of International Antitrust Enforcement*, 18 WHITTIER L. REV. 321, 323 (1997).

278. United States-Mexico-Canada Agreement, *supra* note 256, at art. 21.1(2) ("This does not prevent a Party from applying its national competition laws to commercial activities outside its borders that have an appropriate nexus to its jurisdiction.").

279. Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting, June 7, 2017, https://www.oecd.org/tax/treaties/multilateral-convention-to-implement-tax-treaty-related-measures-to-prevent-beps.htm.

280. *E.g.*, *id.* at art. 4.4 ("Where all Contracting Jurisdictions have made such a notification with respect to a provision of a Covered Tax Agreement, that provision shall be replaced by the provisions of paragraph 1.").

281. *Id.*

by allowing states to make a choice once and by eliminating bilateral negotiations over those choices. It is also possible only because tax treaties are bilateral, rather than multilateral. Most importantly, nations' failures to amend their bilateral treaties do not impede other nations' abilities to do so.

Second, thicker institutions typically involve more formal issue linkages than do thinner institutions. Although the OECD has been the forum for the negotiation of a range of international agreements, such as an anti-corruption treaty and best practices for multinational enterprises,[282] it lacks the rigid legal character of an organization like the WTO. Renegotiating tax jurisdiction via the OECD thus does not automatically bring into play other issues with which the OECD might deal.

The WTO, on the other hand, administers an interlocking set of rules governing trade in goods, services, and intellectual property. The rules on goods, which are older, are especially complicated. They involve detailed limits on tariffs,[283] rules on how to evaluate health-based trade restrictions[284] and technical regulations,[285] and detailed methodologies governing states' responses to unfair trade practices.[286] Linking all of these rules together within a single multilateral institution can make it easier to obtain an initial agreement by allowing nations to trade off different issues.[287]

But those same linkages can make renegotiation harder in the future. Renegotiating one systemic issue may threaten the existing

282. Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, Dec. 17, 1997, S. TREATY DOC. No. 105-43 (1998); *see* Rachel Brewster, *The Domestic and International Enforcement of the OECD Anti-Bribery Convention*, 15 CHI. J. INT'L L. 84 (2014); Organization for Economic Co-Operation and Development, OECD Guidelines for Multinational Enterprises (2011), http://dx.doi.org/10.1787/9789264115415-en.

283. *See* GATT, *supra* note 64, at art. II (referencing nations' tariff schedules).

284. Agreement on the Application of Sanitary and Phytosanitary Measures, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 U.N.T.S. 493.

285. Agreement on Technical Barriers to Trade, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1868 U.N.T.S. 120.

286. Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1868 U.N.T.S. 201; Agreement on Subsidies and Countervailing Measures, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1869 U.N.T.S. 14.

287. *See, e.g.*, Paul Poast, *Issue Linkage and International Cooperation: An Empirical Investigation*, 30 CONFLICT MGMT. & PEACE SCI. 286, 287 (2013) (discussing and citing the long literature making this point).

terms of cooperation on everything else the institution governs. Holdout states may block renegotiation on issue A either for fear of disrupting cooperation on issue B or, conversely, in order to try to extract concessions on issue C. For example, across multiple presidential administrations, the United States tried unsuccessfully to raise concerns about the need for new rules to deal with the role of non-market economies in the WTO. However, other nations were reluctant to engage on the issue substantively, in large part because trying to address that issue would raise a host of other issues, most notably global market access issues involving China, questions about what constitutes permissible industrial policy in market economies, and complaints about the WTO's Dispute Settlement Body. Frustrated by the failure to renegotiate a system issue, the United States imposed a raft of tariffs on steel and aluminum products, as well as products from China, in large part to combat Chinese subsidies. Still unable to muster a coalition to renegotiate, other nations retaliated without first going to the WTO for authorization, a further erosion of WTO rules.[288]

Delegations are a common way to solve these kinds of negotiation problems. As the WTO's negotiation function declined, its Appellate Body became more active in gap filling. In the context of the *Shrimp-Turtle* dispute, one of the early cases challenging the United States' assertion of what was effectively Consumption Jurisdiction, the Appellate Body even adopted an explicitly evolutionary approach to interpreting some GATT obligations.[289] Dispute resolution, in other words, provided the vehicle for contesting and effectively negotiating the shift to Consumption Jurisdiction.

Today, though, the Appellate Body no longer functions, blocked by the United States for overreaching in its interpretations of WTO agreements.[290] As a result, the WTO has no practical way to adapt its rules in response to unilateral action, especially the kind that the United States and EU are increasingly taking in the

288. *See* Understanding on Rules and Procedures Governing the Settlement of Disputes art 23., Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 U.N.T.S. 401 ("Members shall not make a determination to the effect that a violation has occurred . . . except through recourse to dispute settlement . . . .").

289. *Shrimp-Turtle*, *supra* note 99, ¶ 130.

