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

Issue Date: 2016-06-14

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

Addressing global environmental concerns through trade measures

Extraterritoriality under WTO law from a comparative perspective

PROEFSCHRIFT

ter verkrijging van
de graad van Doctor aan de Universiteit Leiden,
op gezag van Rector Magnificus prof. mr. C.J.J.M. Stolker,
volgens besluit van het College voor Promoties
te verdedigen op dinsdag 14 juni 2016
klokke 11.15 uur

door

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geboren te Dendermonde, België

in 1985

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prof. J. Scott (University College London, UK)

Lay-out: Anne-Marie Krens – Tekstbeeld – Oegstgeest

Printed by CPI-Koninklijke Wöhrmann – Zutphen

Voor bompa, bonpapa en mijn liefste metekindje

Acknowledgements

Be it fate or coincidence, a string of rather random occurrences has led me to this day. The journey so far has been fascinating and rewarding, and I am grateful to everyone who has accompanied me on it – for longer or shorter periods, close by or from afar. This book marks the ending of that journey's latest, at times challenging, stage and there are a number of people I would like to express my gratitude to.

First and foremost, I would like to thank my supervisor and Doktorvater Marco Bronckers, whose sharp and structured mind gave me something to hold on to; whose enthusiasm and at times healthy skepticism pushed me further. I now truly appreciate the gentle reminders to take the time to reinforce the foundations of my research. I would also like to thank my co-supervisor Freya Baetens, without whose eye for detail and feedback, this book would not be what it is today.

The absolute best moments of the PhD process where the challenging and stimulating discussions – with my supervisors, with colleagues, with peers from all over that I have had the privilege to meet through conferences and through my study visit at UCL. My jury members – Niels Blokker, Peter Van den Bossche, Cedric Ryngaert and Joanne Scott – deserve a special mention, as they have stimulated and encouraged me at different moments and in different ways to think further, both with regard to the specific content of my research and the bigger picture. I am grateful for their efforts and generosity. A special thanks to Joanne, whose inquisitive mind is an inspiration. Our discussions in London were exactly what I needed and much more than what I had hoped for.

A sincere thank you to all my (former) colleagues at the Europa Institute in Leiden. Our director, Stefaan Van den Bogaert, thank you for being encouraging from the first day I sat in your class in Maastricht (and for leading the Flami-tsunami). Armin, for your capacity to articulate crucial elements of my research that I was struggling with. Elsbeth, for being the most supportive and cheerful roommate and friend. Narin, Ilektra, Marijke, Agis and Thomas N., as my roommates at one time or another, for sharing the joys and frustrations of PhDs, work, life. Narin, you were the very first, and I still miss you in the office. Darinka, Nelleke, Meehea, Narin, dear friends in addition to colleagues. Moritz, Vestert, Alison, Jorrit, Vicky, Pieter, Christa, Tom O., Christophe, Rikki, Melanie, Richard, Daniel M., Daniel C., Thomas W., Lennart, Maarten, Giovanni, Ruben Z., Wendy, Erik K. and former much appreciated colleagues Tom E., Catherine, Ranish, Sjef, Clio, Jasmina, Iryna, Emilie – thank you for the good atmosphere and all the talks, both serious and less serious, at lunches, borrels, case law dinners, PhD days and what else. I would also like to express my sincere gratitude to the Meijers Institute for their helpfulness whenever needed.

This PhD would not have been possible without the endless encouragement, support and love from friends and family. In no particular order and with great appreciation for each and one of you: my compatriots, long shared history and hopefully long shared future ahead, Djon, Lorre, Bie, Sofja, Hannette, Ruth, Ets, Liske, Hannie, Evy, Suzy, Evi and An; the Dutchies, home away from home, Anne V., René, Anne W., Eveline, Hilde, Suzanne and Scarlie; the Bruges crew, friends through time and distance, in particular Bianca, Karin and Cristina. My partners on the court and paranymphs: Dylan, WTO-mate and friend; Anne, very simply put, it would not have been the same without you. I feel blessed with all of you in my life – also those I have not named explicitly but hold dear no matter – cherishing all the memories and shared experiences of student years, travels and other adventures.

Which brings me to family, invaluable for my look on life and for the confidence to be who I am. Thanks ever so much to my family 'by extension': the entire Gråberg family – Wille and Birgitta much missed -, Luk, and Pierre. Thanks even more to my family 'by blood', the core of my being: Do, Marie, mama en papa. Woorden schieten tekort en voelen overbodig. Dank voor de ruimte die jullie me geven om te zijn, wetende dat jullie er zijn.

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List of abbreviations

AB	Appellate Body
ACHPR	African Charter on Human and Peoples' Rights
ACHR	American Convention on Human Rights
ACtHPR	African Court on Human and Peoples' Rights
AG	Advocate General
AMA	Japan Antimonopoly Act
ASEAN	Association of Southeast Asian Nations
ATAA	Air Transport Association of America
ATS	Alien Tort Statute
BCA	border carbon adjustment
BTA	Border Tax Adjustment
CBD	Convention on Biological Diversity
CBDRRC	Principle of common but differentiated responsibilities and respective capabilities
CESCR	Committee on Economic, Social and Cultural Rights
CITES	Convention on International Trade in Endangered Species of Wild Fauna and Flora
CJEU	Court of Justice of the European Union
CMS	Convention on the Conservation of Migratory Species and Wild Animals
COP	Convention of the Parties
DOJ	Department of Justice
DSB	Dispute Settlement Body
DSU	Dispute Settlement Understanding
EC	European Community
ECHR	European Convention on Human Rights
ECJ	European Court of Justice
ECS	economic, social and cultural
ECtHR	European Court of Human Rights
EEA	European Economic Area
EEC	European Economic Community
EEZ	Exclusive Economic Zone
EFTA	European Free Trade Association
ESA	US Endangered Species Act
EU ETS	European Emission Trading System
EU	European Union
FAO	Food and Agriculture Organization of the United Nations
FLEGT	Forest Law Enforcement, Governance and Trade
FTA	free trade agreement

FTAIA	Foreign Trade Antitrust Improvements Act
FTC	Federal Trade Commission
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariffs and Trade
GSP	Generalized System of Preference
HRC	Human Rights Committee
IAC	Inter-American Convention for the Protection and Conservation of Sea Turtles
IACHR	Inter-American Commission on Human Rights
IACtHR	Inter-American Court on Human Rights
ICAO	International Civil Aviation Organization
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICJ	International Court of Justice
ICN	International Competition Network
ILC	International Law Commission
IMF	International Monetary Fund
IPCC	Intergovernmental Panel on Climate Change
IPOA-IUU	FAO International Plan of Action on Illegal, unreported and unregulated fishing
ITO	International Trade Organization
ITTA	International Tropical Timber Agreement
ITTO	International Tropical Timber Organization
IUU fishing	Illegal, Unreported and Unregulated Fishing
JFTC	Japan Fair Trade Commission
MDG	Millennium Development Goal
MEA	multilateral environmental agreement
MFN	most-favoured nation
NATO	North Atlantic Treaty Organization
NGO	non-governmental organization
NMFS	US National Marine Fisheries Service
NOAA	US National Oceanic and Atmospheric Administration
Npr-PPM	non-product-related process and production method
NT	national treatment
OAS	Organization of American States
OECD	Organization for Economic Cooperation and Development
PCIJ	Permanent Court of International Justice
POP Conv.	Stockholm Convention on Persistent Organic Pollutants
PPM	process and production method (measure)
Pr-PPM	product-related process and production method
REDD	reducing emissions from deforestation and forest degradation
RFMO	regional fisheries management organization
RTA	regional trade agreement
SAARC	South Asian Association for Regional Cooperation
SPS	Agreement on the Application of Sanitary and Phytosanitary Measures
TBT	Agreement on Technical Barriers to Trade

TED	turtle excluder device
TEU	Treaty on the European Union
TFEU	Treaty on the Functioning of the European Union
TRIPS	Agreement on Trade-Related Aspects of Intellectual Property Rigths
UK	United Kingdom
UN	United Nations
UNCED	United Nations Conference on Environment and Development
UNCLOS	United Nations Convention on the Law of the Sea
UNCTAD	United Nations Conference on Trade and Development
UNEP	United Nations Environment Programme
UNFCCC	United Nations Framework Convention on Climate Change
UNGA	United Nations General Assembly
US	United States
VCLT	Vienna Convention on the Law of Treaties
VPA	voluntary partnership agreement
WTO	World Trade Organization

1 Introduction

'The greatest threat to our planet is the belief that someone else will save it.'[1]

1.1 Scope of the study

1.1.1 Addressing environmental concerns through trade measures

The state of our environment is a global concern. Environmental degradation and climate change affect all and everyone. Some states will suffer more immediate damage and will feel the physical, social and economic consequences sooner through, for instance, rising sea levels threatening the very existence of their land, through floods and hurricanes, through desertification and extreme drought, but it is undeniable that the environmental impact will eventually affect all states in an irreversible manner.[2] It is equally undeniable that human activity has contributed to the current deplorable status, and that common action is of crucial importance to slow down future environmental deterioration.[3] Despite this increasing awareness, setting binding and ambitious commitments internationally has proven to be a very difficult process due to a multiplicity of factors, such as discords on burden-sharing between developed and developing countries, between 'historic' emitters and 'new' emitters, and disagreement on suitable protective methods, financial mechanisms or appropriate sanctioning of free-riders. International environmental negotiations can be quite frustrating 'in a world in which fisheries deplete, potable water diminishes, species vanish, the air fouls, the ozone layer thins, and the atmosphere warms'.[4] In the realm of climate change, after several failed attempts throughout the last decade, a 'historic' agreement was signed in Paris in December 2015 by more than 190 states, recognising the urgent

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1 Robert Swan OBE, the first man in history to walk to both the North and South Poles.

2 See the assessment reports by the Intergovernmental Panel on Climate Change (IPCC) at https://www.ipcc.ch/publications_and_data/publications_and_data_reports.shtml. The latest series of reports dates from 2014.

3 See IPCC Reports; see also UNFCCC COP 21, Paris Agreement, FCCC/CP/2015/L9, 2015; UN, 2030 Agenda on Sustainable Development, UN Resolution A/RES/70/1 of 25 September 2015, 2015.

4 Gregory Shaffer and Daniel Bodansky, 'Transnationalism, Unilateralism and International Law' 2011, No. 11-34 Legal Studies Research Paper Series Research Paper 2.

need for international action and ambitious efforts. Nevertheless, it remains to be seen how states will convert and implement these ambitions into concrete deeds. In the absence of a stringent and coordinated international framework regulating the preservation of the environment, countries seek alternatives to promote environmental protection. Unilaterally imposed trade measures may be such an alternative, but can they be used to protect global environmental concerns or concerns located outside the territory of the regulating State?

Much has been written about the relationship between trade and environment, and I will not repeat what has been discussed extensively elsewhere.[5] In summary, trade can have both positive and negative consequences for the environment: it could contribute positively by increasing real income and standards of living, allowing countries to allocate more resources to environmental protection. Trade could also lead to higher standards when powerful states promote a regulatory 'race to the top'.[6] However, trade may also damage the environment by increasing energy consumption and pollution while accelerating the overuse of natural resources.[7] Trade could arguably lead to a 'race to the bottom' with regard to environmental standards and regulatory requirements, as countries would lower their standards to attract trade and foreign investment.[8] Even if the race does not literally reach the bottom, economic integration could create a regulatory dynamic in which standards are set strategically with an eye on the environmental standards

5 To name a few: Daniel C. Esty, *Greening the GATT: Trade, Environment and the Future* (Peterson Institute 1994); Adil Najam, Mark Halle and Ricardo Melendez-Ortiz (eds), *Trade and Environment: A Resource Book* (International Institute for Sustainable Development, International Centre for Trade and Sustainable Development, The Regional and International Networking Group 2007); Erich Vranes, *Trade and the Environment: Fundamental Issues in International Law, WTO Law and Legal Theory* (Oxford University Press 2009); James Cameron, Paul Demaret and Damien Geradin (eds), *Trade and the Environment: The Search for Balance* (Cameron May 1994); Thomas J. Schoenbaum, 'International Trade and Protection of the Environment: The Continuing Search for Reconciliation' 1997, 91 American Journal of International Law 268; John H. Jackson, 'World Trade Rules and Environmental Policies: Congruence or Conflict?' 1992, 49 Washington and Lee Law Review 1227; Eric Neumayer, 'WTO Rules and Multilateral Environmental Agreements' in *The Earthscan Reader on International Trade and Sustainable Development* (Earthscan Publications Ltd 2002); UNCTAD, *The Green Economy: Trade and Sustainable Development Implications* (2011).

6 David Vogel, *Trading up: Consumer and Environmental Regulation in a Global Economy* (Harvard University Press 1997) 248ff.

7 Tania Voon, 'Sizing Up the WTO: Trade-Environment Conflict and the Kyoto Protocol' 2000, 10 Journal of Transnational Law and Policy 71, 74.

8 Stefan Zleptnig, *Non-Economic Objectives in WTO Law: Justification Provisions of GATT, GATS, SPS and TBT Agreements*, vol 1 (Mads Andenas ed, Martinus Nijhoff Publishers 2010) 37.

in competing jurisdictions, resulting in at least suboptimal standards in some places.[9]

Environmental aspects of trade have received increasing attention over the last decades. At the 1992 Earth Summit the trade-environment link was recognized explicitly, for instance through Agenda 21, stressing the need to make trade and environmental 'mutually supportive'.[10] Similarly, a reference to sustainable development is found in the Preamble of the 1994 World Trade Organization (WTO) Agreement.[11] The connection between environment and trade has since been articulated in a number of international instruments, such as the Biosafety Protocol to the Convention on Biological Diversity (CBD)[12] or the 2001 POP Convention,[13] in addition to those agreements that already recognized their link, such as the Convention on International Trade in Endangered Species (CITES).[14]

The traditional focus of trade law is on end products and their market impact. From the viewpoint of environmental protection and sustainable development, however, the process through which products are *made* is as important as the product, if not more important.[15] Environmental trade measures hence do not always regulate the end product, as the environmental concerns might be related more to the production process than the actual end product.[16] Targeting the production process is line with the 'polluter pays' principle, as an established principle of environmental law. The use of trade measures linked to the production process has been a particularly knotty issue of the trade and environment debate, sharply dividing opponents and proponents. In particular those measures targeting production methods that leave no physical trace in the end product (the so-called 'non-product-related process and production methods' or npr-PPMs) have been subject of much (unresolved)

9 C. Daniel Esty, 'Bridging the Trade-Environment Divide' 2001, 15 Journal of Economic Perspectives 113, 124; Kym Anderson, 'Environmental and Labor Standards: What Role for WTO?' in Kym Anderson and Bernard Hoekman (eds), *The Global Trading System, Vol 4: New Issues for the WTO* (IB Tauris 2002) 7.

10 Report of the United Nations Conference on Environment and Development, A/CONF.151/26.Rev.1(Vol1), Resolution 1, Annex 2: Agenda 21, 13 June 1992.

11 Marrakesh Agreement Establishing the World Trade Organization, 1867 UNTS 154, 33 ILM 1144, 1994, preamble.

12 Cartagena Protocol on Biosafety to the Convention on Biological Diversity, 29 January 2000, 39 ILM 1027, preamble 9-11. See for more examples Pierre-Marie Dupuy and Jorge E. Vinuales, *International Environmental Law* (Cambridge University Press 2015) 394.

13 Stockholm Convention on Persistent Organic Pollutants, 22 May 2001, 40 ILM 532 (2001), Preamble, para.9.

14 Convention on International Trade in Endangered Species of Wild Fauna and Flora, 3 March 1973, 983 UNTS 243.

15 Edith Brown Weiss, 'Environment and Trade as Partners in Sustainable Development: A Commentary' 1992, 86 American Journal of International Law 728, 730.

16 Sebastian Puth, *WTO und Umwelt: Die Produkt-Prozess-Doktrin* (Duncker & Humblot 2003) 363.

debate.[17] Opponents claim that production is part of the comparative advantage of a state and that trade should only deal with products on the market, rather than deal with environmental conditions outside its own borders. This position was also expressed in the unadopted General Agreement on Tariffs and Trade (GATT) reports in the *US-Tuna* cases where GATT panels found that npr-PPMs could not be consistent with the GATT rules.[18] A decade later the WTO Appellate Body (AB) took a different approach in *US-Shrimp*.[19] According to the AB, npr-PPMs could be accepted in principle, as long as the measure complied with the conditions of Article XX GATT, the general exceptions provision. In its report the AB touched upon important elements to consider such as the uni-or multilateral nature of the measure, the coercive effect and the requirement of a nexus between the regulating state and the concern to be protected. Despite these efforts, however, the AB did not outline a systematic approach to assess the acceptability of PPMs, leaving the discussion unsettled. One particular claim that has remained unresolved relates to the alleged extraterritorial nature of PPMs: states aim at regulating processes that take place outside their jurisdiction and that leave no trace in the end product, with the objective to protect non-trade concerns that are at least partly located outside the territory of the regulating state. Due to the sensitive nature of jurisdictional claims under international law as well as the impact npr-PPMs may have on foreign producers and/or policymakers, these 'extraterritorial' measures raise questions on their legality and acceptability under WTO law.

The npr-PPM discussion has often been reduced to a normative 'good or bad' discussion, repeating the positions of the GATT panels and the AB. However, this thesis purports to avoid that well-trodden normative path: its starting point is to enhance legal understanding of npr-PPMs and focus on the question whether these 'extraterritorial' PPMs could be accepted under WTO law – and in particular Article XX GATT –, and if so, under which conditions. The objective is to develop a systematic approach to assess their extraterritorial reach, applicable to all types of environmental concerns targeted through trade measures. Npr-PPMs are not likely to be extinguished; if anything, they will be used even more often in the future due to globalization, increased awareness of the urgency of environmental challenges and their global impacts, as well

17 Steve Charnovitz, 'The Law of Environmental "PPMs" in the WTO: Debunking the Myth of Illegality' 2002, 27 Yale Journal of International Law 59; Robert Howse and Donald Regan, 'The Product/Process Distinction - An Illusory Basis for Disciplining 'Unilateralism' in Trade Policy' 2000, 11 European Journal of International Law 249; Henrik Horn and Peter C. Mavroidis, 'The Permissible Reach of National Environmental Policies' 2008, 42 Journal of World Trade 1107; Vranes(2009); Christiane R. Conrad, *Processes and Production Methods (PPMs) in WTO Law: Interfacing Trade and Social Goals* (Cambridge University Press 2011).

18 GATT, *United States - Restrictions on Imports of Tuna (Mexico)* GATT Panel 1991, DS21/R; GATT, *United States - Restrictions on Imports of Tuna (EEC)* GATT panel 1994, DS29/R. For a detailed discussion, see chapter 2.

19 WTO, *United States - Import Prohibition of Certain Shrimp and Shrimp Products* AB Report 1998, WT/DS58/AB/R.

as continuously lagging international negotiations on environmental protection in different fora. The question that this thesis aims to answer is whether WTO law, as it stands, allows for 'extraterritorial' trade measures that aim at protecting transboundary environmental resources? Or does WTO law, and more particularly Article XX GATT, form a stumbling block for states seeking to address global environmental concerns through 'extraterritorial' trade measures?

1.1.2 Related questions

This thesis will focus on the extraterritorial reach of npr-PPMs. Extraterritoriality is closely related to concepts such as unilateralism and sovereignty. As these concepts will be referred to on multiple occasions throughout the book, it is useful to define and distinguish them here in order to delineate the specific scope of the research. Furthermore, the question of addressing environmental concerns through trade measures evokes other questions that will be briefly addressed here: is the WTO the appropriate forum to deal with environmental issues; how to deal with the inequity between powerful markets and minor markets with respect to npr-PPMs? Although related to the research question, these questions require a non-legal analysis that is beyond the scope of this thesis.

1.1.2.1 Unilateralism

Extraterritoriality is often equated with unilateral action and while overlapping, both notions need to be distinguished. Within the realm of this book, unilateralism is only a meaningful concept when it relates to situations that are not limited to the territory of the regulating state. In that sense the concept is closely related to extraterritoriality.[20] There is no clear definition under international law of what unilateralism entails.[21] With regard to PPMs, unilateralism can refer to two things: firstly, trade measures are imposed by the importing or exporting state, and are thus unilaterally imposed measures;[22] and second-

20 Bernhard Jansen, 'The Limits of Unilateralism from a European Perspective' 2000, 11 European Journal of International Law 309, 310.

21 See for a discussion on a possible definition of unilateral acts, International Law Commission and Victor Rodriguez Cedeno, Ninth Report on Unilateral Acts of States: Draft Guiding Principles, A/CN4/569, 2006, 54.

22 The EU is a special case, as the Member States have agreed to a common commercial policy at EU-level. Mutatis mutandis EU measures are for the purpose of this debate seen as 'unilateral' measures as well. The fact that the EU represents the viewpoints on the Member States does not change the extraterritorial effect of an EU measure. The fact that all Member States agree on a policy (which is not guaranteed when decisions are taken based on QMV) may only serve as an indication of broader support for a position.

ly, the norm prescribed by the measure can be of a unilateral nature, or can be based on multilateral standards. Principle 12 of the 1992 Rio Declaration, arguably referring to both meanings of unilateralism, states that

> 'unilateral actions to deal with environmental challenges outside the jurisdiction of the importing country should be avoided. Environmental measures addressing transboundary or global environmental problems should, as far as possible, be based on an international consensus.'[23]

However, in the absence of international consensus on environmental action – let alone concrete international measures, commitments and enforcement – unilateral action might be the only way forward, as long as it is combined with a continuous effort to reach international agreement.[24] Thus, rather than a prohibition on unilateral measures, Principle 12 should be read as a good faith duty to engage in cooperation,[25] a duty that the AB has also found to be included in the *chapeau* of Article XX GATT in the landmark case *US-Shrimp*.[26] Environmental trade measures could thus be used in addition to engagements in multilateral processes and institutions, as well as transboundary networks and dialogues among states and non-state actors.[27] Unilateral action in isolation of multilateral consideration will raise more questions as to the legitimacy of those standards.[28] One could say that the legality of unilateral measures depends on the extent to which they circumvent the application or adoption of a multilateral alternative.[29]

Unilateral measures should thus be seen as a second-best option that could advance a collective agenda, where the first option of multilateral commitments is inadequate.[30] The reality is that effective, broad membership environmental treaties are difficult to achieve, so unilateralism could provide an incentive

23 Rio Declaration on Environment and Development, 31ILM 874, Principle 12 (June 14, 1992).
24 Daniel Bodansky, 'What's So Bad about Unilateral Action to Protect the Environment?' 2000, 11 European Journal of International Law 339, 339.
25 Puth(2003), 369.
26 AB Report *US-Shrimp* 1998, para.166.
27 Eric Dannenmaier, 'Constructing Transnational Climate Regimes' in Günther Handl, Joachim Zekoll and Peer Zumbansen (eds), *Beyond Territoriality: Transnational Legal Authority in an Age of Globalization* (Martinus Nijhoff 2012) 521; Tim Gemkow, 'The International Law(s) of Regulatory Extraterritoriality: Causes and Consequences of Rule Variations' Paper at SGIR 7th Pan-European Conference on International Relations ; Bodansky (2000), 343.
28 Laurens Ankersmit, Jessica Lawrence and Gareth Davies, 'Diverging EU and WTO Perspectives on Extraterritorial Process Regulation' 2012, 21 Minnesota Journal of International Law 14, 30.
29 Michael Reisman, 'Unilateral Action and the Transformation of the World Constitutive Process: The Special Problem of Humanitarian Intervention' 2000, 11 European Journal of International Law, 3. Steve Charnovitz, 'A Taxonomy of Environmental Trade Measures' 1993, 6 Georgetown International Environmental Law Review 1, 6.
30 Monica Hakimi, 'Unfriendly Unilateralism' 2014, 55 Harvard International Law Journal 105, 146.

to tackle concerns collectively.[31] This has also been called 'policy-forging' unilateralism.[32] Unilateral action could form part of a dynamic process of action and reaction, of reassessment and response.[33] Eventually, the level of resistance or acceptance by other states will determine whether the advanced norm may at least partly compensate for the deficiencies in the multilateral system. Furthermore, a trade measure may also address a newly emerging concern that is not yet on the international agenda.

Unilateral action to protect the environment is arguably grounded in a combination of self-interest, superiority and altruism.[34] In order to avoid abuse of power, safeguards are required. It is for instance crucial that states adopting unilateral measures base the imposed norm as much as possible on existing international hard or soft law. Non-legal initiatives by civil society and scientific institutions could be taken into account as well by regulating states in order to strengthen substantive support for a measure and weaken its unilateral character.

1.1.2.2 State sovereignty

The concepts of extraterritoriality and unilateralism are both closely tied to the Westphalian notion of state sovereignty. They are both considered controversial because they interfere with the sovereignty of other states. States enjoy full sovereignty over their territory and any exercise of jurisdiction outside of that territory is considered extra-territorial. International law includes a number of principles permitting such extraterritorial jurisdiction, which will be discussed in chapter 4. Npr-PPMs, targeting production processes outside the territory of the regulating state, are regarded as extraterritorial under the geographically bound Westphalian notion of sovereignty. Nevertheless, consumers may feel strongly about environmental concerns related to production of imported products and may be in favour of stricter environmental requirements conditioning market access.[35] Does it still hold in view of global challenges to require a territorial link between the regulating state and the concern to be regulated? The traditional territorial premise is increasingly challenged in today's interdependent world in a number of areas, such as

31 Ankersmit, Lawrence and Davies (2012), 34; Hakimi (2014), 126; Joanne Scott, 'Extraterritoriality and Territorial Extension in EU Law' 2014, 62 American Journal of Comparative Law 87, 106. For some examples, see Steve Charnovitz, 'GATT and the Environment: Examining the Issues' 1992, 4 International Environmental Affairs 203; Bodansky (2000), 344.

32 Laurence Boisson de Chazournes, 'Unilateralism and Environmental Protection: Issues of Perception and Reality of Issues' 2000, 11 European Journal of International Law 315, 317.

33 Shaffer and Bodansky (2011), 8.

34 Neumayer(2002), 147; Aravind Ganesh, 'Understanding the EU Missionary Principle' 2014, Available at SSRN; Werner Meng, *Extraterritoriale Jurisdiktion im öffentlichen Wirtschaftsrecht* (Springer 1994) 550; Hakimi (2014), 111.