290. *The World Trade Organization: The Appellate Body Crisis*, CTR. FOR STRATEGIC & INT'L STUD., https://www.csis.org/programs/scholl-chair-international-business/world-trade-organization-appellate-body-crisis (last visited Mar. 4, 2024).

environmental context. Although the EU and the United States differ in the extent to which they publicly present their measures as consistent with WTO rules,[291] unilateral action has become the norm rather than the exception for both WTO members.

The result is that nations' claims to consumption-based authority have been more damaging to well-developed institutions like the WTO. States always retain the option to exit an international institution. High transaction costs to renegotiation mean that partial (via persistent violation of core norms) or complete exit from the system is more likely in thicker institutions. Moreover, because of issue linkages within well-developed institutions, the inability to successfully renegotiate the allocation of jurisdiction can create a systemic threat to existing patterns of international cooperation. On the other hand, more thinly institutionalized issue areas, such as those that exist in tax and antitrust, create fewer transaction costs, both by creating fewer veto players and fewer issue linkages that can be taken hostage. Renegotiations are thus not only more likely to be successful but are also lower stakes. Taken together, this analysis suggests that more thinly institutionalized international legal frameworks are more durable in unstable economic and political times.

Altogether, this suggests, as Harlan Cohen has put it, that multilateral institutions have life cycles.[292] "Institutional arrangements transform negotiating dynamics, creating new realities that bring different challenges and require different solutions."[293] Thickly institutionalized bodies like the WTO may be effective at enforcing shared understandings of rules. They may also be better at generating consensus over small implementation issues. But when faced with large structural changes in the global economy and the resulting political pressure on nations for new policies, the very thickness of those institutions works against them. It is paradoxically the credibility of their commitments to a wide set of trans-substantive rules that prevents states from easily

291. The EU generally insists its measures are WTO consistent, even when that claim seems implausible. By contrast, the United States has largely stopped justifying its actions in WTO terms.

292. Harlan Grant Cohen, *Multilateralism's Life Cycle*, 112 AM. J. INT'L L. 47 (2018).

293. *Id.* at 48.

adapting thick institutions and their rules to new circumstances.[294] Mature institutions may be more likely to falter precisely because their maturity has led to expanding memberships and expansive issue linkages that helped resolve prior negotiations but limit the freedom of action in future ones.

2. Principled Limits on Consumption Jurisdiction

If institutional solutions are not viable, then states will face pressure to devise limits on the use of Consumption Jurisdiction either unilaterally or through diplomacy outside of institutions. The interaction of states over issues like carbon border adjustments and digital services taxes suggests that these de-institutionalized diplomatic interactions are generating cooperation among states. But these negotiated resolutions are field specific. Just as Consumption and Production Jurisdiction are underlying views of state authority that operate across fields with different doctrinal names, principles limiting the operation of Consumption Jurisdiction should operate across fields.

Although space does not permit a detailed discussion of limiting principles, proportionality offers the best framework for evaluating acceptable uses of consumption-based authority.[295] Proportionality is a principle that has been widely adopted in international law, especially where rights are concerned.[296]

294. One possible result is that states step out of one institution and into a new institution in which holdups do not (yet) have power. Laurence R. Helfer, *Regime Shifting: The TRIPs Agreement and New Dynamics of International Intellectual Property Lawmaking*, 29 YALE J. INT'L L. 1 (2004).

295. Nondiscrimination is another principle common to many fields of international economic law. *See* Nicholas DiMascio & Joost Pauwelyn, *Nondiscrimination in Trade and Investment Treaties: Worlds Apart or Two Sides of the Same Coin?*, 102 AM. J. INT'L L. 48 (2008); NIELS BAMMENS, THE PRINCIPLE OF NON-DISCRIMINATION IN INTERNATIONAL AND EUROPEAN TAX LAW (2012). Nondiscrimination, however, has frequently been interpreted in ways that have limited the ability of states to pursue legitimate objectives whenever the chosen measures have a disparate impact on particular states. *See generally* ANDREW D. MITCHELL, DAVID HEATON & CAROLINE HENCKELS, NON-DISCRIMINATION AND THE ROLE OF REGULATORY PURPOSE IN INTERNATIONAL TRADE AND INVESTMENT LAW (2016) (criticizing the role of regulatory purpose in nondiscrimination cases). For this reason, proportionality, which allows review of both whether the purpose is legitimate as well as the means chosen, offers a better framework for Consumption Jurisdiction.

296. *See, e.g.*, MICHAEL NEWTON & LARRY MAY, PROPORTIONALITY IN INTERNATIONAL LAW (2014); Thomas M. Franck, *Proportionality in International Law*, 4 L. & ETHICS OF HUM. RTS. 230 (2010); Thomas Cottier, Roberto Echandi, Rachel G. Liechti-McKee, Tetyana

Proportionality has been formulated differently depending on context, but in general it involves asking whether a specific state measure pursues a legitimate objective and whether there are equally effective, but less restrictive, policies available to pursue the same objective.[297] Proportionality involves, in other words, balancing the right of states to pursue legitimate objectives against the harm to others they cause by doing so.

Proportionality offers the best vehicle for evaluating whether any particular assertion of consumption-based authority to tax or regulate should be permissible. In its most basic form, states can defend the measures they adopt as protecting legitimate objectives, such as climate change, deforestation, labor rights, or the integrity of the tax base. Once the imposing state has established a legitimate purpose, the aggrieved state would come forward with equally effective but less restrictive means of pursuing the same objective. In effect, proportionality would shift the burden to the state that feels its authority is being infringed to offer alternatives as a basis for negotiation. Unlike under Production Jurisdiction, the presumption would be in favor of the taxing or regulating state's authority.

To be clear, I am not arguing for a court or tribunal to make this determination. Rather, I am suggesting a mode of argument for the kinds of diplomatic debates that have characterized state efforts to impose a digital services tax or impose a carbon border adjustment mechanism. State responses have generally attacked the legitimacy of other states' policies, frequently on grounds of defending the status quo. The United States, for example, attacked nations' efforts to impose a digital services tax as illegitimate and unfair, while also advocating for consumption-based policies in both antitrust and trade.[298] A more productive form of debate would focus first on whether the enacting state has a legitimate consumption-based interest in its policy, and then would emphasize the means chosen. Such debate would avoid the situation in which states advocate for consumption or production-based jurisdiction depending on which is in their interest in a given sector.

Payosova & Charlotte Sieber, *The Principle of Proportionality in International Law: Foundations and Variations*, 18 J. WORLD INV. & TRADE 628 (2017).

297. Cottier et al., *supra* note 296, at 629.

298. *See supra* Part II.

Recognizing proportionality as the governing principle would also reflect nascent practice in international economic law. International tax's formulary approach—which many scholars have called for and which the OECD's new framework adopts—is essentially based on a proportionate approach.[299] Nations have a legitimate interest in taxing a firm's income stemming from their own consumption and they can do so to the extent of their proportional contribution to that overall income. The use of proportionality in international trade law, especially with regard to the application of the GATT article XX's exceptions, also demonstrates that proportionality can be and is used to effectively define the limits of Consumption Jurisdiction.[300]

Proportionality thus offers, in the first instance, a framework for diplomacy that can reduce conflicts by providing states a language in which to negotiate. Consistent with developing principles of international law from state practice, it also reflects both a core concept in international law and existing means of resolving disputes about Consumption Jurisdiction-based policies. Over time, states may or may not trust institutions to interpret and apply proportionality in specific economic fields. But merely recognizing a common principle to organize debates about the limits of a common jurisdictional concept would be a major step forward.

CONCLUSION

Globalization has always been a bit of a Rorschach test. Critics and proponents attack each other over definitional issues, such as "What is neoliberalism?" They use idealized intellectual models to criticize policies that result from real-world political compromises. The last several years have seen a robust debate over whether globalization is ending in an explosion of protectionism, or whether instead the nation-state is reasserting itself as the core regulator of global economic activity.

These extremes miss the point. The globalized world of free-flowing goods, services, and capital is here to stay. The costs of unwinding globalization are too large to contemplate. But the

299. *See, e.g.*, Reuven S. Avi-Yonah & Zachee Pouga Tinhaga, *Formulary Apportionment and International Tax Rules*, *in* TAXING MULTINATIONAL ENTERPRISES AS UNITARY FIRMS 67 (S. Picciotto ed., 2017); Arthur J. Cockfield, *Formulary Taxation Versus the Arm's-Length Principle: The Battle Among Doubting Thomases, Purists, and Pragmatists*, 52 CAN. TAX J. 114 (2004).

300. Cottier et al., *supra* note 296, at 645–48.

nature of our globalized world can still change over time. In the post–World War II era, nations designed the global economic system so that they could use their domestic policies to attract export-oriented business. That system rested on a particular legal notion of who could tax and regulate production. The system made sense in a world in which economic growth was the *raison d'etre*.

Today, nations face a global economy with competing demands. The shift toward "multipurpose" trade policy has been widely noted.[301] That shift will be accompanied not by the end of globalization, but by a rethinking of the role national regulatory authority should play in a global system. There will be growing pains. But a clear-eyed understanding that consumption and market access are the new tools with which individual nations can influence production standards will help ease our transition toward a world in which each nation pursues its own vision of economic flourishing within a vibrant and cooperative world order.

301. A number of conferences, for instance, have convened high-level panels on multipurpose trade policy. *See, e.g.*, *Towards Multipurpose Trade Policy: How Competing Narratives About Globalization Are Reshaping International Trade Cooperation*, WTO PUB. F. (Sept. 30, 2022), https://www.wto.org/english/forums_e/public_forum22_e/pf22_session_fullpage_e.htm?session=41.