35 Douglas A. Kysar, 'Preferences for Processes: The Process/Product Distinction and the Regulation of Consumer Choice' 2004, 118 Harvard Law Review 526, 599.

jurisdiction of the port state with regard to labour standards on the high seas or pollution from ships outside territorial waters,[36] extraterritoriality in the cyber-world including data protection[37] and privacy issues for intelligence surveillance,[38] securities regulation,[39] anti-corruption and anti-bribery legislation,[40] and animal welfare rules.[41] This thesis does not purport to engage

36 See e.g. double hull requirements for ships under the US Pollution Act; See paper Robin Churchill, UNIJURIS Seminar on Port State Jurisdiction 14/12/2015; paper Cleopatra Doumbia-Henry, UNIJURIS Seminar on Port State Jurisdiction (labour standards); Maritime Labour Convention 2006.

37 Christopher Kuner, 'Extraterritoriality and Regulation of International Data Transfers in EU Data Protection Law' 2015, 5 International Data Privacy Law 235; Christopher Kuner, 'Extraterritoriality and the Fundamental Right to Data Protection' 2013, 16 December 2013 EJIL Talk; Teresa Scassa and Robert J. Currie, 'New First Principles? Assessing The Internet's Challenges To Jurisdiction' 2011, 42 Georgetown Journal of International Law 1017; Cedric Ryngaert, *Jurisdiction in Interntational Law* (2nd edn, Oxford University Press 2015) 79.

38 Anne Peters, 'Surveillance Without Borders? The Unlawfulness of the NSA-Panopticon, Part I' 2013, 1 November 2013 EJIL Talk; Carly Nyst, 'Interference-based Jurisdiction over Violations of the Right to Privacy' 2013, 21 November 2013 EJIL Talk; Dan Svantesson, 'Extraterritoriality and Targeting in EU Data Privacy Law: The Weak Spot Undermining the Regulation' 2015, 5 International Data Privacy Law 226.

39 Securities regulation is a branch of financial law that governs transactions in certifications attesting the ownership of stocks. States, especially the US, have attested jurisdiction based on territorial conduct or effects related to a securities transaction. In the landmark judgment Morrison v National Australia Bank, 561 US 247 (2010) the US Supreme Court found that the Exchange Act did not apply extraterritorially, and that a stronger link to the US was required. See e.g. Ryngaert(2015); William S. Dodge, '*Morrison*'s Effects Test' 2011, 40 Southwestern Law Review 687.

40 US anti-corruption legislation (Foreign Corrupt Practices Act) prescribes anti-bribery rules, applying to all natural and legal persons subject to US laws, as well as all 'issuers', which are companies that register securities with the US Securities and Exchange Commission and to any person acting within US territory if there is any connection with the bribery act, for instance routing payment through US bank accounts or sending an email to a US company (FCPA §78dd-1(a) in conjunction with §§78l and 78o(d)). The UK Bribery Act 2010 equally relies on the territoriality and nationality principle for an extraterritorial application. The 1997 OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions sets legally binding standards for its 41 signatories to criminalise bribery of foreign public officials. The Convention allows for jurisdiction either when a part or the whole conduct occurs within the territory of the state (territoriality principle), or when a national of a state is bribing a foreign official (nationality principle). (Art 4, OECD Convention). A broad interpretation of the territoriality principle does not require an extensive physical connection (see Commentary 25 to the OECD Convention). In that light, it has been argued that any means of interstate commerce such as use of emails, telephone or banking system are sufficient to establish jurisdiction. (Mark Pieth, Lucinda Low and Peter Cullen, *The OECD Convention on Bribery: A Commentary* (Cambridge University Press 2007) 277.) See also Branislav Hock, 'Intimations of Global Anti-Bribery Regime and the Effectiveness of Extraterritorial Enforcement: From Free-Riders to Protectionism' 2014, 2014-009 TILEC Discussion Paper.

41 See for instance case Zuchtvieh Export GmbH v Stadt Kempen C-424/13, where the question arose whether EU allows the restriction of an export permit if EU animal welfare standards during transport are not adhered to in third countries, even if those standards are in compliance with the laws of that third country. AG Bot argued for a territorial restriction

in an in-depth debate on sovereignty, but questions whether the notion of sovereignty is flexible enough to reflect the needs of this particular time.[42] The example of environmental npr-PPMs will inquire whether a looser approach to territorial sovereignty can be adopted by interpreting the law as it stands, in light of current global challenges. The analysis can be relevant to the more general question of what states can do when facing global challenges – which by their very nature are not territorial and cannot be solved by individual (state) actors –, particularly when combined with the absence of multilateral consent on the best course of action.

1.1.2.3 WTO as the appropriate forum

The WTO is not an environmental organization, nor the ideal forum to achieve environmental progress. Rather, trade measures are one tool in a preferably larger toolkit for global environmental protection that includes binding environmental agreements. Where binding agreements exist, and where they include enforcement and dispute settlement mechanisms, those approaches should be preferred over trade measures, because of their multilateral, consensual nature. However, where such agreements are lacking the WTO might be an attractive alternative due to the linkages between trade and environment, but also due to the powerful nature of trade measures and the well-functioning WTO dispute settlement system. As noted in the preamble to the Marrakesh Agreement, one of the objectives of the WTO is sustainable development, which includes environmental protection. Trade measures should in that light be seen as a means to an end. The question is whether adjudicators in trade dispute settlement are equipped to undertake a balancing act between trade interests and environmental interests. Can they 'objectively weigh incommensurate concerns, such as the value of commercial freedom versus the value of environmental protection, where the litigant governments will likely have different metrics for these values',[43] while not diminishing or adding to the rights and obligations in the WTO treaties?[44]

It is the task of WTO panel to determine whether a measure unduly restricts trade or is of a discriminatory nature. Is a government really intervening to protect for instance the environment (in which case the measure could hold) or is it rather intervening to protect domestic producers (in which case the measure cannot be seen as consistent)? When a measure has been found to infringe a substantive obligation, justification can be sought under the general

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to EU Regulation 1/2005, but the Court did not address the claims on extraterritoriality. The Court based its reasoning on an arguably faulty interpretation of Article 14 of Regulation 1/2005 and avoided the more systemic issues.

42 Robert Sir Jennings, 'Sovereignty and International Law' in Gerard Kreijen and others (eds), *State, Sovereignty, and International Governance* (Oxford University Press 2002) 29.

43 Charnovitz (2002), 101.

44 See Article 3.2 DSU.

exception clause of Article XX GATT. As has been shown in the past, however, the conditions prescribed in Article XX do not necessarily help in deciding on issues of systemic importance, such as the extraterritorial reach of trade measures. A structural approach to balance trade and non-trade concerns has not been developed yet. The early GATT panels are perceived to have opted for a rather strict trade-over-non-trade approach. WTO panellists as well as the AB have adopted a relatively cautious approach with regard to non-trade concerns: in the few cases that have come before the AB, the AB limited its decision to the specific facts of the case, avoiding broader interpretations that could be applicable to the wider set of non-trade concerns. The model proposed in this thesis will attempt to develop a systematic and structural approach to assess npr-PPMs under the law as it stands. The suggested interpretation of WTO law will draw inspiration from other fields of law where an extraterritorial application of rules is accepted. Through different steps, the model will purport to give panelists the tools to examine those elements that are essential to a trade analysis, and adopt a more deferential approach to non-trade issues, such as the most appropriate method to address a particular environmental problem.

1.1.2.4 Powerful markets

A pertinent concern with regard to the use of npr-PPMs is that only a limited number of countries, namely economically powerful states, will be able to impose their laws extraterritorially in an effective manner. The usefulness of environmental trade measures lies with the power of exclusion. If access to a market is restricted or prohibited for products produced in a manner that is harmful to the environment, then those that seek access to this market will have no choice but to adapt their production process. The more powerful the import market, the stronger the *de facto* coercive effect on producers will be. Can they move export to another market? For many producers, there will be no full alternative to strong markets such as the EU or the US.[45] Complying with the rules of another jurisdiction is then the price of trading with that market.[46]

Developing countries fear that PPMs will be used by the major economic powers and will have strong trade-restrictive effects on developing countries

45 See as will be further discussed on several occasions throughout this thesis, but most notably in chapter 7.6.1: Anu Bradford, 'The Brussels Effect' 2012, 107 Northwestern University Law Review 1; David Singh Grewal, *Network Power: The Social Dynamics of Globalization* (Yale University Press 2008); David Singh Grewal, 'Network Power and Globalization' 2006, 17 Ethics & International Affairs 89.

46 Bradford (2012), 66.

without any compensation, such as technical or financial assistance.[47] The bulk of the costs resulting from npr-PPMs will be carried by those producing under the lowest standards, as they will likely have to adapt most in order to comply with the higher standards. Developing countries fear that the imposition of environmental, technological and other qualitative standards with high thresholds set by industrialised countries may threaten their market access, and that their special position in the WTO, recognised in Part IV of the GATT, will not be taken into account.[48] An assessment of extraterritorial measures should include a good faith obligation on the state imposing the trade measure, which could ideally entail a duty for financial and technical assistance to developing countries where the imposed measures would require costly changes in production processes. The question is then whether this can be required under the GATT and if so, how to operationalize these responsibilities and duties. There are several international mechanisms recognizing the need for developed countries to assist developing countries,[49] however, these merely entail an obligation of conduct and can thus not be enforced.

1.1.3 Aim of study

The main question to be answered in this thesis is whether states, in the absence of binding international environmental agreements, can impose trade measures targeting foreign production processes in order to act upon environmental problems located (at least partly) outside the territory of the regulating state. Does the WTO act as a stumbling block for alternative solutions to global environmental challenges?

This thesis proposes an extraterritoriality decision tree that serves as a systematic approach to assess regulatory npr-PPMs that aim at protecting an environmental problem outside the territory of the regulating state. The decision tree will be embedded within the framework of Article XX GATT as the general exceptions clause, and will guide the analysis of extraterritorial environmental concerns. It answers whether there is a jurisdictional limitation to Article XX GATT, and if so, what that limitation entails. While this thesis' conclusions do not necessarily apply equally to npr-PPMs addressing other

47 Gregory Shaffer, 'WTO Blue-Green Blues: The Impact of US Domestic Politics on Trade-Labor, Trade-Environment Linkages for the WTO's future' 2000, 24 Fordham International Law Journal 607, 625; UNCTAD, *Trade and Environment Review* (2006).

48 Robert Read, 'Process and Production Methods and the Regulation of International Trade' in Robert Read and Nicholas Perdikis (eds), *The WTO and the Regulation of International Trade: Recent Trade Disputes Between the European Union and the United States* (Edward Elgar 2005) 243.

49 See e.g. the Principle of Common but Differentiated Responsibilities as recognized in the United Nations Framework Convention on Climate Change, 1992, Art.3;4; Kyoto Protocol to the United Nations Framework Convention on Climate Change, 1997.

non-trade concerns such as labour or human rights due to the specific complexities and legal frameworks of labour rights and human rights,[50] the proposed model could nonetheless inspire the assessment of other non-trade concerns. Following the proposed steps of the decision tree will not lead to the infamous slippery slope consisting of an uncontainable use of unilateral and extraterritorial action: the decision model takes into consideration how the regulating country is affected by the concern at issue as well as the international support (if existing) for the imposed norms. The need to protect the concern at issue is balanced with safeguarding the fundamental characteristics of the multilateral trading system through the application of several decision criteria.

The thesis starts with an objective assessment of WTO law as it stands, purporting to map and describe the *lex lata*. The analysis of WTO law is complemented with a comparative analysis of other fields of law where an extraterritorial application of laws is accepted, such as competition law and international human rights law, which will serve as a basis for the proposed extraterritoriality decision tree for trade measures. The decision tree takes a normative approach as to how WTO law should be interpreted in light of global environmental challenges. It is not suggested that WTO law needs to be changed, as the current law can be interpreted in such way as to accommodate extraterritorial concerns. The proposed model will be applied to case studies of environmental measures with an extraterritorial element imposed by the EU, in order to identify possible problems in the law and the model. In addition to the EU measures, the model is also applied to the facts of the landmark case *US-Shrimp.*

The choice of EU measures in a study on extraterritoriality under WTO law demands a short justification, even if the choice to study the EU is self-explanatory in light of the EU's trading power. Under international law the EU is a *sui generis* body of states: neither a sovereign state nor a supranational international organization. Nevertheless, in light of the EU's exclusive trade competence,[51] for the purpose of this study I consider the EU in its *sui generis* capacity more closely related to a state than to an international organization.[52] When discussing the extraterritorial application of national laws through international trade measures, this includes the extraterritorial application of EU law to activities occurring outside EU borders. Apart from its trade competence, the EU is also competent to adopt environmental policies.[53] Since the Lisbon Treaty the EU is committed to promoting environmental protection globally

50 For PPMs for non-environmental reasons, see Conrad(2011), 77.
51 Article 3 TFEU.
52 Within a WTO context, the EU as well as its Member States are Members, but are only represented by the EU. According to Article XII of the Marrakesh Agreement, the WTO's membership is not limited to a 'sovereign entity' but instead to a 'state or separate customs territory possessing full autonomy in the conduct of its external commercial relations'.
53 Environment is a shared competence with the Member States, see Article 4 TFEU.

through articles 3(5) and 21(2) TEU.[54] Furthermore, Article 11 TFEU prescribes an environmental integration requirement in other EU policies with a view to promoting sustainable development.[55] While this requirement is important with regard to internal EU policy, it is also being applied externally.[56] The EU has increasingly sought to assert itself as a prominent player in global environmental governance by gradually expanding its environmental policy from an internal policy to one with a marked external dimension. The EU has been actively engaged in the development of a number of multilateral environmental agreements (MEAs), as well as through regional and bilateral processes.[57] As will be demonstrated in chapter 8, the EU has also undertaken unilateral action in order to promote environmental protection.

After having described what I *will* do in this thesis, here is what I will *not* do. With regard to the analysis under WTO law, the focus of the research is on regulatory schemes such as standards and regulations, as opposed to economic incentives such as taxes or subsidies. I will furthermore not engage in a law and economics analysis of the rationale and cost-benefits of PPMs. Neither will I embark on an effectiveness/efficiency-analysis of PPMs, or go into political theory of international relations. The scope of this thesis is purely legal: are there any *legal* impediments to the use of npr-PPMs under WTO law? The proposed analytical model can contribute to a more robust assessment of this question than is currently found in the case law or scholarship. With regard to the comparative analysis of how extraterritoriality is dealt with elsewhere, I do not aim to give an exhaustive overview of extraterritoriality in all fields of law. I have selected those areas that I deem most relevant to

54 Article 3(5) TEU reads 'In its relations with the wider world, the Union shall uphold and promote its values and interests and contribute to the protection of its citizens. It shall contribute to peace, security, *the sustainable development of the Earth*, solidarity and mutual respect among peoples, *free and fair trade*, eradication of poverty and the protection of human rights, in particular the rights of the child, as well as to the strict observance and the development of international law, including respect for the principles of the United Nations Charter.' Article 21(2) TEU reads 'The Union shall define and pursue common policies and actions, and shall work for a high degree of cooperation in all fields of international relations, in order to: (d)foster the sustainable economic, social and environmental development of developing countries, with the primary aim of eradicating poverty; (f)help develop international measures to preserve and improve the quality of the environment and the sustainable management of global natural resources, in order to ensure sustainable development.'

The extent of this obligation is more of a political choice. See for an interesting overview of opinions and case studies, Elisa Morgera (ed) *The External Environmental Policy of the European Union: EU and International Law Perspectives* (Cambridge University Press 2012).

55 Article 11 TFEU reads 'Environmental protection requirements must be integrated into the definition and implementation of the Union policies and activities, in particular with a view to promoting sustainable development.'

56 See for a study on this, Gracia Marin Duran and Elisa Morgera, *Environmental Integration in the EUs External Relations: Beyond Multilateral Dimensions* (Hart Publishing 2012).

57 Ibid 6.

PPMs, the selection of which will be explained in the next section.[58] With regard to the case studies, I will not assess the effectiveness of the environmental measures, or whether a particular policy is the most appropriate one, as that would require tools and skills that go beyond any legal analysis. I will only apply the legal model to determine whether that type of measure could be accepted under WTO law. I do not deny the importance of the above questions but they are beyond the scope of this thesis. In order to develop proposals for feasible and effective trade policy, the outcome of the legal analysis must be complemented with findings of economic, political and environmental science analysis.

1.2 Structure of analysis

1.2.1 Part I: Product or process: Outlining the scope

The first part of the thesis outlines the legal framework of PPMs under WTO law. Chapter 2 starts with defining npr-PPMs, placing them within the broader trade-environment debate. The chapter deals with the question how PPMs can be challenged under WTO law, and more specifically under the GATT. It elaborates on the legal framework, and the provisions that have been invoked in disputes on PPMs: possible inconsistencies with Article III and Article XI GATT are discussed, as well as the justifications under Article XX GATT. In addition to the GATT, the scope of the Agreement on Technical Barriers to Trade (TBT Agreement) with regard to PPMs is addressed as well.[59]

Chapter 3 examines the extraterritorial nature and reach of npr-PPMs. Extraterritoriality in the context of PPMs can be understood in two ways: firstly, a PPM targets the production process and thus 'regulates' activities occurring abroad; secondly, a PPM can aim at protecting a non-trade concern outside the territory of the regulating state. Are both notions problematic, and if so, why? In order to answer these questions, the chapter first discusses the notion of extraterritoriality in a trade context, and then takes a closer look at the jurisdictional scope of the different WTO covered agreements that could be of relevance to regulatory PPMs. Lastly, WTO disputes that dealt with PPMs are analysed. It concludes that the WTO agreements are silent on their jurisdictional scope, and no systematic approach to jurisdictional questions has been developed in the case law.

58 See infra at 1.3.2.
59 For a more in-depth analysis, see chapter 2.4.3.

1.2.2 Part II: Zooming out: Extraterritoriality beyond WTO law

The second part of this thesis engages in a closer study of the notion of extraterritoriality through the analysis of extraterritorial jurisdiction under general public international law as well as two particular fields where extraterritoriality is regularly applied (international human rights law and competition law). The purpose of the comparative analysis is to distil the legal concept of extraterritoriality in different contexts and to analyse under which circumstances states have been willing to accept extraterritorial jurisdiction.

Chapter 4 elaborates on extraterritoriality and jurisdiction from a general public international law perspective by defining both notions and discerning different degrees of extraterritoriality with regard to their level of intrusiveness and connection to the regulating state. It distinguishes between prescriptive and enforcement jurisdiction and discusses the permissive principles of jurisdiction.

Chapter 5 takes a closer look at the effects doctrine as applied in competition law in different domestic systems in order to determine whether this doctrine could also be applied to npr-PPMs aiming at the protection of environmental concerns outside the territory of the regulating state. A parallel is drawn between economic effects on the market and environmental effects within the regulating state.

Chapter 6 studies the extraterritorial application of international human rights law through the decisions of regional and international human rights bodies. Even though the concept of extraterritoriality in a human rights context differs from that in a trade context, as it refers to an extension of states' own obligations rather than prescribing rules on others, the practice of extraterritoriality with regard to shared and fundamental values can be relevant to trade measures protecting common environmental concerns.

1.2.3 Part III: Zooming in: A WTO extraterritoriality decision tree

Part III proposes an extraterritoriality decision tree for WTO law building on the analysis in part II. Chapter 7 introduces the decision tree as embedded in Article XX GATT, serving as a threshold question under the paragraphs of Article XX. As a first step it is suggested to consider the concern's location so as to determine to what extent it has an environmental impact on the regulating state. The second step of the decision model then refers to the international recognition of and support for the prescribed norm. The chapter also considers whether environmental concerns can be addressed under the public morals exception of Article XX(a) GATT. A few critical observations are made that go beyond the legal framework.

Chapter 8 shows the application of the decision tree to four different case studies. It starts with applying the tree to the landmark case of *US-Shrimp*, in order to determine whether this approach would lead to a more satisfying analysis of the contested measure. The model is then applied to EU measures in the field of illegal, unreported and unregulated fishing (IUU Fishing); the aviation measures in light of the European Emission Trading System; and the Timber Regulation as part of the EU's Forest Law Enforcement, Governance and Trade (FLEGT) Action Plan. The analysis leads to a refinement of the decision model, distinguishing between different types of measures on the basis of their norm-generating objective. The last chapter serves as a concluding chapter.

1.3 Methodology

1.3.1 Interpreting legal clauses

An important source for the interpretation of the legal provisions is the jurisprudence of GATT panels, WTO panels and AB. The reports by panels and the AB do not create binding legal precedent, but they give rise to legitimate expectations and provide useful and effective guidance for WTO Members as well as subsequent panels. This means that in practice, the reports have considerable precedential effect and persuasive power.[60] In addition to jurisprudence, scholarly writing aids the understanding of the discussed provisions and will be relied on extensively throughout this study.

1.3.2 Comparative perspective

The WTO is not and cannot be a closed system, impervious to other sources of international law.[61] That is clear from Article 3.2 DSU,[62] as well as the AB's statement in *US-Gasoline* that the WTO Agreements cannot be interpreted 'in clinical isolation of international law'.[63] The existing exceptions as listed in

60 David Palmeter and Peter C. Mavroidis, *Dispute Settlement in the World Trade Organization Practice and Procedure* (2nd edn, Cambridge University Press 2004) 51ff; Natalie McNelis, 'What Obligations Are Created by WTO Dispute Settlement Reports?' 2003, 37 Journal of World Trade 647.

61 Zleptnig(2010), 57.

62 Article 3.2 DSU reads: 'The dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system. The Members recognize that it serves to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law. Recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements'.

63 WTO, *United States - Standards for Reformulated and Conventional Gasoline* AB Report 1996, WT/DS2/AB/R.

for instance Article XX GATT link the WTO to other systems of law and policy.[64] These exceptions fail to give detailed criteria for judging trade and environment disputes, so panels and the AB have no alternative other than to look for relevant outside information that will help them to interpret the covered agreements in a reasonable and objective manner. Article 31.3(c) of the Vienna Convention on the Law of Treaties (VCLT), referring to the 'relevant rules of international law', allows panels and the AB to look at non-trade agreements to inform the interpretation of the WTO Agreements.[65] The relevance of these rules of international law needs to be determined based on the subject of the dispute, the content of the rules under consideration, and the membership of a non-WTO treaty (for instance the membership to an MEA).[66] Even though the jurisdiction of the WTO adjudicating bodies is limited to the WTO agreements,[67] so obligations under non-WTO agreements cannot be enforced through the WTO dispute settlement system,[68] these non-WTO rules can be useful tools of interpretation.[69] In order to determine the implicit jurisdictional scope of Article XX GATT, this thesis analyzes the application of extraterritoriality in

64 Gabrielle Marceau, 'A Call for Coherence in International Law: Praises for the Prohibitino Against 'Clinical Isolation' in WTO Dispute Settlement' 1999, 33 Journal of World Trade 87, 107.

65 It is unclear whether Article 31(3)(c) VCLT, referring to the 'relevant rules of international law applicable in the relations between the parties', should be interpreted in a WTO context as the parties to a dispute, or rather as the parties to the WTO as a whole. In *EC-Biotech* the Panel adopted the latter interpretation, stating that only those rules 'applicable in the relations between all parties to the treaty which is being interpreted' can be taken into account (WTO, *European Communities - Measures Affecting the Approval and Marketing of Biotech Products* Panel report 2006, WT/DS291/R, para.7.71.). The Panel then observed, however, that 'the mere fact that one or more disputing parties are not parties to a convention does not necessarily mean that a convention cannot shed light on the meaning and scope of a treaty term to be interpreted' (para.7.94). The AB in *EC-Aircraft* has adopted a subtle middle way: rules must establish the 'common intention of the parties' (WTO, *European Communities - Measures Affecting Trade in Large Civil Aircraft* AB Report 2011, WTO/DS316/AB/R, para.845.). Even under Article 31(3)(c) the intentions of the broader WTO membership must be taken into account, and a rule must be 'at least implicitly accepted or tolerated by all WTO Members'. Geraldo Vigidal, 'From Bilateral to Multilateral Law-Making: Legislation, Practice, Evolution and the Future of Inter Se Agreements in the WTO' 2013, 24 European Journal of International Law 1027, 1030; Joost Pauwelyn, 'The Role of Public International Law in the WTO: how far can we go?' 2001, 95 American Journal of International Law 535, 576.

66 Marceau (1999), 124.

67 WTO, Dispute Settlement Rules: Understanding on Rules and Procedures Governing the Settlement of Disputes, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 UNTS 401, 33 ILM 1226, 1994, Art.7;11.

68 Article 3.2 DSU.

69 See e.g. AB Report *US-Shrimp* 1998, paras.127; WTO, *Peru-Additional Duty on Imports of Certain Agricultural Products* AB Report 2015, WT/DS457/AB/R; James Mathis, 'WTO Appellate Body, *Peru-Additional Duty on Imports of Certain Agricultural Products,* WT/DS457/AB/R, 20 July 2015' 2016, 43 Legal Issues of Economic Integration 97, 105.

other fields of law. This comparative perspective will aid the interpretation of Article XX in light of global environmental concerns.

1.3.2.1 The aim of comparative law

Comparative legal analysis is both useful and necessary as it can lead to new insights and deeper understanding of legal concepts and systems.[70] Although this analysis helps to construct a general concept of extraterritoriality in a trade context, its aim is also practical: a better comprehension of extraterritoriality in other fields of law and the circumstances under which states might be willing to assert or, at least, accept extraterritorial jurisdiction will allow for a more systematic assessment of trade measures prescribing processes outside the jurisdiction of the regulating state in order to protect environmental concerns both within and outside the territory of that state. The purpose of the comparative analysis is to look beyond the technical façade of the specific rules of any legal system, or any legal practice, and better grasp the notion of extraterritoriality by comparing substantive solutions to legal issues, its objectives and its motives.[71] The comparison will not be 'to the letter', but 'to the spirit', focusing on the rationale and application of extraterritoriality: the *why* and the *how*. The outcome can serve as an aid to legislators when developing trade measures, and as an aid to WTO adjudicators when interpreting the jurisdictional scope of WTO law.[72]

1.3.2.2 A functionalist approach

The mere study of foreign law falls short of being comparative law. One can only speak of comparative law when specific comparative reflections are made.[73] According to Zweigert and Kötz, this is best done by first laying out the essentials of the relevant foreign law, system by system, then using those materials as a basis for a critical comparison, which may then lead to conclusions about the proper policy to adopt,[74] or, in this study, to a clearer framework on extraterritoriality in a WTO context. There is no one 'perfect' method for a comparative study as comparative law is almost by definition 'imperfect': the researcher's legal and cultural background and knowledge

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70 Konrad Zweigert and Hein Kötz, *Introduction to Comparative Law* (3d edn, Oxford University Press 1998) 3. H.A. Schwarz-Liebermann von Wahlendorf, *Droit Comparé: Théorie Générale et Principes* (LGDJ 1978) 174. Mary Ann Glendon, Paolo G. Carozza and Colin B. Picker, *Comparative Legal Traditions* (3d edn, Thomson West 2008) 7.

71 Zweigert and Kötz(1998), 4. Schwarz-Liebermann von Wahlendorf(1978), 179.

72 Peter de Cruz, *Comparative Law in a Changing World* (3d edn, Routledge-Cavendish 2007) 21. Walter Joseph Kamba, 'Comparative Law: A Theoretical Framework' 1974, 23 International and Comparative Law Quarterly 485, 496.

73 Zweigert and Kötz(1998), 6.

74 Ibid.

influence the research.[75] Each language or discourse will necessarily filter reality through the prism of the researcher's own assumptions.[76] Depending on the study's objective, different methods and techniques will be used.[77] Zweigert and Kötz indicated that

> 'there will always be in comparative law, as in legal science generally, let alone in the practical application of law, an area where only sound judgment, common sense, or even intuition can be of any help. For when it comes to evaluation, to determining which of the various solutions is the best, the only ultimate criterion is often the practical evidence and the immediate sense of appropriateness.'[78]

The present study has adopted a functionalist comparative approach by focusing on the concrete issue of addressing extraterritorial concerns. Extraterritoriality in different fields of law is examined in order to determine the function of the extraterritorial application in that particular field, and whether it would be similar in a trade-environment context.[79] Functionalist comparative law is factual, as it does not focus on the rules themselves but on their effects, their application, and their functional relation to society.[80] *Le droit réel* or law in action should be studied, rather than the law in books.[81] This can be done through for instance studying judicial decisions as responses to particular situations. What is essential should be distinguished from what is merely incidental in order to 'transplant' the concept and the application to other circumstances. These new circumstances must be sufficiently homogeneous in order to not risk rejection due to incompatibility.[82]

1.3.2.3 Selection of systems

An important question before starting any comparative analysis is the choice of legal systems. Intuitively, it would seem that the more comprehensive the selection, the more complete the final overview. Nevertheless one has to delimit

75 Mitchell De S.-O.-L'E Lasser, *Judicial Deliberations: A Comparative Analysis of Judicial Transparency and Legitimacy* (Oxford University Press 2004) 242. Vivian Grosswald Curran, 'Cultural Immersion, Difference and Categories in US Comparative Law' 1998, 46 American Journal of Comparative Law 43.
76 Simone Glanert, Method?, in Pier Giuseppe Monateri, Methods of Comparative Law, Cheltenham: Edward Elgar, 2012, 61-77, p69.
77 Dimitra Kokkini-Iatridou, 'Some Methodological Aspects of Comparative Law' 1986, 33 Netherlands International Law Review 143, 156.
78 Zweigert and Kötz(1998), 33.
79 Colin B. Picker, 'Comparative Legal Cultural Analyses of International Economic Law: A New Methodological Approach' 2013, 1 Chinese Journal of Comparative Law 1, 9.
80 Ralf Michaels, 'The Functional Method of Comparative Law' in Mathias Reimann and Reinhard Zimmermann (eds), *The Oxford Handbook of Comparative Law* (Oxford University Press 2006) 342.
81 Schwarz-Liebermann von Wahlendorf(1978), 180.
82 Ibid 201.

the research. According to Zweigert and Kötz, 'sober self-restraint is in order, not so much because it is hard to take account of everything, but because experience shows that as soon as one tries to cover a wide range of legal systems the law of diminishing returns operates'.[83] As the comparatist should dig as deep as possible into the legal systems, making choices is unavoidable. The choice for legal systems must depend on the main aims and objectives of the investigation.[84]

In this study the selection criterion rests on those fields of law and legal systems where an extraterritorial application of law has been accepted (albeit not without some controversy). The fields of law that have been selected for this study, namely general international law, international human rights law and competition law, have been selected based upon their relevance for a discussion on the extraterritorial reach of trade measures. Even though the concepts of extraterritoriality may differ in the various contexts, the rationale of the extraterritorial application in these fields could possibly be transposed or 'transplanted' to a trade and environment context:[85] to what extent can the extraterritorial reach of npr-PPMs be justified through reliance on the general principles on jurisdiction? To what extent can the effects doctrine be applied with regard to environmental effects? To what extent does the nature of common concerns of mankind play a role in assessing the extraterritorial reach of PPMs? The selected fields will thus serve to help understand different aspects of the jurisdictional issue. Within those fields, the law of 'usual suspects' in terms of extraterritorial jurisdiction such as the US and the EU is analysed; in addition, other legal systems are addressed as well, such as for instance, in the field of human rights law, the practice of the African Commission and Court of Human and People's Rights, and in the field of competition law, practice by, for example, Japan. These choices have been determined by the availability of data (legal rules, judicial decisions), either in the original language if mastered by the author or in professional translation.[86]

1.3.2.4 Comparative analysis

The comparative analysis starts with the descriptive phase, reporting on the different system in an objective and functionalist manner. The findings must be 'freed from the context of its own system' and 'studied in the light of their

83 Zweigert and Kötz(1998), 41.
84 Peter De Cruz, *A Modern Approach to Comparative Law* (Kluwer Law International 1993) 36.
85 Daniel Berkowitz, Katharina Pistor and Jean-Francois Richard, 'The Transplant Effect' 2003, 51 The American Journal of Comparative Law 163, 180.
86 Marieke Oderkerk, 'The Importance of Context: Selecting Legal Systems in Comparative Legal Research' 2001, 48 Netherlands International Law Review 293, 305. Basil S. Markesinis, 'Richter, Rechtswissenschaftler und das Studium und die Anwendung Ausländischen Rechts' in Basil S. Markesinis (ed), *Foreign Law and Comparative Methodology: A Subject and A Thesis* (Hart Publishing 1997) 151.

function, as an attempt to satisfy a particular legal need'.[87] Similarities and differences between the different systems must then be identified.[88] What follows is the explanatory phase, in which divergences and resemblances are accounted for through a number of questions. What do the similarities mean? What do the differences reveal? This phase is delicate and difficult – 'correct' explanations depend on the level of knowledge of the studied systems.[89] One has to withstand the tendency to bend the analysis so as to make it fit to the 'claims' of the thesis.[90] Lastly, after a critical evaluation of what has been 'discovered', the conclusions may be 'transplanted', possibly leading to new proposals,[91] i.e. in the study at hand the extraterritoriality decision tree under Article XX GATT.

1.3.3 Case studies

The developed decision model is tested through several legal case studies. The case studies allow for a practical application of the model and will demonstrate the contribution of the decision tree. All examples are trade measures with an environmental objective taken in the absence of a well-functioning international regime governing the concern in question– substantive norms are either lacking, not binding, incomplete, or unenforceable. The case studies start with providing an overview of the context of the measure and identifying its possible extraterritorial effect. The measure is subsequently analysed under WTO law to determine whether inconsistencies with substantive obligations can be found. Assuming that a violation of substantive WTO rules is established, the extraterritoriality decision tree is applied as part of the justification analysis of Article XX GATT. Lastly, challenges to the application of the decision tree are identified and discussed, leading to further refinement of the model.

87 Zweigert and Kötz(1998), 44.
88 Edward J. Eberle, 'The Method and Role of Comparative Law' 2009, 8 Washington University Global Studies Law Review 451, 452.
89 Kokkini-Iatridou (1986), 189.
90 Schwarz-Liebermann von Wahlendorf(1978), 213.
91 Eberle (2009), 463.

PART I

Introducing environmental trade measures

2 Product or process – outlining the scope of trade law

2.1 Introduction

A number of policy tools are available in order to promote environmental policy through trade, such as price-based measures (e.g. taxes, subsidies, higher or lower tariffs) or non-price-based measures (e.g. standards, labeling, production requirements). Price-based measures can either be imposed on imported products only (and might be allowed if scheduled in accordance with Article II GATT) or can take the form of an internal tax (and might be allowed under Article III:2 GATT if non-discriminatory). Non-price-based measures can either be addressed under Article XI GATT if they are imposed at the border and have the form of quantitative barriers to trade, or can be addressed under Article III:4 GATT when imposed both on domestic and imported products. If an adopted trade measure were to violate substantive obligations under GATT, the general exceptions of Article XX foresee in limited environmental justification grounds. Non-tariff barriers can also be addressed under the Agreement on Technical Barriers to Trade (TBT Agreement) of the Agreement on Sanitary and Phytosanitary Measures (SPS Agreement).

As explained in the introductory chapter, trade measures with an environmental objective often aim at the production process rather than at the product itself, as the production process can pose a heavier burden on the environment than the actual product does so targeting production is more effective from an environmental perspective.[1] Measures aiming at the process and production methods are called PPMs, which can either have an impact on the physical characteristics of the final product whereby the environmental effects manifest themselves during distribution/marketing/consumption,[2] the so-called product-related PPMs (pr-PPMs, such as the use of pesticides on vegetables, or production with asbestos fibers that lead to a higher health risk); or can be unrelated to the end product, the so-called non-product-related PPMs (npr-PPMs, such as production of cement in a environmental-friendly factory with lower-than-average emission levels). There has been much debate on whether PPMs can be accepted under WTO law. Traditionally, trade law is concerned

1 Also called the rectification-at-source principle. See Puth(2003), 363.
2 OECD, *Processes and Production Methods (PPMs): Conceptual Framework and Considerations On Use of PPM-based Trade Measures* (1997) 10.

with the treatment of the end product on the market, which include pr-PPMs.[3] The question that needs to be clarified is whether a government can restrict imports of products based on their production processes that leave no trace in the final product (e.g. the use of dolphin-friendly fishing nets or the use of clean energy technologies); or whether in those cases governments are seen to impermissibly influence processes that occur beyond its territory.

This thesis seeks to analyse whether WTO law allows environmental trade measures aimed at protecting concerns outside their territory. In other words, what is the jurisdictional scope of WTO law with regard to the possible extra-territorial effect of npr-PPMs? The 'extraterritorial' nature and reach of npr-PPMs will be examined in chapter 3. The current chapter will outline the general legal framework for npr-PPMs: how can they be challenged under WTO law, and more specifically under the GATT. First, an overview of the trade-environment debate will be given. Second, after putting the development of the WTO and the rise of environmental concerns in their historical perspective, the relevant WTO rules will be elaborated upon. Those provisions that have been invoked in disputes on PPMs will be discussed. The relationship between Article III and Article XI GATT with respect to npr-PPMs will be analyzed, followed by the possible justifications under Article XX GATT.

2.2 The trade and environment debate

Trade and environment are indisputably linked, for instance, in the case of trade in natural resources (such as oil or valuable minerals), trade in products that contain natural resources (such as computer chips), trade in polluting end products (such car with high combustion engines), trade in goods with energy-intensive production (such as steel production), or lower tariffs for environmental-friendly products. States regulate the import of goods to their domestic market through bi-and multilateral trade agreements and unilateral trade measures. National environmental policies that regulate domestic production and set standards for domestic products on the market can be applicable to imports as well, possibly leading to trade restrictions.

The trade-environment relationship has been embedded in the GATT 1947, the predecessor to the current WTO agreements in the post-war global trading system. Article XX GATT 1947 included exceptions to the substantive GATT obligations, allowing Members to adopt measures 'necessary to protect human, animal or plant life'[4] or 'relating to the conservation of exhaustible natural resources'.[5] These measures, however, should not be protectionist or disguised

3 See e.g. WTO, *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products* AB Report 2001, WT/DS135/AB/R; AB Report *US-Gasoline* 1996. See also chapter 2.
4 Article XX(b) of GATT.
5 Article XX(g) of GATT.

restrictions on international trade, as stated in the *chapeau* of Article XX. Article XX served to balance WTO Members' obligations not to discriminate between domestic and imported products and their right to regulatory autonomy, and has played an important role in the trade-environment debate.[6] The next reference to environmental protection in a GATT Agreement came with the conclusion of the Standards Code (the current TBT Agreement[7]), concluded during the Tokyo Round of the GATT (1973-79), after discussions on trade-related technical regulations and standards implemented for environmental purposes. Apart from references in these trade agreements, environmental concerns also found their way into multilateral environmental agreements (MEAs) starting from the mid '70s, such as the 1975 CITES[8] (mandating a system of trade bans and restrictions on trade in endangered species), the 1987 Montreal Protocol[9] (trade restrictions for ozone-depleting substances) and the 1989 Basel Convention[10] (on hazardous wastes).[11]

The beginning of the '90s was an important mark for the trade-environment debate. In 1992 the UN convened a landmark conference in Rio de Janeiro, the United Nations Conference on Environment and Development (UNCED, known as the '92 Rio Earth Summit), to set the tone and ambitions for global policy on development and environment. Leaders in Rio recognized the substantive links between international trade and environment by agreeing to strive for mutually supportive policies in favour of sustainable development.[12] It was

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6 Hugo Cameron, 'The Evolution of the Trade and Environment Debate at the WTO' in Adil Najam, Mark Halle and Ricardo Melendez-Ortiz (eds), *Trade and Environment: A Resource Book* (International Institute for Sustainable Development, International Centre for Trade and Sustainable Development, The Regional and International Networking Group 2007) 3. Article XX will be discussed in further detail below at 1.4.2.

7 Article 2.2 TBT.

8 Convention on International Trade in Endangered Species of Wild Fauna and Flora, 99 3 UNTS 243, 1973.

9 Montreal Protocol on Substances that Deplete the Ozone Layer, 1522 UNTS 3, 1987.

10 Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, 1673 UNTS 126; 28 ILM 657, 1989.

11 As different subsystems under international law, there is no hierarchy in norms between trade law and environmental law. Within the WTO dispute settlement, jurisdiction is li mited to the WTO Agreements, but MEAs can serve as interpretative means to the Agreements (and in particular to Article XX GATT), as was held by the AB in *US-Gasoline*, referring to Article 3.2 DSU.

12 Rio Declaration on Environment and Development 1992, A/CONF.151/26 (Vol. I). See in particular principle 12 stating that 'States should cooperate to promote a supportive and open international economic system that would lead to economic growth and sustainable development in all countries, to better address the problems of environmental degradation. Trade policy measures for environmental purposes should not constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on international trade. Unilateral actions to deal with environmental challenges outside the jurisdiction of the importing country should be avoided. Environmental measures addressing transboundary or global environmental problems should, as far as possible, be based on an international consensus'.

acknowledged that international trade is a key component of sustainable development, through a more efficient allocation of scarce resources and easier access for countries to, for instance, environmental goods and technologies.[13]

In the meantime, the *Tuna-Dolphin* cases under the GATT[14] affirmed the fear of environmentalists that the global trading system was not sufficiently open to non-trade-concerns. At issue was a US measure differentiating tuna caught in a manner that harmed dolphins from tuna caught without harming dolphins. The US measure entailed that the import of tuna was only allowed when dolphin-friendly fishing nets were used. In order to have access to the US market, other states had to prove that they protected dolphins through systems comparable to the US system. The US measure was rejected by the first and the second GATT panel, as it was found that import bans could only protect concerns within the jurisdiction of the regulating state, that unilateral measures such as the one at issue were a threat to the multilateral trading system, and that the measure was to coercive towards other countries.[15]

The unadopted reports generated diverging reactions: on the one hand, developing countries favoured the panels' rejection, as it was feared that the imposition of such environmental standards would lead to green protectionism and would constrain development. Many NGOs and developed countries on the other hand, emphasized the need for a possible justification of trade-restrictive measures based on legitimate and necessary environmental protection measures.[16] The fact that the Marrakesh Agreement establishing the WTO (adopted after the conclusion of the Uruguay Round in 1994) recognized the need for trade to be consistent with the goal of sustainable development,[17] was in large part due to the public pressure from NGOs following the *Tuna-Dolphin* cases as well as the results of the 1992 Rio Summit.[18] The Marrakesh Agreement highlighted that trade liberalization should go hand in hand with environmental and social objectives.

This debate in the early 1990s raised further awareness about the link between trade and environment and public activism stimulated a continuing attempt at conciliating both interests. In a 1994 Decision on Trade and Environment, WTO Members acknowledged the outcomes of Rio and emphasized again the link between trade, environmental protection and sustainable develop-

13 WTO, *Harnessing Trade for Sustainable Development and a Green Economy'* (2011) 1.
14 GATT Panel *US-Tuna (Mexico)* 1991; GATT panel *US-Tuna (EEC)* 1994.
15 See *infra* at 4.1 for a further discussion of the legal analysis of the *US-Tuna* cases with respect to Article III and Article XI GATT, as well as chapter 2.4.2 for a discussion with respect to their extraterritorial nature.
16 Howard Mann and Yvonne Apea, 'Issues and Debates: Dispute Resolution' in Adil Najam, Mark Halle and Ricardo Melendez-Ortiz (eds), *Trade and Environment: A Resource Book* (International Institute for Sustainable Development, International Centre for Trade and Sustainable Development, The Regional and International Networking Group 2007) 6 8.
17 Marrakesh Agreement, 1994, preamble.
18 Mann and Apea(2007), 68.

ment.[19] They decided to establish a WTO Committee on Trade and Environment, dedicated to dialogue between governments on the impact of trade policies on the environment and of environmental policies on trade. The WTO dispute settlement system furthermore played a pivotal role in the debate. The first case filed after the creation of the WTO was an environmental dispute concerning the import of reformulated gasoline from Venezuela into the US.[20] The AB held that WTO law must be understood within the context of the broader body of international law, including MEAs[21] and emphasized that 'in the preamble to the WTO Agreement and in the Decision on Trade and Environment, there is specific acknowledgement to be found about the importance of coordinating policies on trade and the environment'.[22]

In 1997 the *US-Shrimp* case marked a milestone in the shift towards a more innovative and integrated approach to trade and environment in the light of Article XX GATT.[23] The dispute was launched by India, Pakistan, Thailand and Malaysia against the US, and concerned a US regulation banning the import of shrimp that was not harvested in a way that was certified as complying with US standards to protect endangered sea turtle. The AB emphasized the need to balance between the rights of WTO Members to market access and 'free' trade,[24] and the right to take measures relating to, for instance, the conservation of exhaustible natural resources under Article XX(g) of GATT.[25] It was confirmed that WTO Members have the right to adopt environmental policies, also when those have an impact on trade, whereby WTO law serves to limit the exercise of governmental discretion as agreed upon by the sovereign Members in order to guard that balance between trade and non-trade concerns.[26]

Since *US-Shrimp*, reconciling trade liberalization and environmental objectives has proven to be a challenging task. To further this end, the WTO Members launched trade and environment negotiations in the ongoing Doha Development Round.[27] Under the WTO principle of single undertaking, 'nothing has been agreed upon unless everything has been agreed upon', and as long as the Doha round is ongoing, the effect of such negotiations is limited. One of the issues on the agenda is strengthening the cooperation between the WTO

19 Ministerial Decision on Trade and Environment, Marrakesh, 15 April 1994.
20 WTO, *United States-Standards for Reformulated and Conventional Gasoline* Panel Report 1996, WT/DS2/R.
21 Referring to Article 3.2 DSU.
22 AB Report *US-Gasoline* 1996, p.30.
23 AB Report *US-Shrimp* 1998. For a closer discussion of the legal analysis, see chapter 2.4.2.
24 What is meant with free trade is not unrestricted trade, but trade consistent with the substantive obligations in the WTO agreements.
25 Mann and Apea(2007), 69.
26 Petros C. Mavroidis, 'Trade and Environment after the *Shrimps-Turtles* Litigation' 2000, 34 Journal of World Trade 73, 74. See for a further discussion of the case law, chapter 2.
27 Doha Ministerial Declaration, para.6; see also UNEP and WTO, *Trade and Climate Change: WTO-UNEP Report* (2009) xvi.

and MEAs. Also on the Doha Agenda is the liberalization of environmental goods and services. The negotiations call for 'the reduction, or as appropriate, elimination of tariff and non-tariff barriers to environmental goods and services'.[28] The Committee on Trade and Environment acts as a forum within the Doha Development Round to debate environmental aspects of the negotiations.[29] While the discussion of PPMs is not on the agenda, PPMs have received a lot of scholarly attention as a possible means or alternative to address environmental concerns.[30] The central question of this thesis, the extraterritorial nature of PPMs, has largely been ignored in the literature. Before examining that issue in greater detail in the following chapter, the next section will outline the main characteristics of npr-PPMs and review the Article XI/III debate.

2.3 Product or process

2.3.1 PPMs defined

An important question for environmental measures is: are we regulating the product or the process? Whereas product regulations regulate the design, characteristics, and uses of particular products, environmental PPMs regulate the production process and can 'seek to mitigate the environmental effects of private activities by specifying the conditions under which those activities must be carried out'.[31] Even though products themselves can also have an environmental impact (e.g. a polluting car), the production process will often have a greater environmental impact than the actual product. Examples are plenty: energy-intensive industries with high emissions, protection of plant life (e.g. forests, crops) or animal life (e.g. dolphins, sea turtles). PPMs can be formulated either by prescribing defined technologies, or by, for instance, specifying emissions or performance effects that need to be avoided or achieved.[32]

In general, two types of PPMs are distinguished: product-related PPMs (pr-PPMs) and non-product-related PPMs (npr-PPMs). Pr-PPMs are within the scope

28 Doha Ministerial Declaration, para. 31(iii); see also paras. 32, 33 and 51 which set out the 'environmental mandate'.

29 For more information see the homepage of the WTO Committee on Trade and Environment at http://www.wto.org/english/tratop_e/envir_e/wrk_committee_e.htm.

30 See among others Vranes(2009); Conrad(2011); Howse and Regan (2000); Horn and Mavroidis (2008); Charnovitz (2002).

31 Sanford E. Gaines, 'Processes and Production Methods: How to Produce Sound Policy for Environmental PPM-Based Trade Measures?' 2002, 27 Columbia Journal of Environmental Law 383, 394.

32 OECD (1997), 9.

of the TBT Agreement,[33] the SPS Agreement[34] as well as the GATT[35] and are not considered controversial. Food safety offers a good pr-PPM example of how regulators rely on process-based sanitary rules (e.g. pesticides on tomatoes).[36] Npr-PPMs on the other hand have no impact on the physical characteristics of the end product, but focus on, for example, the environmental effects during the production stage (production externalities).[37]

The division between product-related and non-product-related is arguably oversimplified. Consumers may have moral and ecological concerns, which might lead to a preference for goods produced in an animal-friendly or environmental-friendly manner, even if a blindfolded consumer will not be able to distinguish the products. In that way, for the consumer, these processes *are related* to the end product. Howse has argued that the definitions of pr-PPMs and npr-PPMs are incorrect: pr-PPMs do not necessarily relate to the physical characteristics of a product, but rather include all elements that determine a product's position on the market. The market position is strongly influenced by consumer preferences, and hence even those processes that do not change the characteristics of the end product *in se* are pr-PPMs.[38]

In *EC-Seal Products*, the panel and the AB had the opportunity to explore the issue of pr-PPMs under the first sentence of Annex 1.1 TBT. The EU imposed an import ban on all seal products due to public moral concerns with respect to the inhumane killing of seals, with exceptions for seal products from seals hunted by indigenous communities, from seals from hunts conducted for the sustainable management of marine resources, and seal products purchased by travellers. The panel found that the EU measure laid down product characteristics, without analyzing whether the measure might in the alternative also *relate* to product characteristics.[39] The AB reversed the panel's finding that the measure laid down product characteristics, but was unable to complete the legal analysis with regard to *related* PPMs due to a lack of arguments made

33 Annex 1.1 of the TBT Agreement does contain an explicit reference to *related* PPMs, without defining them, see below at 2.4.3 for a further discussion.

34 Sanitary rules are addressed under the SPS Agreement, which refers to end products as well as processes and production methods. Only measures seeking to prevent risks *within* the territory of the importing country fall within the scope of the SPS, and most likely due the nature of sanitary and phytosanitary measures most likely PPMs that do not have an impact on the physical end product would be excluded. See Annex 1 to the SPS Agreement.

35 See for instance AB Report *EC-Asbestos* 2001.

36 Charnovitz (2002), 65; Gabrielle Marceau and Joel P. Trachtman, 'The Technical Barriers to Trade Agreement, the Sanitary and Phytosanitary Measures Agreement, and the General Agreement on Tariffs and Trade: *A Map of the World Trade Organization Law of Domestic Regulation of Goods.*' 2002, 36 Journal of World Trade 811, 865.

37 OECD (1997), 10.

38 Robert Howse, 'Seals Hearing, Day I (part I)', International Economic Law Blog, 18 March 2014; See also Meredith A. Crowley and Robert Howse, '*Tuna-Dolphin II*: A Legal and Economic Analysis Of The Appellate Body Report' 2014, 13 World Trade Review 321, 327.

39 WTO, *European Communities – Measures Prohibiting the Importation and Marketing of Seal Products* Panel Report 2013, WT/DS401/R, para.7.106;7.112.

by the parties and an insufficient exploration by the panel of the relevant issues.[40] The AB did recognize that the distinction between related and non-related PPMs raises systemic issues.[41] It found that product characteristics include objectively definable 'features', 'qualities', 'attributes' or other 'distinguishing marks' of a product;[42] and stated that it must be examined whether the prescribed PPM has 'a sufficient nexus to the characteristics of a product in order to be considered *related* to those characteristics'.[43] While it found the exceptions of the EU Seals regime (the indigenous exception, the travellers exception and the marine resources exception) to not lay down product characteristics, the AB did not clarify whether the identity of the hunter, the type of hunt, or the purpose of the hunt could be seen as *related* to product characteristics.[44] Thus, without clarifying what the 'sufficient nexus' could consist of, it remains unclear whether related PPMs must thus have a physical impact on the end product. If a moral concern about the environmental impact of the production process is to considered 'a sufficient nexus to the characteristics', the traditional distinction between pr- and npr-PPM based purely on physical characteristics should be reviewed.

However, in light of the lacking guidance by the AB on the matter, this thesis will use the distinction between pr-PPMs and npr-PPMs based on the physical characteristics, focusing on those PPMs that have no impact on the physical characteristics of a product (npr-PPMs), as they do not fall within the traditional trade premise that focuses on end products. For the purpose of this research even a general reference to PPMs is to be equated with npr-PPMs.

2.3.2 PPMs as policy tools

Governments can impose npr-PPMs for a number of reasons:[45] as a true incentive for better environmental protection,[46] as a response to consumers' desire for information, or to address economic competitiveness concerns to level the playing field between domestic and imported products, where domestic production processes are subject to stringent environmental regulations.[47] If states cannot impose requirements related to the production of imports, the

40 WTO, *European Communities – Measures Prohibiting the Importation and Marketing of Seal Products* AB Report 2014, WT/DS401/AB/R, para.5.69.
41 Ibid para.5.173.
42 Ibid para.5.11.
43 Ibid para.5.12.
44 Ibid para.5.45.
45 See for an overview of considerations on the motivation, feasibility, effectiveness and efficiency: OECD (1997), 23.
46 See for instance James Bacchus, *Global Rules for Mutually Supportive and Reinforcing Trade and Climate Regimes – E15 Expert Group on Measures to Address Climate Change and the Trade System* (2016).
47 Charnovitz (2002), 62.

efficiency of (domestic) environmental policy could be undermined, as this could lead to a race to the bottom,[48] whereby countries with the least stringent environmental regimes could specialize in the most polluting or least environmental-friendly industries. PPMs can be seen as attempts 'to prevent foreign producers from reaping the benefits of lower human rights, labor, environmental, or other standards'.[49]

While not explicitly prohibited nor allowed under the WTO Agreements, the use of npr-PPMs is controversial. They can restrict trade and make it harder and costlier for an exporter to supply a foreign market.[50] Differing product standards in different export markets may limit the exporter's ability to access several markets.[51] Furthermore, imposing environmental practices to other countries through npr-PPMs can create resistance in the exporting country and can be considered as interference with the exporting country's sovereignty.[52] The acceptance of environmental npr-PPM standards could also open doors to human rights or labour rights npr-PPMs, which is met with some resistance from developing countries in particular.[53] PPMs imposed by developed countries targeting developing countries may be seen as tools of eco-imperialism.[54] It is inherent to trade measures that a 'popular' export market is in a more powerful position to require compliance, in contrast to smaller export markets.[55] In order to prevent abuse, it is thus important to install sufficient safeguards to ensure the legitimacy of the imposed npr-PPMs.[56] However, in the current absence of binding international agreements on important environmental concerns such as climate change, npr-PPMs can as well be a means to 'incentivize' all trading partners, developed and developing, to adhere to higher environmental standards. As long as non-protectionist trade requirements are coupled with other initiatives to ensure environmental protection, such as, for instance, the transfer of know-how on green technologies and financial assistance, environmental-friendly policies could lead to

48 However, empirical evidence is limited and the effect seems to be overestimated – see Bradford (2012).

49 Ankersmit, Lawrence and Davies (2012), 31.

50 OECD (1997), 14.

51 Johannes Norpoth, 'Mysteries of the TBT Agreement Resolved? Lessons to Learn for Climate Policies and Developing Country Exporters from Recent TBT Disputes' 2013, 47 Journal of World Trade 575, 578.

52 Charnovitz (2002), 62.

53 Tom Rotherham, 'Issues and Debates: Standards and Labelling' in Adil Najam, Mark Halle and Ricardo Melendez-Ortiz (eds), *Trade and Environment: A Resource Book* (International Institute for Sustainable Development, International Centre for Trade and Sustainable Development, The Regional and International Networking Group 2007) 184.

54 Shaffer (2000), 624; Voon (2000), 100; Charnovitz (2002); Eric Neumayer, *Greening Trade and Investment: Environmental Protection Without Protectionism* (Earthscan 2001) 15.

55 See for an interesting discussion of powerful markets: Grewal(2008).

56 Gaines (2002), 427.

global benefits, both for developed and developing countries.[57] From a WTO law perspective, the challenge lies in determining the legitimacy and non-protectionist intention of npr-PPMs, thus distinguishing acceptable from unacceptable npr-PPMs.

2.4 Legal analysis of non-product-related PPMs

2.4.1 The violation: Article XI v Article III GATT

The idea that npr-PPMs are always infringing a WTO rule stems from the non-adopted *Tuna-Dolphin* GATT panel reports.[58] The first case dealt with an import ban by the US on tuna originating in Mexico: by not using special dolphin-friendly fishing nets, Mexican fishermen accidentally killed dolphins. The GATT panel held that the US regulations did not apply to the products as such and thus could not fall within the scope of Article III GATT on national treatment. Therefore, the regulation had to be seen as an import ban, to be dealt with under Article XI GATT on quantitative restrictions.[59] Under Article XI GATT the US regulations were considered illegal, and therefore prohibited, unless justified under the Article XX exceptions. The GATT panel found that measures addressing concerns outside their jurisdiction (the safety of dolphins) could not be justified under Article XX.[60] The second GATT panel (with this time the EEC as complainant) held that 'likeness' of products should be determined based on the physical characteristics of a product and not on the manner in which they are processed or produced. Again the US regulation was treated as an import ban rather than an internal regulation.[61] With regard to Article XX GATT, the panel did not find a valid ground as to why policies should be limited to the conservation of resources within the territory of a Member.[62] It did find, however, that measures taken so as to coerce other countries to change their policies were not allowed.[63]

It has been a persistent conviction ever since among many trade observers that npr-PPMs are not allowed under WTO, a view that I believe to be incorrect. Five years after the first *Tuna-Dolphin*, the AB came back to the issue of npr-

57 See chapter 7.4 and 7.6 for a further discussion of market power and safeguards under the chapeau of Article XX GATT.

58 GATT Panel *US-Tuna (Mexico)* 1991; GATT panel *US-Tuna (EEC)* 1994; Mann and Apea(2007), 74.; Joost Pauwelyn, 'Recent Books on Trade and Environment: GATT Phantoms Still Haunt the WTO' 2004, 15 European Journal of International Law 575, 585.; For a further discussion of the cases, see below as well as chapter 2.

59 GATT Panel *US-Tuna (Mexico)* 1991, para.5.14. See infra for a discussion of Article III and XI GATT.

60 Ibid paras.5.26;5.31.

61 Ibid para.5.11.; GATT panel *US-Tuna (EEC)* 1994, para.5.8.

62 GATT panel *US-Tuna (EEC)* 1994, para.5.20.

63 Ibid para.5.27.

PPMs in *US-Shrimp*. The facts were similar, only that this time shrimp and sea turtles were concerned, instead of tuna and dolphins. In this case a violation of GATT law (Article III or Article XI) was assumed and not contested by the US; hence both the panel and the AB focused on Article XX GATT in their analysis. The AB took a different stance than the GATT panels in the first *Tuna-Dolphin* case: the AB held that the conservation measures at issue did fall within the scope of Article XX,[64] implying there is thus no principled prohibition on npr-PPMs.[65] However, as the US did not defend itself either under Article III or Article XI, the AB could not examine whether npr-PPMs could possibly be compatible with Article III.

The relationship between the Article III and Article XI GATT is partly addressed in the Interpretative Note Ad Article III. The Ad Note appears to exclude a simultaneous application of both provisions.[66] According to the Ad Note, two conditions must be met for a measure to fall under Article III: firstly, the measure must apply to imported and like domestic products; and secondly, the measure must be enforced at the time or point of importation of the imported product. Domestic measures, even if applicable at the border, remain covered by Article III.[67] If a measure is applied exclusively to imported products and is solely a border measure, then the relevant provision is Article XI. Different aspects of a measure may be scrutinized under both articles, however.[68] Once a panel (or the AB) has found that a particular measure violates one GATT obligation, it does not need to investigate whether the same measure violates other GATT obligations as well.[69] Also, neither a panel nor the AB can address a provision *ex officio* when that provision has not been invoked by either complainant or defendant. For instance, in *US-Shrimp*, the US did not raise Article III in its defense, which led to the reports being focused on the justifications under Article XX GATT.

For the purpose of this chapter, the relation between Article XI and Article III is of particular interest, as measures falling under Article III can still be found to be consistent with the national treatment obligation. Under Article III a measure is only inconsistent when discriminatory, and differentiation based on production methods may not be deemed discriminatory if the products at issue are unlike or if the differentiation is not deemed to be protect-

64 AB Report *US-Shrimp* 1998, para.121.

65 For a further discussion of these cases with a particular focus on the extraterritorial location of concerns to be protected, see chapter 3.

66 See also WTO, *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products* Panel Report 2001, WT/DS135/R, paras.8.91.

67 Peter C. Mavroidis, *Trade in Goods: The GATT and the Other WTO Agreements Regulating Trade in Goods* (2nd edn, Oxfor University Press 2012) 66.

68 WTO, *India – Measures Affecting the Automotive Sector* Panel Report 2001, WT/DS146/R, para.7.224.

69 WTO, *US-Measures Affecting Imports of Woven Wool Shirts and Blouses from India* AB Report 1997, WT/DS33/AB/R, 18.

ive of domestic products. There is no similar opportunity under Article XI, as all border measures that are capable of restricting imports will infringe this provision. Measures that are inconsistent with either provision can be justified under Article XX if they are in compliance with the conditions of both the paragraphs and the *chapeau*.

2.4.1.1 Issues under Article XI GATT

Article XI:1 GATT reads

> 'No prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licences or other measures, shall be instituted or maintained by any contracting party on the importation of any product on the territory of any other contracting party or on the exportation or sale for export of any product destined for the territory of any other contracting party.'

Article XI GATT entails a prohibition on quantitative restrictions. In principle import and export quantitative restrictions are prohibited irrespective of their rationale. As soon as a restriction falls within the scope of Article XI, a violation can be found and no discriminatory effect needs to be established. Duties, taxes and other charges are excluded from the scope of Article XI, as they are addressed under Articles I, II and III:2 GATT. Article III:4 also covers internal measures applied at the time of importation, according to the above-cited Ad Note.

The first *Tuna-Dolphin* GATT panel considered that the production method (the method of fishing tuna) could not fall under Article III GATT as the US regulation did not apply to the products as such.[70] Instead the measure was considered inconsistent with Article XI, as a prohibition or import restriction on tuna caught by dolphin-harming fishing nets.[71] That decision to address PPMs under Article XI supported a strictly territorial view: if the production method does not take place within the domestic market but in the exporting Member, a WTO Member cannot regulate those production methods.[72] The panel's approach can be criticized because the regulations in question did apply to imported and domestic products and did serve a policy purpose. Once a restriction is dealt with under Article XI the violation is easily established, and the analysis will turn to Article XX GATT.

70 GATT Panel *US-Tuna (Mexico)* 1991, para. 5.15.
71 Ibid para.5.18.
72 Marceau and Trachtman (2002), 858.

2.4.1.2 Issues under Article III GATT

Whereas a violation under Article XI GATT is straightforward, the legal analysis of PPMs under Article III is less obvious. If a PPM measure would be dealt with under Article III there are several conditions that need to be fulfilled in order to establish a violation. Article III GATT lays down the national treatment obligation, or the obligation to treat imported products no less favourably than domestic products. National treatment prohibits discrimination against imported products once the imported product has entered the domestic market.

The relevant paragraphs of Article III GATT read

> '1. The contracting parties recognize that internal taxes and other internal charges, and laws, regulations and requirements affecting the internal sale, offering for sale, purchase, transportation, distribution or use of products, and internal quantitative regulations requiring the mixture, processing or use of products in specified amounts or proportions, should not be applied to imported or domestic products so as to afford protection to domestic production.
> 2. The products of the territory of any contracting party imported into the territory of any other contracting party shall not be subject, directly or indirectly, to internal taxes or other internal charges of any kind in excess of those applied, directly or indirectly, to like domestic products. Moreover, no contracting party shall otherwise apply internal taxes or other internal charges to imported or domestic products in a manner contrary to the principles set forth in paragraph 1.
> (…)
> 4. The products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use. The provisions of this paragraph shall not prevent the application of differential internal transportation charges which are based exclusively on the economic operation of the means of transport and not on the nationality of the product.'

Article III contains disciplines on domestic taxation and regulation. Article III:2 requires that imported products shall not be subject to (internal) taxes of any kind in excess of those applied to like domestic products. Article III:4 requires that imported products shall be accorded treatment no less favourable than that accorded to like domestic products in respect of laws and regulations affecting among others their sale and transportation. Article III:1 adds the general principle that none of the above shall be applied in a manner so as to afford protection to domestic production.[73] In *Korea-Alcoholic Beverages* the AB identified the objectives of Article III as 'avoiding protectionism, requiring equality of competitive conditions and protecting expectations of equal com-

73 WTO, *Japan-Taxes on Alcoholic Beverages* AB Report 1996, WT/DS8/AB/R, para. 111.

petitive relationships'.[74] The current analysis will focus on Article III:4 GATT as the centre of gravity for the legal analysis of regulatory npr-PPMs. Whereas environmental measures in the form of fiscal measures, such as border tax adjustments (BTAs) or border carbon adjustments (BCAs) have received considerable scholarly attention,[75] this thesis will focus on regulatory schemes rather than fiscal measures as the latter pose particular question beyond the focus of this thesis, which is the extraterritorial nature of npr-PPMs.

Article III establishes a three-tier test of consistency: first, the measure at issue must be an internal tax or charge (Article III:2) or an internal regulation (Article III:4); second, the products concerned must be like; and third, the like imported products must not be treated less favourably than domestic products (so as to afford protection to domestic products). Article III does not only cover 'in law' or *de jure* discrimination, but also covers 'in fact' or *de facto* discrimination.[76] Whereas *de jure* discrimination is judged on the wording of the measure – an explicit distinction made based on origin –, in order to find *de facto* discrimination, an origin-neutral measure must differentiate between imported and domestic products, imposing a burden on the imported products that is

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74 WTO, *Korea – Taxes on Alcoholic Beverages* AB Report 1999, WT/DS75/AB/R, para. 120.

75 BTAs are fiscal measures that charge imported products a tax similar to what domestic products are being charged, in order to level the playing field (*GATT: Report of the Working Party on Border Tax Adjustments* (1970) para. 4.). The aim of a BCA is to level the playing field by imposing a similar constraint on the carbon emissions of the imported and domestic goods. Jean Foure, Houssein Guimbard and Stephanie Monjon, 'Border Carbon Ajustment in Europe and Trade Retaliation: What would be the Cost for European Union?' 2013, 34 CEPII Working Paper; Henrik Horn and Peter C. Mavroidis, 'To B(TA) or not to B(TA)? On the Legality and Desirability of Border Tax Adjustments From a Trade Perspective'34 The World Economy 1911; Javier de Cendra, 'Can Emissions Trading Schemes be Coupled with Border Tax Adjustments? An Analysis vis-a-vis WTO Law' 2006, 15 Review of European Community & International Environmental Law 131; Kati Kulovesi, 'Climate Change and Trade: At the Intersection of Two Interacting Legal Regimes' in Erkki Hollo, Kati Kulovesi and Michael Mehling (eds), *Climate Change and the Law* (Springer 2013) 435; Reinhard Quick, 'The Debate Continues: Are Border Adjustments of Emission Trading Schemes a Means to Protect the Climate or Are They 'Naked' Protectionism?' in Inge Govaere, Reinhard Quick and Marco C.E.J. Bronckers (eds), *Trade and Competition Law in the EU and Beyond* (Edward Elgar 2011); Roland Ismer and Karsten Neuhoff, 'Border Tax Adjustment: A Feasible Way to Support Stringent Emission Trading' 2007, 24 European Journal of Law and Economics 137; Patrick Low, Gabrielle Marceau and Julia Reinaud, 'The Interface between the Trade and Climate Change Regimes: Scoping the Issues' 2011, WTO Staff Working Paper; Joost Pauwelyn, 'Carbon Leakage Measures and Border Tax Adjustments under WTO Law' in Denise Prevost and Geert Van Calster (eds), *Research Handbook on Environment, Health and the WTO* (Edward Elgar 2012).

76 A measure discriminates *de jure* when it is clear from reading the text of the law or regulation that it is discriminatory. If on the face the measure does not seem to discriminate, a measure can still be *de facto* discriminatory if on reviewing of the facts, it becomes clear that it discriminates in practice.; see James Flett, 'WTO Space for National Regulation: Requiem for a Diagonal Vector Test' 2013, 16 Journal of International Economic Law 37, 20.

considered illegitimate.[77] Regulatory distinctions can be of particular relevance when dealing with *de facto* discriminatory measures.

From an environmental perspective, it would be much more beneficial to consider PPM measures under Article III than under Article XI, as this would allow WTO Members to make regulatory distinctions between two physically similar goods and consider them unlike because of their production method, based on, for instance, consumer preferences. Alternatively, regulatory purposes could be considered when examining whether distinctions relate to the foreign origin of imported goods. If the products would be considered unlike because of a different production method, or no discrimination related to the foreign origin of the goods could be detected, there would be no inconsistency with Article III and no recourse to Article XX would be needed.

2.4.1.2.1 Determining likeness

The concept of like products is not defined in the GATT, even though likeness recurs in a number of provisions, and has thus been subject to much debate and jurisprudence. It is agreed that the concept of 'like products' has a different meaning in the different contexts where it is used. In *Japan-Alcoholic Beverages II* the AB used the image of an accordion which 'stretches and squeezes' in different provisions. The AB stated that

> 'the width of the accordion in any one of those places must be determined by the particular provision in which the term 'like' is encountered as well as by the context and the circumstances that prevail in any given case to which that provision may apply.'[78]

In general, the criteria of the GATT Working Party on Border Tax Adjustments are relied on to determine likeness. These encompass (i) physical characteristics of a product, such as the products' properties, nature and quality; (ii) consumers' tastes and habits; and (iii) the products' end-uses in a given market.[79] In *Spain – Unroasted Coffee*, the GATT panel also considered the tariff classifications of the products.[80] Products do not need to be identical, but they need to be similar.[81] For instance, likeness under the first sentence of Article III:2 should be interpreted narrowly, because the second sentence of Article III:2 bears on products that are 'directly competitive or substitutable products'.[82] The second sentence is based on a more general criterion, namely the protective

77 Robert E. Hudec, 'GATT/WTO Constraints on National Regulation: Requiem for an "Aim and Effects" Test' 1998, 32 International Lawyer 619, 623.
78 AB Report *Japan-Alcoholic Beverages II* 1996, para. 114.
79 (1970), para. 18.
80 GATT, *Spain – Tariff Treatment of Unroasted Coffee* GATT Panel Report 1981, BISD 28S/102, paras. 4.6.
81 AB Report *Japan-Alcoholic Beverages II* 1996, para. 113.
82 Annex I to the GATT, Note *Ad* Article III, paragraph 2

nature of the system of internal taxation and therefore applies only if the imported and domestic products are not like products.[83] In *Korea-Alcoholic Beverages,* the AB explained that by definition all 'like' products are 'directly competitive or substitutable', but not vice versa.[84] According to the AB, 'directly competitive or substitutable' refers to a competitive relationship in the marketplace, determined from the consumer's perspective. Cross-price elasticity of demand in the relevant market can be a helpful tool.[85] Products that do not compete cannot be like products, and like products are in an especially close competitive relationship.

Article III:4, establishing national treatment for internal regulations, has been interpreted broadly, to include all measures that may modify the conditions of competition.[86] The non-discrimination obligation applies to 'like' products. In *EC-Asbestos* the AB observed that where Article III:2 consists of two separate sentences with distinct obligations, narrowing the scope of 'likeness' in the first sentence, Article III:4 by contrast only applies to 'like products'.[87] The accordion of likeness hence stretches differently in both paragraphs. In light of the general principle of non-protectionism in Article III:1, 'like products' must be in a competitive relationship. The AB clarified that not '*all* products which are in *some* competitive relationship are "like products" under Article III:4'.[88] While likeness under Article III:4 has a broader scope than under the first sentence of Article III:2, that scope is not broader than the two sentences of Article III:2 combined. The nature and extent of the competitive relationship need to be determined on a case-by-case basis, based on the known criteria of physical properties, end-use, consumer preferences and tariff classification.[89] The AB thereby emphasized that all relevant evidence needs to be taken into account, such as for instance the health risk posed by asbestos, as constituting a defining aspect of the physical properties.[90]

If likeness is determined through a competitive relationship, it may well be that physically identical products may nevertheless not be 'like' when consumer preferences point to the contrary.[91] It is ultimately the consumer

83 AB Report *Japan-Alcoholic Beverages II* 1996, paras. 112.
84 AB Report *Korea-Alcoholic Beverages* 1999, para. 118.
85 Ibid para. 121.
86 GATT, *Italian Discrimination Against Imported Agricultural Machinery* GATT Panel Report 1958, BISD 7S/60, para. 12.
87 AB Report *EC-Asbestos* 2001, para. 94.
88 Ibid para. 99.
89 Ibid para. 101.
90 Ibid para. 115.
91 Reinhard Quick and Christian Lau, 'Environmentally Motivated Tax Distinctions and WTO Law: The European Commission's Green Paper on Integrated Product Policy in Light of the 'Like Product-' and 'PPM-' Debates' 2003, 6 Journal of International Economic Law 419, 431.; Marco C.E.J. Bronckers and Natalie McNelis, 'Rethinking the 'Like Product' Definition in GATT 1994: Anti-Dumping and Environmental Protection' in Marco C.E.J. Bronckers (ed), *A Cross-Section of WTO Law* (Cameron May 2000); Donald Regan, 'Regulatory

who determines whether a competitive relationship between products exists.[92] What if consumers have such a strong preference for green products, or for goods produced under fair and healthy labor conditions, to the extent that the less-green or unfairly manufactured shirt is no longer an alternative option? Only a very weak competitive relationship might then exist between two physically like products. To this date, no case has yet been adjudicated where products were found to be unlike because of consumer preferences, if they were otherwise found to have the same characteristics.[93]

For npr-PPMs consumer preferences could be the decisive element in a likeness determination. Nevertheless, non-likeness, or the non-existence of a competitive relationship based on consumer preferences, seems very difficult to prove.[94] Identical products are usually in a competitive relationship because they at least potentially compete with each other as substitutable products.[95] A market-based analysis requires an economic analysis of consumer preferences on a case-by-case, country-by-country basis.[96] Only if consumers are willing to pay a higher price for a product that has been produced in a different way, and where the other products is not considered a viable alternative, can the competitive relationship between identical products be ruled out.[97] Consumer preferences as determinant factor in a likeness analysis do not guarantee an environmental-friendlier outcome. Notwithstanding good intentions, in most markets consumers are primarily guided by the price of products and less by, for instance, the environmental conditions of production. Even with well-informed consumers it is not clear whether a sufficiently large group of consumers would indeed change their preferences purely based on environmental grounds. That does not necessarily mean that people do not care about the environmental concerns, but studies have shown that people express different preferences as a voter/citizen than as a consumer.[98] Price awareness is even

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Purpose and 'Like Products' in Article III:4 of the GATT (With Additional Remarks on Article III:2)' 2002, 36 Journal of World Trade 443, 447.

92 Pauwelyn (2004), 586. Consumer preferences play an important role in a market-based approach, see also Conrad(2011), 222. See also Won-Mog Choi, *'Like Products' in International Trade law. Towards a Consistent GATT/WTO Jurisprudence* (Oxford University Press 2003) chapter II.3.

93 Note that in *EC-Asbestos* the AB considered the fibres in question as 'physically very different' because of its health risks, which would in turn influence consumers' tastes.

94 Quick and Lau (2003), 431.

95 Ibid 432.

96 Bronckers and McNelis(2000), 50.

97 Conrad(2011), 227.

98 Cass Sunstein, 'Endogenous Preferences, Environmental Law' 1993, 22 Journal of Legal Studies 217, 242., explaining why some concerns may be highly valued by political participants, who are simultaneously not willing to back up that valuation as consumers on te market; Daphna Lewinsohn-Zamir, 'Consumer Preferences, Citizen Preferences, and the Provision of Public Goods' 1998, 108 Yale Law Journal 377, 379., arguing that consumers may perceive a sense of 'hopelessness' that is absent in political settings; Deborah Guber, *The Grassroots of a Green Revolution: Polling America on the Environment* (Cambridge: MIT

more determinant for poor consumers: wealthier consumers could more easily choose between products according to their general preferences, while poor consumers need to give more consideration to the price. Following this logic, the same measure that might be considered legal in wealthy countries, could be found illegal in poor countries.[99] A market-based approach through consumer preferences thus raises challenges with regard to environmental concerns.

2.4.1.2.2 Treatment no less favourable

Treatment no less favourable requires effective equality of opportunities for imported products to compete with like domestic products.[100] A distinction in treatment can be *de jure* or *de facto*,[101] but any determination of treatment no less favourable requires an assessment of the implications of the measure at issue for the group of imported products and the group of domestic products.[102] Article III:4 does not require the *identical* treatment of imported and like domestic products, but rather the *equality of competitive conditions* between these like products.[103] A mere distinction based on origin is not sufficient but a detrimental impact on the conditions of competition for like imported products must be shown.[104] There is no *de minimis* standard for treatment less favourable,[105] but there must be a 'genuine relationship' between the measure at issue and the adverse impact on competitive opportunities for imported products.[106]

The AB has held that Members can draw regulatory distinctions without this necessarily leading to discrimination.[107] The tipping point seems to be where the regulatory distinctions distort the conditions of competition to the detriment of imported products.[108] However, should the assessment of treatment less favourable not go beyond a mere consideration of a detrimental effect on competitive opportunities, but rather consider whether these detrimental

Press, 2002), 155, noting that a critical component of an individual's willingness to engage in activity designed to support environmental causes or other public goods hinges upon the perceived efficacy of that activity.

99 Conrad(2011), 234.

100 Panel Report *US-Gasoline* 1996, para.6.10.

101 Lothar Ehring, '*De Facto* Discrimination in World Trade Law: National and Most-Favoured-Nation Treatment – or Equal Treatment?' 2002, 36 Journal of World Trade 921.

102 AB Report *EC-Seal Products* 2014, para.5.101.

103 Ibid para.5.108.

104 WTO, *Korea-Measures Affecting Imports of Fresh, Chilled and Frozen Beef* AB Report 2000, WT/DS161/AB/R, para.135.

105 WTO, *China-Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment* Panel Report 2009, WT/DS363/R, para.7.1537.

106 AB Report *EC-Seal Products* 2014, para.5.101.

107 AB Report *EC-Asbestos* 2001, para.100.

108 WTO, *Thailand-Customs and Fiscal Measures on Cigarettes from the Philippines* AB Report 2011, WT/DS371/AB/R, para.128.

effects are really related to the foreign origin of the measure? The question whether to apply purportedly objective 'economic' or competition-oriented tests, on the one hand, and more subjective tests that look at the sincerity of the measure's regulatory purposes, on the other hand, has been a returning matter of debate.[109] This crucial issue will be further discussed in the following section on the inclusion of legitimate regulatory purposes in the national treatment analysis.

2.4.1.2.3 Aims and effects or the inclusion of regulatory purposes

Differentiation between like imported and domestic products does not necessarily mean that there is also discrimination. States might have legitimate reasons to impose differential treatment on domestic and imported products. Whether these reasons and regulatory purposes should be included in a national treatment analysis (or in a likeness analysis)[110] has been much debated over the years,[111] and has revived after the 2012 TBT cases. Should legitimate regulatory purposes be excluded from the Article III GATT analysis altogether and be left to Article XX; should they be considered when determining likeness; or rather when assessing treatment less favourable?

In the traditional technical analysis of likeness as discussed above, regulatory objectives are not taken into account and the focus is limited to the conditions of competition. The text of Article III, however, is hardly unequivocal on the correct analysis of likeness.[112] It has been argued that regulatory choices should be included into the analysis of origin-neutral measures under Article III.[113] This would bring a review of national law in line with the basic objective of the GATT – banning protectionism –, while leaving governments with the necessary policy space to address legitimate non-trade concerns. In the 1992 *US-Malt Beverages* case, the GATT panel considered policy objectives in determining likeness. According to the panel the words 'so as to afford

109 Tomer Broude and Philip I. Levy, 'Do You Mind If I Don't Smoke? Products, Purpose and Indeterminacy in *US-Measures Affecting The Production And Sale of Clove Cigarettes*' 2014, 13 World Trade Review 357, 359.

110 Regan (2002).

111 See for instance Hudec (1998); Michael Ming Du, 'The Rise of National Regulatory Autonomy in the GATT/WTO Regime' 2011, 14 Journal of International Economic Law 639; Flett (2013).

112 For an interesting analysis of the institutional constraints of the WTO, see Ming Du (2011). He argues that the WTO agreements are inherently vague and indeterminate due to the single undertaking-principle in the negotiations between very heterogeneous Members. The WTO tribunals interpret the texts with little democratic legitimacy, and their interpretations have differed over time. "Not only has the line been repeatedly drawn, shifted, and erased in academic discourse, the jurisprudence also echoed this uncertainty by evolving, reaffirming the link between the horizontal trade/non-trade debate and the vertical institutional struggle between Members and the WTO adjudicate bodies."(p.655)

113 Conrad(2011), 207; Regan (2002); Donald H. Regan, 'Further Thoughts on the Role of Regulatory Purpose under Article III of the General Agreement on Tariffs and Trade' 2003, 37 Journal of World Trade 737.

protection to domestic production' in Article III:1 do not prevent contracting parties from differentiating between different product categories for *bona fide* policy purposes, *in casu* public health concerns.[114] The panel's approach to look at the regulatory purpose and the effect on conditions of competition would become known as the 'aims and effects' test.[115] The GATT panel in *US-Taxes on Automobiles* further developed this test.[116] Rather than only looking at the competitive opportunities, the aim of a measure should be examined as well:

> 'A measure could be said to have the aim of affording protection if an analysis of the circumstances (…) demonstrated that a change in competitive opportunities in favor of domestic products was a *desired outcome* and not merely an incidental consequence of the pursuit of a legitimate policy goal.'[117]

The advantages of the test were that firstly, a violation was no longer based on a purely technical analysis of likeness but on the trade effects of a measure; and secondly, justification for legitimate regulatory purposes was no longer limited to Article XX, consisting of an exhaustive list of justification grounds and a strictly interpreted chapeau. This new approach was also in line with the one-stage test of violation of the new Standards Code and SPS Code (current Article 2.1-2.2 TBT and Article 2 SPS).[118]

However, the test also raised certain problems. Firstly, neither Article III:2 first sentence nor Article III:4 contain a textual reference to Article III:1, upon which the aim and effects-test was based.[119] Secondly, the burden of proof would become much heavier on the complainant, who would also have to show the aim of the measure.[120] Thirdly, Article XX could become redundant if the regulatory purpose is already taken into account under Article III.[121] The AB in *Japan-Alcoholic Beverages II* rejected the aims and effects-test by stressing that the intent of legislators or regulators was irrelevant when determining likeness.[122] The AB did recognize that an additional element had to be taken into account to discuss the 'protective application of a measure' and stated:

114 , *United States – Measures Affecting Alcoholic and Malt Beverages* GATT Panel 1992, DS23/R – 39S/206, para.5.25.
115 Hudec (1998), 627.
116 The report remains unadopted, as the EU (complainant) blocked the adoption of the report. The EU challenged the aim and effects-test in the first WTO case dealing with the issue, *Japan –Alcoholic Beverages II.*
117 , *United States – Taxes on Automobiles* GATT panel 1994, DS31/R, para.5.10.
118 Hudec (1998), 628.
119 WTO, *Japan – Taxes on Alcoholic Beverages II* panel report 1996, WT/DS8/R, para.6.16.
120 Ibid.
121 Ibid para.6.17.
122 WTO, *Japan – Taxes on Alcoholic Beverages II* AB 1996, WT/DS8/AB/R, p.27.

> '[w]e believe it is possible to examine objectively the underlying criteria used in a particular tax measure, its structure, and its overall application to ascertain whether it is applied in a way that affords protection to domestic products.'[123]

Although it is true that the aim of a measure may not be easily ascertained, nevertheless its protective application can most often be discerned from the design, the architecture, and the revealing structure of a measure. The distinction between the aim and effects-test and this new 'protective application' test was not very clear, and was very much based on the specifics of Article III:2. The AB later rejected any protective application-analysis with respect to Article III:4 in *EC-Bananas III*, stating that there is no reference to Article III:1 in Article III:4.[124] In *Chile-Alcoholic Beverages,* though the AB found the products to be 'directly competitive or substitutable products' and found dissimilar taxation, it then proceeded to assess whether the measure was 'applied so as to afford protection' to domestic production. The AB observed that the stated objectives of a government may be relevant in evaluating the design of a measure by noting:

> '[w]e consider that a measure's purposes, objectively manifested in the design, architecture and structure of the measure, *are* intensely pertinent to the task of evaluating whether or not that measure is applied so as to afford protection to domestic production.'[125]

In *EC-Asbestos* the AB seemed to indicate that rather than under likeness, regulatory purpose might be considered under 'treatment less favourable'. The AB seems to retreat from its previous position in *EC-Bananas* by stating that

> 'the term 'less favourable treatment' expresses the general principle in Article III:1. If there is 'less favourable treatment' of the group of like imported products, there is, conversely, protection of the group of like domestic products. However, a Member may draw distinctions between products which have been found to be 'like', without, for this reason alone, according to the group of like imported products less favourable treatment than that accorded to the group of like domestic products.'[126]

It seems logical that in evaluating regulatory distinctions, one should not only look at the effect on competition, but especially consider whether the distinc-

123 Ibid p.29.

124 WTO, *European Communities – Regime for the Importation, Sale and Distribution of Bananas III* AB 1997, WT/DS27/AB/R, para.216.

125 WTO, *Canada-Certain Measures Affecting the Automotive Industry* AB Report 2000, WT/DS139/AB/R, para.62.

126 AB Report *EC-Asbestos* 2001, para.100.

tion is related to the origin of the products. In *Dominican Republic-Cigarettes*, the AB stated that

> 'the existence of a detrimental effect on a given imported product resulting from a measure does not necessarily imply that this measure accords less favorable treatment to imports *if the detrimental effect is explained by factors or circumstances unrelated to the foreign origin of the product*.'[127]

Thus, even if a measure has a detrimental effect on imports as opposed to like domestic products, that effect alone may not be sufficient proof of less favourable treatment: rather, a non-protectionist objective may demonstrate that the measure is not *de facto* discriminatory based on origin.[128] In *EC-Biotech* the panel assumed biotech and non-biotech products to be like, but found that the EC treated all biotech products alike irrespective of origin, and equally treated all non-biotech products alike irrespective of origin. As Argentina had 'not adduced argument and evidence sufficient to raise a presumption that the alleged less favourable treatment is explained by the foreign origin of the relevant biotech products', the panel was unable to find a national treatment violation.[129]

Pauwelyn, who argues that the focal point of a national treatment analysis should lie with determining whether or not imported products are discriminated based on their origin, supports this approach. *De jure* discrimination based on origin is easily found (and may still be justified under exceptions), but the important question under Article III is how to define *de facto* discrimination?[130] According to Pauwelyn, the test for *de facto* discrimination for measures that seem origin-neutral should be seen as a weighing exercising including consideration of both the objective purpose of the regulation and its effects.[131] He argues that rather than focusing on likeness (criteria upon which it is permissible to distinguish) panels and the AB should focus on the one *impermissible* feature, which is national origin.[132] Thus if a national

127 WTO, *Dominican Republic – Measures Affecting the Importation and Internal Sale of Cigarettes* AB 2005, WT/DS302/AB/R, 96. In that case, both importers and domestic producers of cigarettes had to pay a bond of five million pesos, which imposed a higher burden on an imported cigarette as compared to a domestic cigarette, because importers sell fewer cigarettes in the Dominican Republic than domestic producers. The AB found that the detrimental effect was thus explained by factors such as market share, but was not related to the foreign origin of the product, and thus no treatment less favourable under Article III:4 could be established.

128 Joost Pauwelyn, 'Comment: The Unbearable Lightness of Likeness' in Marion Panizzon, Nicole Pohl and Pierre Sauvé (eds), *GATS and the Regulation of International Trade in Services* (Cambridge University Press 2008) 365.

129 Panel report *EC-Biotech* 2006, para.7.2514.

130 See also for an overview of earlier WTO jurisprudence, Ehring (2002).

131 Pauwelyn(2008), 358.

132 Ibid 363.

measure distinguishes between products based on genuine features that are not origin-based (such as physical characteristics, consumer tastes or legitimate objectives such as environmental protection), the measure would be permissible.[133]

In the recent TBT case law, – where Articles 2.1 and 2.2 TBT were interpreted, relying extensively on the jurisprudence of Article III GATT -,[134] regulatory objectives were considered for the analysis of less favourable treatment. In both *US-Clove Cigarettes*[135] and *US-Tuna II,*[136] the AB explicitly considered the policy objectives of the measures in determining less favourable treatment under Article 2.1 TBT (the national treatment provision). In *US-COOL*[137] the policy objective was only considered shortly under Article 2.1 TBT.[138]

US-Clove Cigarettes concerned a US measure prohibiting cigarettes with characterizing flavour, other than tobacco or menthol. Indonesia, the biggest exporter of clove cigarettes claimed that the measure was in breach of the TBT as it accorded treatment less favourable to like imported products. Clove cigarettes were found to be like domestic cigarettes. The AB stated with regard to the less favourable treatment analysis under Article 2.1 TBT that

> '[a] panel must further analyze whether the detrimental impact on imports stems exclusively from a legitimate regulatory distinction rather than reflecting discrimination against the group of imported products. In making this determination, a panel must carefully scrutinize the particular circumstances of the case, that is, the design, architecture, revealing structure, operation, and application of the technical regulation at issue, and, in particular, whether that technical regulation is even-handed, in order to determine whether it discriminates against the group of imported products.'[139]

133 Ibid.

134 Article 2.1 TBT contains the national treatment and MFN obligation, requiring no less favourable treatment for imported products than that accorded to domestic or other imported like products). Article 2.2 TBT ensures that regulations are not more trade restrictive than necessary in order to fulfill a legitimate objective (non-exhaustive list). Protection of the environment is one of the grounds listed.

135 WTO, *United States – Measures Affecting the Production and Sale of Clove Cigarettes* AB Report 2012, WT/DS406/AB/R.

136 WTO, United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products AB Report 2012, WT/DS381/AB/R.

137 WTO, United States-Certain Country of Origin Labelling (COOL) Requirements AB Report 2012, WT/DS384/AB/R.

138 The AB's methodology has been criticized for its 'lock, stock and barrel' export of GATT solutions into the TBT, see among others Petros C. Mavroidis, 'Driftin' too far from shore – Why the Test for Compliance with the TBT Agreement Developed by the WTO Appellate Body is Wrong, and What Should the AB Have Done Instead' 2013, 12 World Trade Review 509.

139 AB Report *US-Clove Cigarettes* 2012, para.182. This was confirmed by the AB in AB Report *US-COOL* 2012, para.271.

Although considering the objective of reducing youth smoking, the AB held that this objective could not justify the measure, as menthol cigarettes would equally increase the attractiveness of tobacco to youth.[140]

In *US-Tuna II*, the US established criteria according to which tuna products sold in the US could carry a 'dolphin-safe' label. The US distinguished between the area where tuna was harvested (inside or outside the Eastern Tropical Pacific Ocean) and the technique used in tuna fishing (with or without the use of special nets). Mexico claimed both a national treatment and a most-favoured nation violation under Article 2.1 TBT. The AB found that the US measure treated Mexican tuna *de facto* less favourably than US tuna and recalled that the treatment less favourable analysis should include whether the disparate impact of a measure stemmed exclusively from a legitimate regulatory distinction.[141] That was not (fully) the case here.[142]

A US measure imposing country of origin labeling (COOL) requirements on livestock of domestic, foreign and mixed origin was at issue in *US-COOL*. After having found a detrimental impact on Canadian and Mexican livestock, the AB proceeded to check under Article 2.1 TBT whether the measure was applied in an even-handed manner. The specifics of the COOL measure made compliance with its requirements least costly for producers if they relied exclusively on domestic livestock, and in that way the measure had a detrimental impact on the competitive opportunities of imported livestock. The expensive recordkeeping and verification requirements regarding the countries where the livestock were born, raised and slaughtered, were not necessarily conveyed to consumers through the prescribed labels, and thus the detrimental impact did not stem exclusively from a legitimate regulatory distinction (the objective of informing consumers).[143] Under Article 2.2 TBT the AB agreed with the panel that the objective was legitimate, however, it did not complete the analysis on the necessity of the measure due to a lack of relevant factual findings by the panel and insufficient undisputed facts on the record.[144]

In the light of these recent TBT cases, it is being proposed to include national regulatory autonomy in the analysis under Article III GATT as well, rather than limit it to Article XX, so as to ensure a consistent and coherent interpretation and application of both agreements.[145] Should the TBT approach of considering whether a detrimental impact is attributable to a legitimate regulatory distinction apply *mutatis mutandis* to Article III:4 GATT? As Flett noted, 'respect for regulatory autonomy should not be rendered ineffective by an excessively

140 AB Report *US-Clove Cigarettes* 2012, para.225.
141 AB Report *US-Tuna II* 2012, para.216.
142 Ibid paras.251; 288.
143 AB Report *US-COOL* 2012, 349.
144 Ibid 491. See also for a further discussion of the case Petros C. Mavroidis and Kamal Saggi, 'What Is Not So Cool About *US-Cool* Regulations? A Critical Analysis Of The Appellate Body's Rulings on *US-Cool*' 2014, 13 World Trade Review 299.
145 Flett (2013), 27; Crowley and Howse (2014), 322; Broude and Levy (2014), 391.

rigid interpretation and application of Article III:4'.[146] When permitting a modification of the conditions of competition if it stems from a legitimate regulatory distinction under Article 2.1 TBT, the AB referred to the 'context' of Article 2.1 requiring such interpretation.[147] Such support could also be found in the context of Article III:4 GATT – specifically as supplied by Article III:1.[148] Even though in contrast to the TBT, the GATT contains a general exceptions clause, according to Crowley and Howse, there is

> 'no reason why a responding Member could not argue under Article III GATT that, despite features of the design and structure of its measure appearing to be non-evenhanded in their impact on competing imported products, these features can in fact be fully explained by a legitimate regulatory distinction.'[149]

Including regulatory distinctions in the analysis of Article III GATT would allow WTO Members to go beyond the closed list of exception grounds in Article XX GATT. The list of Article XX was drafted in 1947, based on concerns of that time. The TBT already contains an open list of legitimate objectives, which allows a reflection of current circumstances. Including regulatory purpose in the analysis of Article III GATT does not imply Article XX would become void, as there is considerable overlap between both provisions.[150] Any testing of all the facts under Article III would imply the suitability and the necessity of a measure, a proportionality test comparable to Article XX.[151] This 'new' aims and effects-test would broaden the space for regulatory autonomy for facially neutral measures with legitimate objectives. Any explicit justification grounds (for sure for *de jure* discrimination, and for doubtful cases of *de facto* discrimination) would still be dealt with under Article XX. The burden of proof would lie with the complainant to show that the differential treatment under Article

146 Flett (2013), 53.

147 That context includes Article 2.2 TBT as well as the preamble of the TBT Agreement. AB Report *US-Tuna II* 2012, para.213; WTO, *United States – Measures Affecting the Production and Sale of Clove Cigarettes* AB Report 2012, AB/DS406/AB/R, para.182; AB Report *US-COOL* 2012, para.240.

148 William J. Davey and Keith E. Maskus, '*Thailand-Cigarettes (Philippines)*: A More Serious Role for the 'Less Favourable Treatment' Standard of Article III:4' 2013, 12 World Trade Review 163, 180.

149 Crowley and Howse (2014), 332.

150 The AB commented on this point in AB Report *EC-Asbestos* 2001, para.115., noting that considering evidence relating to health risks under Article III:4 do not render Article XX redundant; The AB stated that 'the fact that that interpretation of Article III:4 implies a less frequent recourse to Article XX(b) does not deprive the exception in Article XX(b) of *effet utile*'.

151 See Weihuan Zhou, '*US-Clove Cigarettes* and *US-Tuna II (Mexico)*: Implications for the Role of Regulatory Purpose under Article III:4 of the GATT' 2012, 15 Journal of International Economic Law 1075.; Federico Ortino, 'From 'Non-Discrimination' to 'Reasonableness': A Paradigm Shift in International Economic Law?' 2004, 01/05 Jean Monnet Working Paper NYU School of Law.

III is based on the foreign origin of the products. The respondent will need to demonstrate the non-protectionist purpose of the measure, and show a genuine link between that purpose and the measure. When a distinction originates from a legitimate regulatory objective, a measure would not need to seek justification under Article XX, as no violation would be found in the first place. The hurdles of Article XX have proven extremely hard to overcome, even for non-protectionist measures. As has been noted, this

> 'norm-justification dichotomy between Article III and Article XX raises a troubling question of constitutional identity, the way a society wants to understand its internal hierarchy of values. There is no reason to believe that liberalized trade should prevail over the competing values, such as human health and safety and protection of the environment.'[152]

Despite strong arguments to be made in favour of adopting a similar TBT test for consideration of legitimate regulatory purposes under Article III GATT, it seems that in *EC-Seal Products* the AB rejected such approach, by distinguishing between the justification provisions under the TBT and the GATT.[153] The AB pointed to Article XX GATT to support its position that the balance under Article 2 TBT between right to regulate and non-discrimination requires an examination of regulatory purpose, whereas under the GATT Article XX serves to counterweigh the non-discrimination obligations. According to the AB, 'a panel is not required to examine whether the detrimental impact of a measure on competitive opportunities for like imported products stems exclusively from a legitimate regulatory distinction'.[154] Note the AB's particular wording of 'not required to' rather than 'should not' or 'cannot'. The AB indicated that it is sufficient to establish a distinction in the competitive opportunities to the detriment of imported products, for which it does not matter whether that distinction is protectionist or whether it stems from a legitimate regulatory distinction. However, the AB did not say that *if* indeed such distinction stems from a legitimate regulatory purpose, that that would be irrelevant. Seen the previous turns the AB has taken in this matter, further confirmation of this approach is to be awaited.[155] In the recent *Argentina-Financial Services* GATS case, the panel did rely on the TBT case law to include regulatory distinctions

152 Ming Du (2011), 671.
153 AB Report *EC-Seal Products* 2014; Michael Ming Du, ''Treatment No Less Favourable' and the Future of National Treatment Obligation in GATT Article III:4 after *EC-Seal Products*' 2016, 15 World Trade Review 139.
154 AB Report *EC-Seal Products* 2014, para.5.117.
155 See also Ming Du (2016), 155.

to determine likeness under Article II:1 GATS,[156] however, that approach was rejected by the AB.[157]

If regulatory distinctions were included in the analysis of Article III, the extraterritorial effect of measures would also need to be taken into account in that analysis. In light of the AB's findings in *EC-Seal Products*, the main analysis will focus on assessing extraterritoriality within the framework of Article XX. Chapter 7, introducing the extraterritoriality decision tree, will in addition to Article XX also address the application of the tree to Article III GATT.

2.4.2 The justification: Article XX GATT

If a particular npr-PPM is found to violate either Article III or Article XI, the question arises whether that violation could still be justified under the general exceptions of Article XX GATT. In order to protect and promote societal values and interests, governments frequently adopt legislation or take measures that might constitute barriers to trade, and might hence be inconsistent with the non-discrimination principles or other rules of WTO law. WTO law provides for a set of exceptions to reconcile trade liberalization with the pursuit of other societal interests. While only the general exceptions of Article XX GATT will be discussed here, the WTO covered agreements also offer security exceptions,[158] economic emergency exceptions,[159] regional integration exceptions,[160] balance of payment exceptions[161] and economic development exceptions,[162] the discussion of which is of less relevance to this thesis on environmental trade measures with an extraterritorial effect.

Article XX of the GATT 1994, entitled 'General Exceptions', reads:[163]

> 'Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on inter-

156 WTO, Panel Report, *Argentina-Measures Relating to Trade in Goods and Services*, 2015, WT/DS453/R, para.7.176-179.
157 WTO, AB Report, *Argentina-Measures Relating to Trade in Goods and Services*, 2016, WT/DS453/AB/R, para. 6.127.
158 Article XXI GATT 1994 and Article XIV *bis* GATS.
159 Article XIX GATT 1994 and the *Agreement on Safeguards*.
160 Article XXIV GATT 1994 and Article V GATS.
161 Articles XII and XVIII:b GATT 1994 and Article XII GATS.
162 Article XVIII:a GATT 1994 and the 'Enabling Clause'.
163 Paragraphs (c), (h), (i) and (j) omitted by author. These paragraphs relate to trade in gold and silver; obligations under international commodities agreements; efforts to ensure essential quantities of materials to a domestic processing industry; and products in general or local short supply. They have been of less importance in international trade law and practice, and are furthermore of little relevance to this study.

> national trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:
> (*a*) necessary to protect public morals;
> (*b*) necessary to protect human, animal or plant life or health;
> (*c*) …
> (*d*) necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement, including those relating to customs enforcement, the enforcement of monopolies operated under paragraph 4 of Article II and Article XVII, the protection of patents, trade marks and copyrights, and the prevention of deceptive practices;
> (*e*) relating to the products of prison labour;
> (*f*) imposed for the protection of national treasures of artistic, historic or archaeological value;
> (*g*) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption;'

Article XX sets out an exhaustive list of exceptions, which can be invoked by a Member when a measure has been found to be inconsistent with one of the GATT provisions. The GATT panel in *US-Section 337* noted that the central phrase in the introductory clause of Article XX is that 'nothing in this Agreement shall be construed to prevent the adoption or enforcement by any Member of measures…'.[164] The AB has stated in *US-Gasoline* and *US-Shrimp* that in the interpretation of Article XX balance needs to be sought between Members' rights to invoke exceptions as well as their duty to respect other Members' WTO rights and to liberalize trade. Such balance must be *bona fide*, or reasonable.[165] The AB stated that the relationship between the commitments and the exceptions can be given meaning only 'on a case-to-case basis, by careful scrutiny of the factual and legal context in a given dispute'.[166]

In order for Article XX to be successfully invoked, the conditions of said article have to be fulfilled through a two-tier test: first, the conditions of the paragraphs must be complied with; and second, the requirements of the introductory clause, referred to as the chapeau. While the panel in *US-Shrimp* suggested to first check the conditions of the *chapeau* of Article XX, seen its conclusive nature, before going into the paragraphs of the article, the AB firmly rejected this approach. According to the AB, panels should first examine whether a measure is justified under a particular paragraph before moving to an examination of consistency with the chapeau,[167] as the chapeau deals

164 , *US-Section 337* GATT Panel Report, para.5.9.
165 AB Report *US-Shrimp* 1998, para. 128.
166 AB Report *US-Gasoline* 1996, 16.; For an interesting discussion on the difficulties of this balancing act under Article XX *see* Christopher Doyle, 'Gimme Shelter: The "Necessary" Element of GATT Article XX in the Context of the *China-Audiovisual Products* Case' 2011, 29 Boston University International Law Journal 143.
167 AB Report *US-Shrimp* 1998, paras 116ff.

with the *application* of a measure rather than with the design of the measure as such. The panel in *Brazil-Retreated Tyres* described the distinction between the two elements of the test in the following way:

> '[In its analysis under Article XX(b)] [t]he panel will not … examine … the manner in which the measure is implemented in practice […]. These elements will, however, be relevant to later parts of the panel's assessment, especially under the chapeau of Article XX, where the focus will be, by contrast, primarily on the manner in which the measure is applied.'[168]

The focus of this research is on the extraterritorial nature of trade measures and thus also on whether and to what extent Article XX GATT precludes extraterritorial measures. Can Article XX only be invoked to protect concerns located within the territory of the imposing state? What if the measure aims at protecting 'common concerns' which are of importance to the entire international community, or concerns located abroad which create domestic moral concerns? Article XX does not contain an explicit jurisdictional limitation, but whether there is an implied jurisdiction limitation will be discussed in greater detail in chapter 3. In this section an overview will be given of the other relevant elements of Article XX GATT with regard to environmental disputes.

2.4.2.1 Article XX(b) and (g) GATT

The paragraphs of Article XX lay down specific grounds of justification for measures that are otherwise inconsistent with provisions of the GATT. The grounds range from human, animal or plant life or health, to public morals, and protection of national treasures of artistic, historic or archaeological value. Of most relevance to this study are the two paragraphs which can be used for environmental protection purposes, namely paragraphs (b) and (g).

Article XX(b) concerns measures which are 'necessary to protect human, animal or plant life or health'. The paragraph sets out a two-tier test to determine whether a measure is provisionally justified under this provision. The panel in *US-Gasoline* held that first, the policy objective pursued by the measure at issue must be the protection of life or health of humans, animals or plants; and that second, the measure must be necessary to fulfill that policy objective.[169] Regarding the first element, the panel in *EC-Tariff Preferences* noted that not only the express provisions of legislation or a measure are at issue, but also the design, architecture and structure of that measure.[170] In *Brazil-Retreaded Tyres*, Article XX(b) was invoked for environmental policy measures.

168 WTO, *Brazil – Measures Affecting Import of Retreaded Tyres* Panel Report 2007, WT/DS332/R, para. 7.107.
169 Panel Report *US-Gasoline* 1996, para. 6.20. For a more recent application of this test, see Panel report *EC-Biotech* 2006, para.7.179.; Panel Report *Brazil-Retreaded Tyres* 2007, para.7.40.
170 , *EC-Tariff Preferences* Panel Report, para. 7.200.

The case dealt with an import ban on retreaded tyres, whereby Brazil argued that waste tyres create perfect breeding grounds for disease carrying mosquitos, but also that the accumulation of waste tyres creates a risk of tyre fires and hence toxic leaching of chemicals and hazardous substances. The panel noted thereby that a party invoking environmental policy measures under Article XX(b) 'has to establish the existence not just of risks to "the environment" generally, but specifically of risks to animal or plant life or health'.[171] Hence not all environmental policy measures would fall within the scope of application of Article XX(b) GATT, even though it is likely that most environmental measures will have an impact on animal or plant life or health.[172]

The second element of Article XX(b), the 'necessity' requirement, is more problematic. The panel noted in *Thailand-Cigarettes* that the measure by Thailand

> 'could be considered 'necessary' in terms of Article XX(b) only if there were no alternative measure consistent with the GATT, or less inconsistent with it, which Thailand could reasonably be expected to employ to achieve its health policy objectives.'[173]

The alternative measure must be *as effective* in achieving the policy objective pursued as the measure at issue. The panel in *US-Gasoline* made an important classification as to the requirement of 'necessity' under Article XX(b), stating that it is not the necessity of the policy objective, but the necessity of the disputed measure to *achieve* that objective.[174] The AB further clarified the 'necessity' test in *EC-Asbestos* by stating first, that the level of protection can only be determined by the Member itself and that this cannot be challenged by other WTO Members.[175] Second, the AB reiterated from earlier jurisprudence that 'necessary' refers to 'no alternative to the measure at issue that the Member could reasonably be expected to employ'.[176] In order to determine reasonableness, factors such as difficulty of implementation have to be taken into account. In later disputes it was added that the less restrictive the impact of the measure at issue is on international trade, the more easily the measure may be considered 'necessary'.[177] Third, the AB specified that the GATT-con-

171 Panel Report *Brazil-Retreaded Tyres* 2007, para. 7.46.
172 Peter Van den Bossche and Zdouc Werner, *The Law and Policy of the World Trade Organization: Text, Cases and Materials.* (3d edn, Cambridge University Press 2008) 555.
173 WTO, *Thailand-Customs and Fiscal Measures on Cigarettes from the Philippines* Panel Report 2010, WT/DS371/R, paras. 73 and 75.
174 Panel Report *US-Gasoline* 1996, para. 6.22.
175 AB Report *EC-Asbestos* 2001, para. 168.
176 Ibid para. 172.
177 Panel Report *Brazil-Retreaded Tyres* 2007, para. 7.104.

sistency of alternative measures leads to the question whether an alternative measure that would achieve the same end would be less trade restrictive.[178]

Article XX(g) concerns measures 'relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption'. Article XX(g) sets outs a three-tier test, requiring that a measure first, relates to the *conservation of exhaustible natural resources*; second, *relates* to such conservation; and third, must be made effective in conjunction with domestic restrictions. The first element of exhaustible natural resources has been interpreted broadly, in the sense that it encompasses both biological resources as well as non-living resources,[179] such as clean air.[180] The term 'relating to' has been held to cover a wider scope than terms used in other paragraphs such as 'necessary to' and 'essential to'. In *Canada-Herring and Salmon,* the GATT panel found that a measure was '*relating to* the conservation of exhaustible resources' if it was '*primarily aimed at*' this policy goal.[181] The consequent test resembled the necessity test from paragraph (b). In *US-Shrimp,* the AB interpreted 'relating to' as designating a 'close and genuine relationship of ends and means',[182] i.e. between the measure and the policy objective. The third element of Article XX(g) is a requirement of 'even-handedness' in the imposition of restrictions on imported and domestic products,[183] which does not require 'identical treatment of domestic and imported products', however.[184]

In *EC-Seal Products,* the EU invoked Article XX(a) on public morals to justify its seals regime. The EU relied on public morals expressed by EU citizens on inhumane killing methods of seals to impose an import ban on seal products. The EU equally invoked Article XX(b) but did not make any substantive arguments.[185] It is clear that there can be substantive overlap between Article XX(a) and other substantive exception grounds, as the scope of moral issues can arguably be very broad.[186] It can be difficult to distinguish moral from environmental concerns: for instance, the protection of an animal species threatened with extinction can have a direct environmental impact on country A, but can be a moral concern to the not directly affected country B. The relationship between the public morals exception and the environmental

178 AB Report *EC-Asbestos* 2001, para.172.
179 AB Report *US-Shrimp* 1998, para. 131.
180 AB Report *US-Gasoline* 1996.
181 GATT, *Canada – Measures Affecting Exports of Unprocessed Herring and Salmon* GATT Panel Report 1988, BISD 35S/98, para. 4.6.
182 AB Report *US-Shrimp* 1998, para 136.
183 Van den Bossche and Werner(2008), 637. See also WTO, *China-Measures Related to the Exportation of Various Raw Materials* AB Report 2012, WT/DS394/AB/R, para.357.
184 AB Report *US-Gasoline* 1996, p.20.
185 WTO, Panel Report, *EC-Seal Products,* 2013, para.7.640.
186 Steve Charnovitz, "The Moral Exception in Trade Policy", *Virginia Journal of International Law* 38(1998): 689.

exceptions will be discussed in greater detail in chapter 7, in the context of the extraterritoriality decision tree.

2.4.2.2 *The chapeau*

Next to meeting the requirements of one of the paragraphs of Article XX, in order for a measure to be justified, the requirements of the *chapeau* of Article XX have to be met as well. The *chapeau* has been highly relevant in dispute settlement practice as for several controversial decisions the *chapeau* was the stumbling block.[187] The purpose of the *chapeau* is to protect the legal rights of the complaining party, ensuring that no abuse is made of the legal rights of the defendant to justify trade-restrictive measures,[188] and thus to maintain a balance between rights and obligations of WTO Members.[189] In assessing the application of the measure, one must examine the manner in which the measure is implemented in practice, how other elements extraneous to the measure could affect the measure's ability to perform its function.[190] In *EC-Seal Products*, empirical evidence was lacking as to whether the measure met the *chapeau*'s conditions. The AB looked at the 'actual or expected application' of the measure, based on the 'design, architecture, and revealing structure' of the measure,[191] elements which are usually considered in the context of the paragraphs.[192]

The *chapeau* of Article XX prohibits 'arbitrary or unjustifiable discrimination between countries where the same conditions prevail' and 'disguised restrictions on international trade'. These concepts may be read side-by-side and impart meaning to one another.[193] WTO Members must take into account the different conditions that may occur in the territories of other Members.[194] A measure needs to be sufficiently flexible and should consider similar measures enacted by other Members, which can be comparable in effectiveness, to address the same policy objectives.[195] In *US-Shrimp (Article 21.5 Malaysia)*, the AB added that the *chapeau* entails a good faith obligation, whereby WTO Members must make serious efforts to negotiate concerns before resorting to

187 In both *US-Shrimp* and *US-Gasoline* for instance the measures at issue were found by the AB to have been applied in a manner which constituted arbitrary and unjustifiable discrimination.
188 AB Report *US-Gasoline* 1996, p.20.
189 AB Report *US-Shrimp* 1998, para. 156.
190 WTO, *Brazil – Measures Affecting Import of Retreaded Tyres* AB Report 2007, WT/DS332/AB/R, para.7.107.
191 AB Report *EC-Seal Products* 2014, para.5.302.
192 Lorand Bartels, 'The Chapeau of the General Exceptions in the WTO GATT and GATS Agreements: A Reconstruction' 2015, 109 American Journal of International Law 95, 101.
193 AB Report *US-Gasoline* 1996, p.23.
194 AB Report *US-Shrimp* 1998, para. 164.
195 Ibid para. 177.

trade restrictive measures.[196] With regard to 'no disguised restriction on trade', even if a measure does not discriminate, the measure shall not be protectionist in nature. It is not clear whether a measure could be justified if it combined legitimate and illegitimate purposes. Should any illegitimate purpose, even when minor compared to the legitimate purpose, suffice to fail a defense under Article XX? In the example of measures that seek to achieve environmental protection, but that at the same time aim at leveling the playing field and protecting domestic industry, this condition may yet prove to be an important aspect of the *chapeau*.[197]

2.4.3 The TBT Agreement

The TBT Agreement has also been ground of debate with regard to PPMs. In particular, it is still unresolved whether npr-PPMs could fall within the scope of the Agreement, or whether it is limited to pr-PPMs. In GATT law, non-discriminatory policies cannot be challenged: in principle countries can do as they please as long as they do not unduly restrict import or discriminate imports as against domestic products. Under the TBT, technical barriers to trade are disciplined (in particular, they must be necessary or least-trade restrictive) even if they do not discriminate against imports.[198] The TBT and GATT seem be cumulatively applicable rather than mutually exclusive. In *EC-Asbestos* the AB observed that the TBT furthers the objectives of GATT

> 'through a specialized legal regime that applies solely to a limited class of measures. For these measures, the TBT Agreement imposes obligations on Members that seem to be *different from*, and *additional to*, the obligations imposed on Members under the GATT 1994 (emphasis added).'[199]

The TBT covers technical regulations (mandatory compliance), standards (voluntary compliance) and conformity assessment procedures.[200] All technical regulations are covered by the TBT, other than sanitary or phytosanitary measures as defined in the SPS Agreement.[201] In order to determine whether the TBT is at all relevant to the discussion of environmental npr-PPMs, the scope

196 WTO, *United States – Import Prohibition of Certain Shrimp and Shrimp Products, Recourse to Article 21.5 of the DSU by Malaysia* AB Report 2001, WT/DS58/AB/RW, paras. 115.
197 Bartels (2015), 123.
198 See below for a discussion of Article 2.2 TBT. See also Pauwelyn (2004), 580.
199 AB Report *EC-Asbestos* 2001, para. 80.
200 Article 1.6 TBT. Mandatory technical regulations are developed and implemented by governments, whereas standards as voluntary requirements are most often developed and implemented by private bodies. See Rotherham(2007), 179.
201 See the definition of sanitary and phytosanitary measures in Annex A to the SPS Agreement.

of the agreement must be assessed first. The term 'technical regulations' has been defined in Annex 1.1, referring to

> '[A document] which lays down product characteristics or *their related processes and production methods*… It may also include or deal exclusively with terminology, symbols, packaging, marking or labelling requirements *as they apply to a product, process or production method*.' (emphasis added)

Annex 1.1 refers to production methods, but adds that they must be 'related' to product characteristics, when not concerning 'terminology, symbols, packaging, marking or labelling requirements'. In EC-*Seal Products*, the AB examined the meaning of 'product characteristics' and found that characteristics include objectively definable 'features', 'qualities', 'attributes' or other 'distinguishing marks' of a product.[202] The AB then found 'related' in the first sentence of Annex 1.1 to refer to these characteristics: the process or production method must thus be related to the product characteristics, or must in other words have a sufficient nexus to the characteristics of the product.[203] It is unclear what is meant with a 'sufficient nexus' in this context. If one were to argue that 'related' means that the measure must have an impact on 'objectively definable product characteristics', then npr-PPMs that do not affect the physical characteristics of a product, will not be considered 'related' and thus fall outside the scope of the TBT. If a sufficient nexus could be understood as *any* link to the 'characteristics', then certain npr-PPMs could be considered related: for instance, the fact that shrimp was harvested in a turtle-friendly way, could be 'related' to the end product through its moral or ethical advantage. It remains unclear, though, what the AB could have had in mind. Any production process has an automatic 'nexus' to the product, but when is this sufficient? If assessing that nexus would imply a consideration of the objective of the PPM (e.g. an environmental objective, ethical characteristics), then how to distinguish the test from regulatory purpose or a necessity test?

In EC-*Seal Products* the AB found that the ban on seals products imposed a characteristic on products 'by providing that they may not contain seal',[204] however, the exceptions to the EU seal regime (the indigenous communities exception, the marine resources management exception and the travellers exception) did not. According to the AB, there is no basis in the text of Annex 1.1 to 'suggest that the identity of the hunter, the type of hunt, or the purpose of the hunt could be viewed as product characteristics'.[205] As a measure must be examined as a whole, including prohibitive and permissive elements, and the main features of the EU seal regime were the exceptions rather than the

202 AB Report *EC-Seal Products* 2014, para.5.11.
203 Ibid para.5.12.
204 Ibid para.5.39.
205 Ibid para.5.45.

criteria relating to the manner in which seal is killed, the AB considered the EU seal regime to not lay down product characteristics and thus not to constitute a technical regulation.[206] Whether these exceptions could be considered PPMs *related to* product characteristics was unfortunately left unanswered by the AB. As the panel had not examined the issue in its report and as the parties had not submitted sufficient argumentation, the AB did not rule on this point. The AB did note that 'the line between PPMs that fall, and those that do not fall, within the scope of the TBT Agreement raises important systemic issues'.[207] The contours of npr-PPMs within the TBT have thus not yet been determined. If one were to argue that a npr-PPM were to have a sufficient nexus with the product characteristics, despite the lack of physical impact, that measure would then be considered a technical regulation and fall within the scope of the TBT.

The second sentence of Annex 1.1, referring to among others labelling requirements, only refers to PPMs in general, without distinguishing between related and non-related PPMs. It can thus be accepted that for those requirements (labelling, packaging, symbols), it is irrelevant to what extent the production process impacts on the physical characteristics of final product in order to fall within the scope of the TBT Agreement.[208] Labelling requirements could be seen as a special regime, exceptionally bringing npr-PPMs within the scope of the TBT. As suggested by Marceau, the regime of labelling requirements can be more flexible as such measures do not completely restrict trade but essentially provide information.[209] By informing consumers, labels can be a first tool to distinguish between products based on their production methods.[210] Whether or not the labelling measure in question is inconsistent with the agreement then needs to be determined through an analysis of the substantive TBT obligations.

Article 2 TBT, governing technical regulations, contains the most important substantive requirements in the TBT Agreement with regard to PPMs. It includes the national treatment and MFN obligation in Article 2.1 TBT and the additional obligation to ensure that regulations are not more trade restrictive than necessary to fulfill a legitimate objective (non-exhaustive list) in Article 2.2 TBT. Article 2.1 TBT follows a similar approach to Article III GATT with regard

206 Ibid para.5.58.
207 Ibid para.5.69.
208 See for instance *US-Tuna II* on dolphin-safe labels for tuna products. AB Report *US-Tuna II* 2012; Philip I. Levy and Donald Regan, '*EC-Seal Products*: Seals and Sensibilities (TBT Aspects of the Panel and Appellate Body Reports)' 2015, 14 World Trade Review 337, 350; Norpoth (2013), 580.; Vranes(2009), 339.; Marceau and Trachtman (2002), 861.
209 Gabrielle Marceau, 'A Comment on the Appellate Body Report in *EC-Seal Products* in the Context of the Trade and Environment Debate' 2014, 23 RECIEL 318, 327.
210 See Laurens Ankersmit and Jessica Lawrence, 'The Future of Environmental Labelling: *US-Tuna II* and the Scope of the TBT' 2012, 39 Legal Issues of Economic Integration 127, 136.; Enrico Partiti, 'The Appellate Body Report in *US-Tuna II* and Its Impact on Eco-Labelling and Standardization' 2013, 40 Legal Issues of Economic Integration 73, 79.

to the national treatment obligation. It must be determined firstly, whether the relevant products are like, i.e. in a sufficiently strong competitive relationship.[211] If not, are imported products treated less favourably compared to domestic products, and does that impact stem exclusively from a 'legitimate regulatory distinction'?[212] The context of Article 2.1 TBT, among which Article 2.2 TBT and the preamble of the TBT Agreement, supports a finding that technical regulations may pursue legitimate objectives when they are not applied in a manner that would constitute a means of arbitrary or unjustifiable discrimination.[213] When ascertaining whether a technical regulation modifies the conditions of competition to demonstrate less favourable treatment, a panel must analyze whether the detrimental impact on the imported products stems exclusively from a legitimate regulatory distinction.[214] Article 2.2 TBT establishes an additional obligation that technical regulations shall not be more trade-restrictive than necessary to fulfil a legitimate objective. Article 2.2 TBT resembles the sub-paragraphs of Article XX GATT, with a (non-exhaustive in case of Article 2.2) list of objectives, as well as a necessity test.[215] Technical regulations have to conform to the requirements of Article 2.2 though, irrespective of whether a measure was found to be inconsistent with Article 2.1 TBT: Article 2.2 is thus not a justification provision for inconsistencies found with other substantive obligations. This distinction between Article XX GATT and Article 2.2 TBT may have important consequences for the burden of proof: the respondent bears the burden under Article XX GATT to justify its measures, whereas the complainant likely bears the burden under Article 2.2 TBT.[216] The TBT does not contain a general exceptions clause.

Thus, in summary, a textual analysis of Annex 1.1 TBT does not seem to support the inclusion of npr-PPMs within the scope of the TBT Agreement, unless they concern requirements such as labelling or packaging that serve to inform consumers. However, the AB in *EC-Seal Products* created an opening for npr-PPMs by referring to a 'sufficient nexus' between production and end product, without clarifying whether such nexus could only consist of a physical impact. If npr-PPMs would fall within the scope of the TBT Agreement, the measure needs to be consistent with Article 2.1 and 2.2 TBT.

211 AB Report *US-Clove Cigarettes* 2012, para.120.
212 Ibid para.271.
213 AB Report *US-Tuna II* 2012, para.213; AB Report *US-Clove Cigarettes* 2012, para.182; AB Report *US-COOL* 2012, para.240.
214 AB Report *US-Clove Cigarettes* 2012, para.182.
215 AB Report *US-Tuna II* 2012, para.322. As under Article XX GATT, environmental concerns are explicitly mentioned in Article 2.2 TBT.
216 Andrew Green, 'Climate Change, Regulatory Policy and the WTO: How Constraining are Trade Rules?' 2005, 8 Journal of International Economic Law 143, 174.

2.5 CONCLUSION

Throughout the years, environmental protection has received more and more attention in the WTO and is now recognized as a real and legitimate objective within international trade. The object of this study is to determine the degree of acceptance of trade measures that aim at environmental concerns located outside the territory of the regulating state through regulating the production process, and in particular npr-PPMs that have no impact on the physical characteristics of the product. Whereas chapter 3 will focus on the extraterritorial nature of PPMs, this chapter has outlined the legal challenges for npr-PPMs under the GATT.

The case law on PPMs is scarce and has focused on Article XX GATT. By finding that npr-PPMs fall outside the scope of Article III GATT because they do not regulate products as such, the GATT panels in the *Tuna-Dolphin* cases have strongly, but arguably falsely, influenced the PPM debate. The measures were found to be import bans inconsistent with Article XI GATT, steering the analysis to Article XX GATT. The AB in the landmark *US-Shrimp* was not in the position to clarify the relation between Articles III and XI GATT as Article III was not invoked by either of the parties. The relationship between Article III and Article XI with respect to npr-PPMs thus remains unclear, but could have important consequences for npr-PPMs. A measure falling within the scope of Article XI GATT is in violation of this Article, and will thus need to be justified under the general exceptions. Under Article III, though, an inconsistency is not automatically established. Firstly, consumer preferences could influence a finding of likeness if they demonstrate a sufficiently strong preference for one product over another based on the production method. Secondly, it could be argued that treatment less favourable can only be established when the detrimental impact is due to the foreign origin of the imported products. Through a TBT-inspired, revised 'aims-and-effects' test, regulatory purposes might be taken into account at the stage of determining treatment less favourable, whereby states can make regulatory distinctions based on legitimate regulatory objectives. Only when the conditions of likeness and treatment less favourable are fulfilled, will the analysis turn to Article XX GATT. A measure could be justified under Article XX if the conditions of the paragraphs and the *chapeau* are met.

3 The (extra)territorial reach of national measures under WTO law

3.1 Introduction

In the interplay between trade and non-trade concerns – whether trade measures can be used to address non-trade concerns such as human rights, environmental or social concerns – the issue of extraterritoriality or the 'extra-territorial effect' of trade measures needs to be addressed. Can states impose domestic policies on other states or foreign producers through trade measures? Can states regulate concerns located outside their territory?

Traditionally, trade measures protect concerns within the jurisdiction of a regulating state. For instance, products that may be harmful for consumers' health can be taxed differently or restricted for import. These measures inherently have an impact on choices made by producers in the exporting country, as they need to comply with the laws of the importing country in order to get access to the market. Because these measures regulate requirements on products within the market, and states are sovereign to regulate within their territory, these 'product-measures' do not raise jurisdictional issues. As has been explained in the previous chapter, WTO Members can also impose npr-PPMs, measures that focus on the production process and do not have an impact on the physical characteristics of the end product. Npr-PPMs can be criticized for their extraterritorial reach. For instance, a country could restrict imports of products produced by child labour or produced in an energy-intensive factory. The fact that a measure targets the production process abroad does not mean, however, that the objective of the measure (such as environmental protection) does not have a territorial link. In particular with regard to environmental protection, the concerns to be protected can very well be of a transboundary or global nature. Polluting activities can cause harm both within and outside the state of production (e.g. air pollution), or states may want to act in order to protection the global environment, even if the physical damage within its own territory is limited or non-existent. Extraterritoriality in the context of npr-PPMs can thus be understood in two ways: firstly, a PPM targets the production process and thus 'regulates' activities occurring abroad; secondly, a PPM may aim at protecting a non-trade concern located outside its own territory. Are both notions problematic, and if so, why?

The following chapter will seek to answer that question and identify the gaps in the existing legal analysis of extraterritorial trade measures under WTO law. Firstly, extraterritoriality in the context of international trade will be discussed; secondly, a closer look will be taken at the jurisdictional scope of different WTO agreements; and thirdly, WTO jurisprudence on jurisdiction and extraterritoriality will be analysed.

3.2 Extraterritoriality and international trade

3.2.1 Two notions of extraterritoriality

Under public international law, extraterritoriality refers to an exercise of jurisdiction (prescriptive, enforcement or judicial) outside a state's territory or jurisdiction.[1] In the context of international trade, it is difficult to define extraterritoriality as, by their very nature, trade measures have an impact or effect outside the borders of the country imposing such measures.[2]

A first notion of extraterritoriality relates to PPMs targeting foreign production processes. The measure will only be 'activated' when market access is sought, thus the regulating country is not actually prescribing foreign activity, but conditioning market access upon compliance with the prescribed rules. Enforcement of trade measures occurs within the territory of the imposing member, likely at the border. Producers abroad are still free to produce in their preferred or locally regulated way and their compliance with trade rules is in principle a matter of choice: they are free to choose their export markets. If they choose to export to a market, then they need to comply with that market's rules. Rather than regulating conduct abroad, 'extraterritorial' PPMs *affect* or *incentivize* conduct abroad.[3] They hence do not seem to be *prima facie* illegal under international law, or their illegality is at least questionable.[4] Non-compliance of a measure will lead to restricted or no market access to the imposing country, the effect of which will be more coercive the more important the market.[5] Extraterritorial trade measures might thus better be defined as measures with an extraterritorial effect or an extraterritorial reach.[6]

A second notion of extraterritoriality in a trade context refers to the location of the concern to be protected. Does the measure address environmental

1 See chapter 4 on extraterritoriality under international law.
2 AB Report *US-Shrimp* 1998, para.121.
3 Vranes(2009), 174. This will be further discussed in chapter 3: extraterritorial prescriptive rules might mandate conduct abroad, however, without the enforcement of such rules, their effect or legal power is seriously limited, if not non-existent. It is thus not surprising that the mere exercise of extraterritorial prescriptive jurisdiction is mostly perceived as harmless and does not meet strong opposition. It is rather where states aim to enforce their rules outside their territory that the sovereignty of other states is threatened.
4 Zleptnig(2010), 308.; See chapter 3 for a further analysis of extraterritoriality and public international law.
5 Ankersmit, Lawrence and Davies (2012), 25. See also chapter 6 for further comments on market power.
6 Meng(1994), 76.

concerns located outside its territory? In order to determine whether a npr-PPM can be accepted under WTO law with respect to its extraterritorial nature, the real issue is thus not the location of the production process, but the location of the concern. For instance, does a measure address the protection of threatened pandas or the pollution of a foreign lake, concerns that are clearly located outside the territory of the regulating state? Or is a measure addressing air pollution or the protection of sea turtle species that live both within and outside territorial waters, concerns that are of a transboundary nature? It is this notion that seems crucial to the assessment of extraterritoriality under WTO law. The question is whether WTO Members can only address concerns within their territory, or also concerns outside their territory, i.e. outside their territorial jurisdiction. A useful distinction introduced by Charnovitz refers to inward-looking measures for those npr-PPMs that address concerns within the regulating state, and outward-looking measures for those that address concerns outside the regulating state.[7]

3.2.2 Inward- and outward-looking measures

In addition to domestic concerns, trade measures can address concerns (at least partly) located outside a state's territory, whether of an environmental, social or moral nature. Countries could impose such 'extraterritorial' measures for a number of reasons, for instance to 'force' other governments to adopt higher environmental standards, to address moral concerns of consumers about environmental concerns, to avoid environmental harm domestically, or to protect the global environment – even without direct physical environmental effects on the territory of the regulating state.[8] In literature, a distinction is made in between inward- and outward-looking measures.[9] Does the measure aim at protecting concerns within the territory of the Member imposing the measure or does the measure aim at a concern outside that territory? In case of the former no problems seem to arise from a jurisdictional perspective, as those concerns fall within the territorial jurisdiction and sovereign rights of the regulating state – even though the measures might have an effect on other states' export, such as a ban on asbestos or a ban on hormones-injected beef.

More complex is when the measure is outward-looking, or when a measure is both outward- and inward-looking. For instance, an import ban on skins

7 Steve Charnovitz, 'The Moral Exception in Trade Policy' 1998, 38 Virginia Journal of International Law 689.

8 Bernhard Jansen and Mauritz Lugard, 'Some Considerations on Trade Barriers Erected for Non-Economic Reasons and WTO Obligations' 1999, 2 Journal of International Economic Law 530, 533.

9 See a.o. Charnovitz (1998).; Ankersmit, Lawrence and Davies (2012).

of seal pups because of public outrage at the killing of baby seals,[10] or a ban on animals pelts from countries where where 'internationally agreed humane trapping standards' have not been upheld,[11] a ban on products made by indentured child labour,[12] a ban on meat products unless the animals were slaughtered 'in a humane way',[13] a ban on tuna that is caught in a manner killing dolphins,[14] or a ban on shrimp harvested with nets that accidentally catch sea turtles.[15] Even though the reasons to address these concerns might be legitimate, the jurisdictional status of these trade measures is less clear, especially when a measure has both an inwardly- and outwardly-directed purpose. For instance, a US law forbidding interstate commerce of human organs has the inwardly-directed purpose of preventing an immoral market for organs within the US, while having the outwardly-directed purpose of protecting persons abroad from selling organs or be killed for organs.[16] Does an inward-looking link 'trump' the outward-looking purpose? When a measure is only outward-looking, a presumption of unacceptable extraterritoriality arises, as a territorial link between the state and the concern to be protected would be missing. The important questions thus relate to the location of the concern that is pursued through the measure: is there is a (physical) link still with the territory (protection of migratory turtles, protection of air) or not at all (protection of a threatened species elsewhere, protection of labour rights in the producing country)? Can a domestic moral objection suffice to establish a territorial link to protect environmental concerns located abroad? What about the global commons, whereby it is inherent that every state is affected and has an interest in their conservation?

While PPMs might have legitimate purposes, trade law also needs to respect the sovereignty of other WTO Members, as well as the multilateral nature of the trading system and of international law in general. The question thus is whether outward-looking and/or global concerns *could* and *should* be addressed through trade measures. International cooperation and agreements are the primary means to achieve common goals, such as protection of the global

10 Council Directive 83/129/EEC concerning the importation into Member States of skins of certain seal pups and products derived there from; see also Lüdwig Krämer, 'Environmental Protection and Trade – The Contribution of the European Union' in Rüdiger Wolfrum (ed), *Enforcing Environmental Standards: Economic Mechanisms as Viable Means?* (Springer 1996).

11 See Gillian Dale, 'The European Union's Steel Leghold Trap Ban: Animal Cruelty Legislation in Conflict with International Trade' 1996, 7 Colorado Journal of International Environmental Law and Policy 441. ; Charnovitz (1998), 23.; André Nollkaemper, 'The Legality of Moral Crusades Disguised in Trade Laws: An Analysis of the EC 'Ban' on Furs From Animals Taken by Leghold Traps' 1996, 8 Journal of Environmental Law 237.

12 Charnovitz (1998), 25.

13 21 U.S.C. §620(a) (1972).

14 See GATT Panel *US-Tuna (Mexico)* 1991; GATT panel *US-Tuna (EEC)* 1994.

15 AB Report *US-Shrimp* 1998.

16 Charnovitz (1998), 4.

environment. However, it is precisely where international agreements are lacking,[17] a well-known problem in the environmental realm, that unilateral trade measures addressing these concerns might stand out as an effective alternative. In that light, an outright prohibition of all npr-PPMs might be throwing out the baby with the bathwater. A more sensible approach is needed to deal with inward- and outward-looking trade measures.

3.3 THE (EXTRA)TERRITORIAL SCOPE OF THE WTO AGREEMENTS

3.3.1 Extraterritoriality under GATT

No territorial limitation or specification on the 'permissible jurisdictional reach'[18] is included in either the Marrakesh Agreement or the GATT. This means that the GATT does not explicitly limit the location of (environmental, social, political,…) concerns that WTO Members may address through trade measures. Based on the idea of reciprocal exchange of benefits,[19] WTO Members can unilaterally decide on their domestic policies and trade measures, as long as they comply with their WTO obligations. The question of which transactions can be regulated unilaterally is subordinate to that of how.[20] Under the GATT, as a first rule, trade measures have to comply with the non-discrimination obligations, that is to say, the principles of most-favoured nation and national treatment. If a measure complies with these obligations, a possible extraterritorial effect is ignored. If a measure is inconsistent with substantive obligations, because of, for instance, less favourable treatment of imported like products, a justification needs to be sought under the exception provisions, such as Article XX GATT.[21] Under this exhaustive list of general exceptions, WTO members can impose trade-restrictive measures on public policy grounds, as long as they meet the standard of necessity,[22] do not constitute 'a means of arbitrary or unjustifiable discrimination' or 'a disguised restriction on trade'.[23] WTO Members hence retain sovereignty over their national policy, as long as that policy is not extended through trade measures for protectionist

17 Such agreement can be lacking for a number of reasons: because it is not a priority to all states, because the resources or institutions are lacking to reach and administer such agreement, because international negotiations can take a long time etc. See chapter 6 for a discussion of extraterritoriality in the field of human rights and the matter of universal concerns. It is in the interest of trading partners to not impose absurd requirements, because without any reasonable ground the rule will most likely be considered inconsistent with WTO law, and trading partners might limit trade with the imposing country.

18 *See* Horn and Mavroidis (2008), 1108.

19 Preamble Marrakesh Agreement.

20 Horn and Mavroidis (2008), 1108.

21 See chapter 2.

22 See the different paragraphs of Article XX GATT for the required degree of necessity.

23 Chapeau Article XX GATT.

purposes. The GATT only sets out what is not allowed, rather than establishing common policies that all Members should follow.[24]

A few of the disputes that have come before panels and AB contained jurisdictional elements, but the jurisdictional (or territorial) limitation of the WTO Agreements has not yet been adequately addressed. This is partly due to the fact that the parties did not make a jurisdictional claim. Panels are limited to an objective assessment of what is before them,[25] and cannot add to the complainant's claims, based on the legal maxim *non ultra petita*.[26] Panels can, however, review the content of their own competence to adjudicate a dispute.[27] This means they can thus verify, on their own initiative, whether they have the competence required to decide the dispute (*Kompetenz-Kompetenz).*[28] In *Mexico-Corn Syrup (Article 21.5 US),* the AB stated that

> 'panels have to address and dispose of certain issues of a fundamental nature, even if the parties to the dispute remain silent on those issues. In this regard, we have previously observed that '[t]he vesting of jurisdiction in a panel is a fundamental prerequisite for lawful panel proceedings'. For this reason, panels cannot simply ignore issues, which go to the root of their jurisdiction – that is, to their authority to deal with and dispose of matters. Rather, panels must deal with such issues – if necessary, on their own motion – in order to satisfy themselves that they have authority to proceed.'[29]

In order to determine whether a panel should, for instance, address an issue of extraterritoriality which has not been raised by the complainant, the question is whether the issues are 'of such a nature that they could have deprived the panel of its authority to deal with a matter'.[30] It is unlikely that the extraterritorial nature of a concern would indeed be considered such a fundamental issue as to put into doubt a panel's jurisdiction. Rather, extraterritorial concerns would form part of an examination of the merits. The Dispute Settlement Understanding (DSU) states that panel and AB rulings and recommendations 'shall not nullify nor impair benefits accruing to any Member under those agreements, nor impede the attainment of any objective of those agreements'.[31] This implies that, in the absence of explicit claims on jurisdiction, it is still the panel's duty to ensure that the objectives of the WTO Agreements are attained, which can involve (and has involved in previous case law) the

24 Horn and Mavroidis (2008), 1109.
25 Article 11 DSU.
26 Horn and Mavroidis (2008), 1122.; WTO, *Mexico – Anti-Dumping Investigation of High-Fructose Corn Syrup (HFCS) from the United States* AB Report 2001, WT/DS132/AB/RW, para.36.
27 Horn and Mavroidis (2008), 1122.
28 Isabelle Van Damme, 'Inherent Powers of and for the WTO Appellate Body' 2008, 102 Graduate Institute Geneve CTEI Working Paper, 17.
29 AB Report *Mexico-Corn Syrup (Article 21.5 US)* 2001, para.36.
30 Ibid para.53.
31 Article 3.5 DSU.

question whether addressing concerns outside a Member's territory would preclude such attainment.

So far, the extraterritoriality discussion in GATT cases has taken place under Article XX GATT. This does not exclude the possibility of this issue arising under other provisions, for instance, in light of an 'aims and effects'-test or a regulatory purpose-test under a *de facto* discrimination examination under Article III GATT.[32]

3.3.2 Extraterritoriality under GATS

GATS is the GATT counterpart for trade in services. Like GATT, GATS does not contain any provision on its jurisdictional scope. Therefore, one can assume that by analogy with GATT, extraterritoriality would mainly be discussed under Article XIV GATS, the counterpart of the general exceptions of Article XX GATT. Article XIV GATS is rarely invoked and has only been the subject of dispute in *US-Gambling*[33] and in the recent *Argentina-Financial Services*.[34] Jurisdiction was not discussed in either case. The *chapeaux* of both articles are quasi identical, but Article XX GATT has ten exception grounds, whereas Article XIV GATS only contains five. While Article XIV GATS for instance contains an exception ground for public morals under paragraph XIV(a), and one for the protection of human, animal and plant life under paragraph XIV(b), there is no equivalent of Article XX(g), aiming at the protection of exhaustible natural resources. The fact that GATS contains fewer grounds could be due to the intangible nature of services. Still, there is no obvious reason why GATS would not contain a similar exception to Article XX(g) GATT. The GATS drafters must have deemed these interests to be irrelevant for GATS, but one could also wonder whether they may have intended to limit the environmental justification grounds for trade restrictive legislation under GATS as compared to GATT.[35] According to the Committee on Trade and Environment in a background paper on the environmental exceptions in Article XIV GATS, earlier drafts of the article did contain an exception for the 'conservation of exhaustible natural resources'.[36] Due to concerns over the 'apparent vagueness and scope of the term "environment"' and serious doubt as to whether this provision

32 See chapter 2.4.1.2.

33 WTO, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services* AB Report 2005, WT/DS285/AB/R.

34 WTO, *Argentina-Measures Relating to Trade in Goods and Services* AB Report 2016, WT/DS453/AB/R.

35 Thomas Cottier, Panagiotis Delimatsis and Nicolas Diebold, 'Article XIV GATS: General Exceptions' in Rüdiger Wolfrum, Peter-Tobias Stoll and Clemens Feinäugle (eds), *WTO-Trade in Services* (Martinus Nijhoff Publishers 2008) 297.

36 Committee on Trade and Environment, Environment and Services, WT/CTE/W/9, 8 June 1995, para.5.

would be of any use in the services trade context, it was left out of the final text.[37] Some of the delegations were of the opinion that intangible services themselves cannot be polluting, and only cause environmental damage in connection to trade in goods, under which case Article XX GATT would then apply, at least to the GATT violation.[38]

The question of an extraterritorial application of measures with an environmental objective is less relevant for services than it is for trade in goods and (foreign) production methods. Many trade measures on services will affect the provision of services within the regulating country, and any environmental impact will thus be (at least partly) territorial (at least partly inward-looking). A possible example is the EU's attempt to include emissions of foreign aviation into the European Trading System, which takes into account the existence of an equivalent climate change programme in the home country.[39] A hypothetical outward-looking example could be a requirement of CO2 neutrality for companies before they can supply cross-border services or compliance with corporate social responsibility norms in the worldwide activities of a company; however, such a requirement is challenging for reasons other than the extraterritorial effect, such as monitoring and enforcement. Other examples exist outside the environmental context, such as trade sanctions in the form of market access barriers to entities doing business with certain countries with the objective of democratizing political regimes, however, the possible justification of those measures is beyond the scope of the environmental focus of this thesis.

3.3.3 Extraterritoriality under the TBT Agreement

During the Tokyo Round (1979) a first attempt to deal with technical barriers to trade was made with the adoption of the GATT Standards Code. The aim of this code was twofold: on the one hand, the GATT parties wanted to achieve greater harmonization through international standards; while at the same time restricting the negative trade effects of national regulations and standards adopted by states pursuing non-trade concerns.[40] The current TBT Agreement was adopted in the Uruguay Round (1994), thereby further developing the original Standards Code.

Like GATT and GATS, the TBT is silent on its jurisdictional scope. As discussed in chapter 2, it is not clear whether npr-PPMs fall within the scope of the TBT Agreement. Apart from labelling and packaging requirements, there is no

37 Committee on Trade and Environment, WT/CTE/W/9, para.7-9.
38 Cottier, Delimatsis and Diebold(2008), 305.
39 See chapter 8 for the case-study on aviation in the EU ETS.
40 Zleptnig(2010), 367.

textual support in the Agreement to conclude that npr-PPMs could be within its scope. If they would be included, there is nothing to be found in the text or jurisprudence regarding a possible jurisdictional limitation to the exception grounds, similar to the legitimate regulatory distinctions that WTO Members can rely on in the context of Article 2.1 TBT. With regard to labelling, in the *US-Tuna II* case,[41] there was no discussion whether the US could apply dolphin-safe labels to imported tuna. The US differentiated between tuna products on the basis of the area where the tuna was harvested and based on the technique used for fishing. As the US measure mainly served to inform domestic consumers, the fact that the label also had as its objective the protection of dolphins outside US waters did not seem to matter.[42]

Article 2.4 TBT encourages the use of relevant international standards as a basis for Members' technical regulations, unless the international standards do not achieve the legitimate objective pursued. The question is when a standard can be considered relevant to the subject matter of the regulation at issue.[43] For purposes of the TBT Agreement, standards must be approved by an international body, membership of which must be open to the relevant bodies of at least all WTO Members.[44] This interpretation of relevant standards demonstrates that while the TBT Agreement does not impose a hard norm that Members must use the same standards, the use of common standards, adopted by consensus,[45] is highly encouraged. Thus, those PPMs falling within the scope of the TBT Agreement should be based on international standards, unless the regulating state can prove that these standards do not effectively achieve the legitimate objective pursued by the measure.[46]

3.3.4 Extraterritoriality under the SPS Agreement

The SPS Agreement provides a multilateral framework for the use of sanitary (human and animal life and health) and phytosanitary (plant life and health)

41 WTO, AB Report, *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, WT/DS381/AB/R, 2012.

42 WTO, *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products* Panel Report 2011, WT/DS381/R; AB Report *US-Tuna II* 2012.

43 Decision of the TBT Committee on Principles for the Development of International Standards, Guides and Recommendations with Relation to Articles 2, 5 and Annex 3 of the Agreement, G/TBT/1/Rev.9, 2000.

44 Annex 1.2 to the TBT Agreement; AB Report *US-Tuna II* 2012, para.359.

45 Explanatory Note to Annex 1.2 TBT Agreement.

46 Article 2.4 TBT reads as follows: 'Where technical regulations are required and relevant international standards exist or their completion is imminent, Members shall use them, or the relevant parts of them, as a basis for their technical regulations except when such international standards or relevant parts would be an ineffective or inappropriate means for the fulfilment of the legitimate objectives pursued, for instance because of fundamental climatic or geographical factors or fundamental technological problems.'

measures. The SPS was adopted to address non-tariff barriers resulting from the use of sanitary and phytosanitary measures at national level, and is a further development of Article XX(b) GATT.[47] SPS measures differ considerably throughout countries as each country decides on its own policies regarding the regulation of life, health and safety matters. Perception of risk and the regulatory response to that risk may vary greatly from country to country.[48] Article 1 SPS states that the Agreement applies to 'all sanitary and phytosanitary measures which may, directly or indirectly, affect international trade'. The scope of the SPS is further clarified in para.1 of Annex A, listing the possible SPS measures. In that list, there is a clear territorial reference in contrast to the other described agreements: every measure aims at the protection of health 'within the territory of the Member'. Outward-looking measures seem thus not to be covered under the SPS. A similar territorial reference cannot be found in the GATT, GATS or TBT.

3.4 Case law

While there is no official *stare decisis* doctrine in the WTO legal system, in practice, panels and the AB do refer to and rely on precedent.[49] Litigants will thus also rely on previous case law to persuade a panel or the AB. The jurisdictional scope of the GATT has been interpreted in different manners. In the following section, these disputes will be discussed, whereby a distinction will be made between the inwardly and outwardly direction of the trade measure at issue. It is generally accepted that the protection of concerns within a Member's territory falls within the scope of Article XX GATT. Disputes dealing with inwardly-directed measures will only be briefly mentioned, as it is clear from the panel and AB reports that jurisdiction did not play any significant role in these disputes: jurisdiction is barely, if at all, addressed by parties to the dispute or the adjudicating body. For that reason, this section will mainly focus on the cases dealing with outwardly-directed npr-PPMs, as they remain the object of controversy.

3.4.1 Inward-looking

Many of the trade measures seeking justification under Article XX GATT have an extraterritorial effect, as in that producers in exporting countries will need to adapt their production and processing methods in order to have access to the market of the imposing Member. As has been explained above, this can

47 Zleptnig(2010), 117.
48 Ibid 332.
49 WTO, AB Report, *United States-Final Anti-Dumping Measures on Stainless Steel from Mexico*, WT/DS344/AB/R, 2008, paras.158-162.

be the side-effect of a lawfully applied measure under WTO rules,[50] and it has been generally accepted in the case law that the measure could still – concerning its extraterritorial effect at least – be GATT-consistent. Where the inward-looking measures in the following examples of disputes were found inconsistent with a Member's WTO obligations, they failed on grounds other than jurisdiction.

In the first WTO case, *US-Gasoline*, Venezuela and Brazil challenged the US rules discriminating against gasoline imports.[51] The US Clean Air Act was adopted to improve air quality in the most polluted areas of the country by controlling toxic and other pollution caused by the combustion of gasoline manufactured in or imported into the US, whereby baseline levels on chemical characteristics of 1990 could not be exceeded. The rules to determine baseline levels were stricter for imported gasoline than for domestically refined gasoline. The US argued that the Act was aimed at the protection of clean air within the US. Whereas the panel found that the measures could not be justified under Article XX(g) as the measures did not 'relate to the conservation of exhaustible natural resources', the AB found that they did, but that the conditions of the chapeau were not fulfilled. The AB held that with regard to the baseline establishment rules for importers, alternative courses of action were available to the US, which had no discriminatory effect,[52] leading to a finding of unjustifiable discrimination. By protecting clean air *within* the US threatened by the combustion of gasoline, the measure was inward-looking.

In *Brazil-Retreaded Tyres*, Brazil imposed an import embargo on retreaded, but not on new tyres.[53] The measure was based on environmental and health concerns within Brazil, as retreaded tyres have a shorter lifespan than new tyres, and would hence lead to a faster accumulation of waste tyres, thereby providing breeding grounds for mosquito-borne diseases and causing difficult-to-control fires. Disposing of waste tyres furthermore had negative environmental consequences. Both the panel and the AB accepted the environmental arguments by Brazil, but as the measure discriminated between MERCOSUR and other countries, found the measures to be an arbitrary and unjustifiable discrimination.[54]

In *EC-Asbestos*, Canada challenged French legislation banning the sale of asbestos-containing construction material into its market because of public health reasons.[55] Canada argued that asbestos-containing and asbestos-free materials were like products and should thus receive the same regulatory treatment. The panel found the measure to be justified under Article XX(b)

50 AB Report *US-Shrimp* 1998, para.121.
51 AB Report *US-Gasoline* 1996.
52 Ibid p.25.
53 AB Report *Brazil – Retreaded Tyres* 2007.
54 Ibid para.233.
55 AB Report *EC-Asbestos* 2001.

after finding a violation of Article III:4 GATT, whereas the AB overturned the panel report and found that the products were unlike due to the health risks as a particular characteristic of asbestos.[56] The measure hence did not violate Article III:4 GATT.

In the case of *US-Gambling*, object of the challenge by Antigua and Barbados was a US decision to ban cross border gambling and betting services.[57] The US argued the ban was necessary under the public moral exception of Article XIV GATS because gambling posed an increased threat for organized crime, money laundering, fraud and other consumer crimes, public health and children and youth within the US.[58] The panel acknowledged that in principle gambling could fall within the public morals exception, and the AB recognized the measure to be necessary under Article XIV(a). The US failed, however, to prove that it did not arbitrarily discriminate against foreign gambling.

3.4.2 Outward-looking

The number of outward-looking adjudicated disputes remains very small. The first dispute dealing with an extraterritorial measure was the GATT case *Belgian Family Allowances*, in which the GATT panel did not address jurisdiction. The only other outward-looking disputes so far adjudicated are the well-known GATT *US-Tuna* disputes, and the WTO cases *US-Shrimp*, *EC-Tariff Preferences* and *EC-Seal Products*. A couple of cases have not become subject of adjudication, as for instance a mutually agreed solution was reached. Members announced they were considering resorting to WTO litigation, but did not follow through,[59] or a request for the establishment of a panel was received (e.g. the EU's request with regard to a Massachusetts law prohibiting government procurement of goods and services from any person doing business with Burma[60] or the EU's request with regard to the US Cuba Act regarding trade sanctions against Cuba),[61] but a mutually agreed solution was found in these cases leading to the suspension of the panels' work. Seen the political sensitivity of these measures with an extraterritorial effect, one can assume that states prefer to settle these conflicts in diplomatic negotiations, rather than having a technical trade panel decide on it.

56 Ibid para.116.
57 WTO, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services* Panel Report 2004, WT/DS285/R.
58 Ibid paras.3.15.
59 See for instance on the EU ban on fur from animals caught with leghold traps, Dale (1996); Charnovitz (1998), 23; Nollkaemper (1996). States also threatened to bring a claim to the WTO for the EU Aviation Directive, see chapter 7 on the EU ETS and Aviation.
60 United States – Measure Affecting Government Procurement, WT/DS88.
61 United States – The Cuban Liberty and Democratic Solidarity Act, WT/DS38.

Through Article 3.2 DSU, the WTO agreements are generally interpreted following the general international rules of treaty interpretation laid down in the VCLT.[62] While not all WTO Members are parties to the VCLT, the AB has recognized the status of VCLT rules on treaty interpretation (Articles 31 and 32) as customary international law.[63] Under Article 31(1) VCLT, a treaty is to be interpreted in good faith. Any interpretation must begin with an examination of the ordinary meaning of the words, read in their context, and in the light of the object and purpose of the treaty involved.[64] The AB has stated that the object and purpose of the treaty as a whole will be taken into account where the meaning of the text itself and in its context is equivocal or inconclusive, or where further confirmation of the correctness of the reading of the text is desired.[65] When the means of Article 31 VCLT do not resolve a problem of interpretation, Article 32 VCLT provides for supplementary tools of interpretation, including the *travaux préparatoires* and the circumstances of the treaty's conclusion. In the following discussion of case law, one will notice that interpretations of the territorial limitation of Article XX GATT have differed over panels and time, and no generally accepted position on (extra)territoriality has been articulated so far.

3.4.2.1 Belgian Family Allowances

The first dispute under GATT dealing with an outward looking measure was the *Belgian Family Allowances* case in 1952.[66] Under this dispute dealing with a most-favoured-nation (MFN) violation, the jurisdictional issue was not addressed, nor did Belgium argue that its measure was justified under Article XX. The case, a very short 1952 GATT report, was the first case addressing the PPM issue in the context of Article I GATT (or GATT in general). Norway and Denmark alleged a violation by Belgium of the MFN principle in Article I GATT, as a tax exemption was given to Sweden and not to them, while the same conditions in all three Scandinavian countries prevailed. At issue was a Belgian

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62 Vienna Convention on the Law of Treaties, 1969, entry into force 27 January 1980, 8 I.L.M. 679. WTO, AB Report, *United States – Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R, 1996, p.16.

63 AB Report *Japan-Alcoholic Beverages II* 1996, p.10.

64 WTO, *European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries* AB Report 2004, WT/DS246/AB/R, para.90. See also Isabelle van Damme, 'Treaty Interpretation by the WTO Appellate Body' 2010, 21:3 European Journal of International Law 605-648; James Cameron and Kevin Gray, 'Principles of International Law in the WTO Dispute Settlement Body' 2001, 50 International and Comparative Law Quarterly 255.

65 See e.g. AB Report *US-Shrimp* 1998, para 114; AB Report *EC-Asbestos* 2001, para.88; AB Report *Japan-Alcoholic Beverages II* 1996, para.106; AB Report *Japan – Measures Affecting the Importation of Apples* 2003, WT/DS245/AB/R, paras 179, 184; AB Report *China – Measures Affecting Imports of Automobile Parts* 2008, WT/DS339/AB/R, para. 151. See Van Damme (2010) 631.

66 GATT, *Belgium – Family Allowances* GATT Panel Report 1952, G/32 – BISD 1S/59.

law that charged a levy on foreign goods purchased by Belgian government bodies, which was used to broaden the revenue base for Belgium's family allowance program which had until then been funded primarily through a payroll tax on Belgian employers.[67] Countries that applied a system of family allowances similar to the Belgian system were exempted from this tax. Sweden received the exemption, while having a similar family allowances program as Norway and Denmark, who did not get the exemption.

The GATT panel found a violation of Article I on the mere ground that Belgium treated goods differently based on country of origin, and stated that an exemption had to be granted unconditionally to all GATT contracting parties.[68] The panel did not look into the Norwegian or Danish policies. No justification through Article XX was argued.[69] Apart from finding an inconsistency with Article I, the GATT panel added that the Belgian law 'was based on a concept which was difficult to reconcile with the spirit of the General Agreement',[70] without, however, qualifying what was meant exactly with that concept: PPMs, the lack of a link between the product and the purpose of the measure, extraterritorial application or a coercive effect on other governments?

This early GATT dispute is a clear example of an outward looking measure, whereby Belgium attempted to influence other Members' family allowances system. The purpose of the Belgian measure was not related at all to the end product. It is unknown whether, if the measure had been related to the product, Belgium would have invoked Article XX GATT or whether the panel would have accepted product-related PPMs under Article I.[71] Remarkable is that Norway and Denmark did not contend that the system of exemptions was an Article I violation, but they argued that they deserved the exemption as much as Sweden did.[72] They thus seemed to accept the existence (and GATT-consistency) of 'extraterritorial' conditions as such. It seems as if all parties to the dispute believed that the practice of linking a tax to the government policy in the exporting country would be GATT-consistent, as long as the conditions upon which the tax would be levied were applied even-handedly to all GATT parties. While the case could have been important in

67 Steve Charnovitz, '*Belgian Family Allowances* and the challenge of origin-based discrimination' 2005, 4 World Trade Review 7, 8.

68 GATT Panel Report *Belgium – Family Allowances* 1952, para.3.

69 According to Charnovitz, even if Belgium would have invoked Article XX as a defense – even under current WTO jurisprudence – Belgium would still have lost the case. (see Charnovitz (2005), 7.)

70 GATT Panel Report *Belgium – Family Allowances* 1952, para.8.

71 This was later clarified by the panel in *Indonesia-Autos* (WT/DS54/R, 1998, para.14.143) finding that an advantage under Article I GATT could not 'be made conditional on any criteria that is not related to the imported product itself'. The panel in *Canada-Autos (*WT/DS139/R, 2000, para.10.23) explained unconditionally as 'the extension of [an advantage under Article I:1] may not be made subject to conditions with respect to the situation or conduct' of the exporting country.

72 Charnovitz (2005), 12.

determining the jurisdictional scope of trade measures and npr-PPMs, it is now mainly remembered for its very rigorous interpretation of Article I GATT while leaving important issues unresolved.

3.4.2.2 GATT US-Tuna (Mexico)

As seen in the previous chapter, in 1991 the trade-environment debate was brought into the spotlights by the (unadopted) GATT *Tuna-Dolphin* reports. It was the first time that the lawfulness of trade measures with an extraterritorial focus or effect was addressed by a GATT panel. The United States prohibited the import of tuna that was caught in a way that resulted in the incidental killing of dolphins. In order to have access to the US market, the US measure required that other states prove that they protected dolphins through systems comparable to the US system. In the first case Mexico challenged the provision on the grounds that its tuna exporters were negatively affected. The GATT panel found that the measures violated Article XI GATT and thus needed to be justified under Article XX GATT. The important question was whether Article XX could be applied for non-economic objectives outside the territory of the imposing Member. The panel observed that previous panels had interpreted Article XX narrowly, as a limited and conditional exception from obligations under other provisions of the GATT.[73]

The panel looked at the drafting history of Article XX(b) and came to the conclusion that the concerns of the drafters focused on objectives within the jurisdiction of the importing country.[74] The grounds upon which the panel came to that conclusion are rather questionable, though. When the GATT 1947 was drafted, there was very little discussion about its scope, probably because the exceptions were very similar to what could be found in a number of bilateral treaties, as well as in the International Trade Organization (ITO) Charter.[75] The panel noted that the proposal for Article XX(b) originated from the Draft ITO Charter of the ITO. The exception in the New York Draft read: 'For the purpose of protecting human, animal or plant life or health, if corresponding domestic safeguards under similar conditions exist in the importing country'.[76] The latter part of the proviso was later dropped as unnecessary. According to the panel, this proviso indicates that the drafters focused on life or health of humans, animals or plants within the jurisdiction of the importing country,[77] even though it seems more logical that the refer-

73 GATT Panel *US-Tuna (Mexico)* 1991, para.5.22.
74 Ibid para.5.26.
75 Rainer Grote, 'Article XXIII GATS' in Rüdiger Wolfrum, Peter-Tobias Stoll and Clemens Feinäugle (eds), *WTO-Trade in Services* (Martinus Nijhoff Publishers 2008) 502.
76 Article 37 1947 New York Draft Charter of the International Trade Organization
77 GATT Panel *US-Tuna (Mexico)* 1991, para.5.26.

ence to the importing country applies to the corresponding domestic safeguards.

Furthermore, the panel might have erred by only looking at the New York draft of the ITO Charter, as the legislative history goes back to the negotiations of the International Convention for the Abolition of Import and Export Prohibitions and Restrictions 1927,[78] which may not support the panel's interpretation. The general exceptions were negotiated for the 1927 Convention first and were later copied by the ITO Charter.[79] Article 4 of the 1927 Convention contained an exception for trade restrictions imposed for the protection of public health, animals and plants, without any reference to a territorial limitation. Much of the wording of Article 4 is to be found in Article XX GATT today. There is no apparent evidence that Article 4 was limited to a strictly territorial interpretation. The US for instance had 'extraterritorial' import prohibitions in effect at the time, such as an import ban on certain whale species, and one can thus assume that they perceived the text of Article XX as including such trade measures.[80]

With regard to Article XX(g), creating an exception for measures relating to the conservation of exhaustible natural resources when made effective in conjunction with restrictions on domestic production, the panel referred to a previous GATT panel interpretation of 'in conjunction with' domestic production restrictions as 'primarily aimed at rendering effective these restrictions'.[81] The panel then noted that 'a country can effectively control the production or consumption of an exhaustible natural resource only to the extent that the production or consumption is under its jurisdiction' and suggested that Article XX(g) was intended to permit Members to adopt trade measures primarily aimed at rendering effective restrictions on production or consumption within their jurisdiction.[82] While it is logical to conclude that domestic restrictions will take place within a Member's jurisdiction, this reading of the second part of Article XX(g) in no way implies that the exhaustible natural resources as object of conservation policies also need to be located within that jurisdiction.

78 Not entered into force.
79 Salman Bal, 'International Free Trade Agreements and Human Rights: Reinterpreting Article XX of the GATT' 2001, 10 Minnesota Journal of International Law 62, 104.
80 Charnovitz (1992), 209.
81 GATT, *Canada – Measures Affecting Exports of Unprocessed Herring and Salmon* GATT panel 1988, L/6268 – 35S/98, para.4.6. This interpretation has been rejected by the AB in China-Raw materials, whereby the AB stated that Article XX(g) permits trade measures relating to the conservation of exhaustible natural resources if such trade measures *work together with* restrictions on domestic production (WTO, *China – Measures Related to the Exportation of Various Raw Materials* AB Report 2012, WT/DS394/AB/R, para.360.)
82 GATT Panel *US-Tuna (Mexico)* 1991, para.5.31.

The panel furthermore expressed its concern about an 'extra-jurisdictional interpretation'[83] of Article XX, as such interpretation would allow for unilateral measures that would jeopardize the multilateral framework of the GATT.[84] The US failed to demonstrate that it had exhausted all other reasonable options, such as the negotiation of an international agreement.[85] As has been discussed above, unilateralism is related but not identical to extraterritoriality. The panel's concern seems to have been focused more on the unilateral nature of the measure, rather than the extraterritorial nature of it.

3.4.2.3 GATT US-Tuna (EEC)

In the second *Tuna* case, the same US measures were challenged by the EEC and the Netherlands. The GATT panel followed the first GATT panel's reference to the term 'extra-jurisdictional' and developed that argument more explicitly. Since it did not find any interpretative aid in the wording of the relevant provisions, the panel looked at the context of the other paragraphs of Article XX, such as Article XX(e) relating to products of prison labour (abroad) and observed that it 'could not be said that the GATT proscribed in an absolute manner measures that related to things located, or actions occurring, outside the territorial jurisdiction of the party taking the measure'.[86] The panel agreed with the US that Article XX(g) could in principle apply to measures aiming at the protection of exhaustible natural resources outside the territory of a state, insofar as international law permits governments to exercise jurisdiction over their nationals and vessels outside their territory.[87] According to the panel, the drafting history does not support any other conclusion.[88] Measures could apparently be extra-territorial but not extra-jurisdictional.[89]

The GATT panel then investigated whether trade measures could be allowed to have a coercive effect on other states to change their policy in respect of the exhaustible natural resource in question.[90] It concluded that in the light of the object and purpose of the GATT, allowing such measures would seriously impair the multilateral framework of the GATT.[91] Measures taken so as to force other countries to change their policies cannot be seen as to be 'primarily aimed at' the protection of natural resources, because they were too indirect,

83 The panel did not use the term 'extraterritorial' but referred only to 'extra-jurisdictional' application of Article XX, without explaining the relevant distinction (if any distinction) between the two.
84 GATT Panel *US-Tuna (Mexico)* 1991, para.5.27; 5.31.
85 Ibid para.5.28.
86 GATT panel *US-Tuna (EEC)* 1994, para.5.16.
87 Ibid para.5.20.
88 Ibid.
89 Ilona Cheyne, 'Environmental Unilateralism and the WTO/GATT System' 1995, 24 Georgia Journal of International and Comparative Law 433, 453.
90 GATT panel *US-Tuna (EEC)* 1994, para.5.24.
91 Ibid para.5.26.

and hence the measures could not be justified under Article XX(g).[92] The panel followed a similar reasoning regarding Article XX(b) and found that measures aiming at the protection of human or animal life outside the jurisdiction of the imposing member did fall within the scope of the provision,[93] in contrast to the findings of the first *Tuna* GATT panel. In its consideration of 'necessary', the panel stated that measures that force other states to change their policies cannot be considered necessary. It accepted an earlier definition of 'necessary' to the effect that there must be no less trade-restrictive alternative measure consistent with the GATT available,[94] but did not exactly follow that definition, as again its argument was based entirely on the directness of the measures. The panel found the import restrictions to be too indirect, as they could not, by themselves, achieve the objective sought since that was dependent upon a change in policies and practices of other countries.[95] Since the US measures were coercive and insufficiently direct, they could not be justified under Article XX(b).[96] The panel hereby implied that all 'coercive' measures or all PPM-measures, as they relate to a process or production beyond the territory of a state, could hence never be necessary or relate to their objective: by their nature they would be too indirect as the achievement of their objective depends upon the change of practices in exporting countries. Bartels has correctly pointed out that the panel 'mistook an effect of an excess of jurisdiction (coercion) for the rules governing the proper exercise of jurisdiction in the first place'.[97] While the panel indicated the importance of rules of legislative jurisdiction, it (as well as the first *Tuna* panel) failed to correctly apply them to the case at hand.

The panel also shortly referred to the interpretative rules of Article 31(3) VCLT, according to which (a) subsequent agreements and (b) subsequent practice between the parties can be taken into account.[98] The panel observed that the treaties cited by the parties to the dispute[99] were bilateral or plurilateral and could hence not apply to the interpretation of the GATT. There are currently no agreements ratified by all GATT parties that establish clear practice of extraterritorial trade-restrictive measures. Even though the panel did not address Article 31(3)(c) VCLT, referring to the 'relevant rules of international

92 Ibid para.5.27.
93 Ibid para.5.33.
94 Ibid para.5.35.
95 Ibid para.5.23.
96 Ibid para.5.39.
97 Lorand Bartels, 'Article XX of GATT and the Problem of Extraterritorial Jurisdiction: The Case of Trade Measures for the Protection of Human Rights' 2002, 36 Journal of World Trade 353, 390.
98 GATT panel *US-Tuna (EEC)* 1994, para.5.19. Article 31(3) VCLT will further be addressed at 7.2.3.
99 E.g. Ibid para.3.21. referring to the Convention Relative to the Preservation of Fauna and Flora in their Natural State, 1993; or Convention on Nature Protection and Wild Life Preservation in the Western Hemisphere, 1940.

law applicable between the parties', it might be useful to complete the reasoning. Article 31(3)(c) does not make other norms of international law directly *applicable* to the dispute, but allows other norms to be used to give proper meaning to the provision. The following question is of importance for that interpretation: which rules can be taken into account as being 'applicable between the parties'? It has been argued that only those treaties that have identical membership as the WTO agreements can be taken into account.[100] This approach has also been adopted by the panel in *EC-Biotech*, stating that,

> 'it makes sense to interpret Article 31(3)(c) as requiring consideration of those rules of international law which are applicable in the relations between all parties to the treaty which is being interpreted. Requiring that a treaty be interpreted in the light of other rules of international law which bind the States party to the treaty ensures or enhances the consistency of the rules of international law applicable to these States and thus contributes to avoiding conflicts between the relevant rules.'[101]

This approach, while logical, creates significant difficulty, as there are hardly any treaties with identical membership to the WTO. By contrast, the argument has been made that the term 'parties' in Article 31(3)(c) refers to the parties to the dispute.[102] If that were to be the case, then any treaty concluded between the parties to a dispute could be invoked for the interpretation of WTO law. The problem, however, is that such interpretation would only be valid for those parties, and could not count as a legitimate interpretation for all other WTO Members who would, through the interpretation of WTO law, be indirectly bound to a treaty they have never agreed to. In *US-Shrimp* the AB did rely on other agreements such as CITES or the CBD to interpret Article XX GATT, although not all parties to the dispute – let alone all parties to the GATT – were parties to these agreements.[103] Pauwelyn has suggested a middle approach, focusing on the common intentions of all parties. Rather than being formally and legally bound, these common intentions refer to the at least implicit acceptance or tolerance of norms by all WTO parties.[104] Nevertheless, how can one deduce such common intentions of all parties? Would it suffice if a large number of Members support a certain view? What if a large number of small countries are party to an agreement, but a large country is not? Should that make a difference?

100 Zleptnig(2010), 71.
101 Panel report *EC-Biotech* 2006, para.7.70.
102 Zleptnig(2010), 73; Marceau (1999), 124; Campbell McLachlan, 'The Principle of Systemic Integration and Article 31(3)(c) of the Vienna Convention ' 2005, 54 International and Comparative Law Quarterly 279.
103 AB Report *US-Shrimp* 1998, paras.130-132.
104 Pauwelyn (2001), 576.

For instance, an MEA calling for the imposition of certain trade restrictions, ratified by approximately half of the WTO membership, may constitute significant support that a trade restrictive measure in accordance with that agreement could indeed be necessary for the protection of human health under Article XX(b) GATT.[105] There are a number of conventions, which are widely ratified, where an extraterritorial application of trade measures is employed for the protection of global environmental interests, such as the 1989 Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal,[106] prohibiting exports and imports of hazardous and other wastes by parties to the Convention to and from non-party states; or the 1973 CITES,[107] regulating imports and exports of certain species of animals and plants. If it could be established that the trade-related aspects of these treaties are tolerated by a sizeable number of WTO Members (e.g. half of the WTO Members), these treaties could support an extraterritorial interpretation of Article XX GATT. However, the size of the membership cannot be the decisive factor, as the agreements' relevance to the subject of the dispute as well as the content of the rules need to be taken into consideration when determining whether non-WTO rules can help to interpret WTO provisions.[108]

3.4.2.4 US-Shrimp

US-Shrimp is a case very similar in facts to the GATT *US-Tuna* disputes.[109] Instead of tuna and dolphins, in the dispute at hand the US banned the import of shrimp not harvested in a way that was certified as complying with US standards to protect endangered sea turtle. Certifications were issued to countries that had essentially the same protective policy in place, and little leeway was left for alternative programs. The panel report was appealed before the AB in the main proceedings, with a follow-up of both panel and AB proceedings under Article 21.5 DSU.

The panel emphasized the multilateral nature of the WTO when examining the *chapeau* of Article XX GATT.[110] Unilateral measures would lead to an abuse of the exceptions contained in Article XX and would undermine the WTO trading system.[111] With regard to the 'extra-jurisdictional application of US law' the panel considered not the effect outside the jurisdiction of the US as problematic, but when a measure 'operates so as to affect other governments'

105 Ibid 572.
106 *Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal*, March 22, 1989, 28 ILM 649.
107 CITES, 1973.
108 Marceau (1999), 124.
109 AB Report *US-Shrimp* 1998.
110 WTO, *United States – Import Prohibitions of Certain Shrimp and Shrimp Products* Panel report 1998, WT/DS58/R, para.7.43.
111 Ibid para.7.44.

policies in a way that threatens the multilateral trading system'.[112] The panel and later the AB emphasized that negotiations of international agreements and standards are desirable. The panel, however, did not address the difficulty with negotiating such agreements, nor that in the absence of multilateral agreement or binding international standards, unilateral measures might be a more result-oriented solution. International environmental law tends to articulate broad principles rather than concrete compliance measures and that very weakness might necessitate the unilateral adoption of specific implementation measures.[113] The panel started its analysis of Article XX with the *chapeau* and because of the unilateral and coercive nature of the US measure did not examine the paragraphs.

The AB did not agree with the panel's finding on unilateralism under the *chapeau* and stated that

> 'conditioning market access to a Member's domestic market on whether exporting Members comply with, or adopt, a policy or policies unilaterally described by the importing Member may, to some degree, be a common aspect of measures falling within the scope of one or another of the exceptions (a) to (j) of Article XX.'[114]

Requiring compliance from exporting countries does not render a measure a priori incapable of justification under Article XX, as this would render the specific exceptions of Article XX inutile.[115] After stating that the panel incorrectly reversed the order of the two-tier test of Article XX, the AB continued the analysis under Article XX(g). When considering the location of the turtles, the AB refrained from taking any stand on the jurisdictional limitation of Article XX(g), stating that

> '[w]e do not pass upon the question of whether there is an implied jurisdictional limitation in Article XX(g), and if so, the nature or extent of that limitation. We note only that in the specific circumstances of the case before us, there is a sufficient nexus between the migratory and endangered population involved and the United States for purposes of Article XX(g).'[116]

Even though the AB did not say it in that many words, this sufficient nexus with sea turtles allowed the US to impose these largely outward-looking measures. Some of the turtles migrating through US waters some of the time, sufficed to establish a nexus. Did the AB mean to articulate a territorial requirement, or could such a nexus for instance also be of a moral nature? As the

112 Ibid para.7.51.
113 Chantal Thomas, 'Should the World Trade Organization Incorporate Labor and Environmental Standards?' 2004, 61 Washington and Lee Law Review 347, 365.
114 AB Report *US-Shrimp* 1998, para.121.
115 Ibid.
116 Ibid para.133.

AB did not specify which criteria need to be fulfilled in order to establish a sufficient nexus, this rather broad concept is open for interpretation.[117]

The AB then referred to the possible coercive effect of the US measure when dealing with the *chapeau*, after having found that the conditions of Article XX(g) had been complied with:

> 'Perhaps the most conspicuous flaw in this measure's application relates to its intended and actual coercive effect on the specific policy decisions made by foreign governments (emphasis added). [The measure] in its application, is, in effect, an economic embargo, which requires all other exporting Members, if they wish to exercise their GATT rights, to adopt essentially the same policy (…) as that applied to (…) US domestic shrimp trawlers (original emphasis).'[118]

The AB's interpretation of coercive effect differs from the GATT panel's interpretation in *US-Tuna.* The AB in *US-Shrimp* could not accept that exporting countries *had to adopt the exact same policy*, rather than adopting a policy of a comparable effect, with a degree of discretion or flexibility; whereas according to the GATT panel's reasoning in *US-Tuna*, *any measure with extraterritorial effect* was seen as coercive and sufficient to fall outside the scope of Article XX. The AB eventually found the US measure to entail arbitrary discrimination because of the rigidity and lack of policy discretion for the exporting countries, but did, in principle, accept the fact that WTO Members can impose unilateral measures aiming at concerns located at lest partly outside their territory (when a sufficient nexus can be found). The fact that the AB emphasized what it did not decide confirms this point:

> 'And we have not decided that sovereign states should not act together bilaterally, plurilaterally or multilaterally, either within the WTO or in other international fora, to protect endangered species or to otherwise protect the environment.'[119]

The preference for multilateral action over unilateral action was reiterated in both the panel report and the AB report in the Article 21.5 DSU follow-up of the case. However, the AB was also clear on the point that the conclusion of an international agreement cannot in and of itself be a requirement for justification under Article XX GATT:[120]

> 'WTO Members do have an obligation to seek in good faith multilateral solutions, but if the failure to conclude such agreement would impede justification under

117 See also chapter 3 on the territoriality principle under international law.
118 AB Report *US-Shrimp* 1998, para.161.
119 Ibid para.185.
120 AB Report *US-Shrimp (Article 21.5 Malaysia)* 2001, para.124.

> Article XX, this would imply that every other WTO Member has, in effect, a veto over that Member's fulfillment of its WTO obligations.'[121]

The protection of sea turtles was accepted as a legitimate environmental aim. The AB stated that the words of Article XX must be read by a treaty interpreter 'in the light of contemporary concerns of the community of nations about the protection and conservation of the environment'.[122] The AB hence recognized that the notion of exhaustible resources under Article XX(g) must not be interpreted in light of the original intent of the GATT parties, but in light of present realities and of the emerging necessity to cooperate in the enforcement of conservation of endangered species.[123] This evolutionary interpretation of a changed context is particularly important in the discussions about the environment as environmental concerns are by their nature not limited to territorial borders: not only endangered species, but also biodiversity and climate change have impact beyond borders.

3.4.2.5 US-Tuna II (Mexico)

The most recent *US-Tuna II (Mexico)* dispute dealt with non-discrimination under the TBT. The measure at issue established conditions for use of a 'dolphin-safe' label on tuna products and conditions for access to that official label. The US differentiated between tuna products on the basis of the area where tuna was harvested and based on the technique used for fishing. While the most important part of the judgment relates to the inclusion of regulatory purpose under the 'less favourable treatment' test of Article 2.1 TBT,[124] the case does raise some questions with regard to the extraterritorial scope. The terms extraterritoriality or extra-jurisdictionality have not been used by the panel nor the AB, but Mexico referred in its claim to the 'coercive objective'[125] of the US measure. The AB accepted the US regulatory objective of its measures as legitimate: 'contributing to the protection of dolphins, by ensuring that the US market is not used to encourage fishing fleets to catch tuna in a manner that adversely affects dolphins'[126] and did not react to the claim of coercive-

121 Ibid para.123.
122 AB Report *US-Shrimp* 1998, para.129.
123 Ibid para.130.; see also Francesco Francioni, 'Environment, Human Rights and the Limits of Free Trade' in Francesco Francioni (ed), *Evironment, Human Rights and International Trade* (Hart Publishing 2001).
124 See chapter 2.
125 AB Report *US-Tuna II* 2012, para.335.
126 Ibid para.337.

ness. Mexico did not come back to this claim in the compliance proceedings to the case.[127]

What does this non-reaction by the AB (and the panel) mean? Pauwelyn wondered whether this meant that WTO Members can be legitimately concerned about the welfare of animals outside their own territory, 'to the extent that the action is limited to avoiding that their own domestic market is used to encourage adversely affecting those animals'.[128] Does this mean that 'extraterritorial' trade measures would now be legitimate and 'territorial' because the imposing Member argues that it does not want its own domestic market to be used to encourage activities it cannot support because of its public policy grounds? Restricting or prohibiting access to a domestic market is exactly the leverage states have through trade measures, and if states use that leverage, is there not always a coercive intention or effect? If the above stated reasoning is indeed what the AB meant, then the discussion on many cases with an extraterritorial element would seem to be closed, as all measures conditioning access to a domestic market through regulatory purposes would be accepted. It could also be, however, that as the measure dealt with a labelling requirement that served to inform domestic consumers, that that 'domestic' objective sufficed to no longer consider the 'extraterritorial effects'. Furthermore, labelling requirements can be subject to a more flexible interpretation as their trade-restrictive effect is smaller compared to other trade restrictions.[129] If non-product-related process requirements can be considered to fall within the scope of the TBT Agreement,[130] a restrictive interpretation of the reach of the labelling measure would make no sense. Npr-PPMs will, by their very nature, have an effect on processes occurring outside the territory of the importing state. Nevertheless, in light of the sensitive nature of the topic, further case law clarifying the jurisdictional reach of the TBT and the coerciveness of measures is to be awaited.

3.4.2.6 EC-Seal Products

In the *EC-Seal Products* dispute, Norway and Canada claimed that the EU's ban on seal products was in violation with the GATT and the TBT. Three exceptions limit the scope of the ban: the import and sale of seal products resulting from traditional hunts by Inuit or other indigenous communities that contribute

127 Panel Report, *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products, Recourse to Article 21.5 DSU by Mexico* 2015 WT/DS381/RW; AB Report, *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products, Recourse to Article 21.5 DSU by Mexico* 2015 WT/DS381/AB/RW.

128 Joost Pauwelyn, International Economic Law and Policy blog, 22 May 2015, at http://worldtradelaw.typepad.com/ielpblog/2012/05/index.html.

129 Marceau (2014), 327.

130 See chapter 2.

to their subsistence (the indigenous exception);[131] the importation of goods purchased abroad by travellers for casual or non-commercial use (the travellers' exception);[132] and products resulting from hunting conducted for the sustainable management of marine resources can be placed on the market on a not-for-profit-basis (the MRM exception).[133] Seal products originate both from within and outside the EU, and the EU ban was phrased in a neutral way, giving the measure both an inward- and outward-looking element. The arguments of the parties did not focus on the possible extraterritorial aspect and the panel did not address the issue.[134] Neither did the AB, even though it made the following statement, recognizing the importance of clarity on the (extra)territorial scope of Article XX:

> 'As set out in the preamble of the Basic Regulation, the EU Seal Regime is designed to address seal hunting activities occurring 'within and outside the community' and the seal welfare concerns of 'citizens and consumers' in EU member states. The Participants did not address this issue in their submissions on appeal. Accordingly, while *recognizing the systemic importance of the question of whether there is an implied jurisdictional limitation* in Article XX(a), and, if so, the *nature and extent of that limitation*, we have decided in this case not to examine this question further.'[135] (emphasis added)

The EU had invoked the public morals exception of Article XX(a) GATT to justify its import ban, because of the moral concerns of EU citizens about seals' welfare. As with the labelling issue in *US-Tuna II*, it could be argued that the territorial link of moral concerns *within* the territory of the EU (the morals of EU citizens) 'trumps' the extraterritorial element of seals outside Europe. The question is then whether the public morals exception could then be used to circumvent possible territorial limitations of the environmental exceptions?[136] The *Seals* case has not clarified the debate on jurisdiction and extraterritoriality, so further case law on this issue, as well as on the relationship between the public morals exception and the environmental exceptions, is to be awaited.

131 European Commission Regulation 737/2010 (2010 OJ L216), art. 2.1.
132 European Commission Regulation 737/2010 (2010 OJ L216), art. 2.2.
133 Ibid.
134 WTO, Panel Report, *European Communities – Measures Prohibiting the Importation and Marketing of Seal Products*, WT/DS401/R, 2013. (AB Report to be expected May 2014) For a discussion of possible legal arguments, *see* Robert Howse and Joanna Langille, 'Permitting Pluralism: The *Seal Products* Dispute and Why the WTO Should Accept Trade Restrictions Justified by Noninstrumental Moral Values' 2012, 37 Yale Journal of International Law 367.
135 AB Report *EC-Seal Products* 2014, para.5.173.
136 See chapter 7.3 for a discussion of public morals and environmental concerns. See also Barbara Cooreman, 'Testing the Limits of Article XX(a) GATT after *Seals*' 2016, 5 Journal of International Trade and Arbitration Law 519.

3.4.2.7 EC-Tariff Preferences

Next to Article XX GATT, WTO Members may also justify differential treatment of developing members based on their Generalized System of Preferences (GSP)[137] through the Enabling Clause.[138] This clause permits developed country Members to grant preferential tariff treatment to products originating in developing countries on a non-reciprocal and voluntary basis under a GSP scheme.[139] GSP schemes are exceptions to Article I GATT, as 'like products' from other industrialized members do not receive the same treatment.[140] Paragraph 3c of the Enabling Clause provides that more favourable treatment for developing countries 'be designed and, if necessary, modified, to respond positively to the development, financial and trade needs of developing countries'. According to the AB in *EC-Tariff Preferences*, any such needs must be assessed according to an objective standard.[141] It is not required that benefits under the GSP schemes have a territorial link with or an effect on the donor country. GSP schemes shall be non-discriminatory,[142] but differentiation is allowed when based on objective criteria, as has been held by the AB.[143]

The only (adjudicated) case on GSP so far, *EC-Tariff Preferences*, dealt with the EC's GSP scheme, based on Council Regulation 2501/2001/EC applying a GSP scheme for the years 2002-2004.[144] The regulation provided for five preferential tariff arrangements, among which special incentive arrangements for the protection of labour rights, for the protection of the environment (outward-looking), and to combat drug production and trafficking. India requested a panel to consider the consistency with WTO law of all three arrangements, but opted later to limit its legal complaint to the GSP Drugs, which was the only arrangement dealt with by the panel and the AB. The panel and the AB found the EC's Drug Arrangements to be inconsistent with the Enabling Clause, as no objective criteria were provided to differentiate between the beneficiaries of the Drug Arrangements and other developing countries that did not receive said treatment. The EC's measure could thus not be justified.

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137 As described in the Decision of the Contracting Parties of 25 June 1971, relating to the establishment of "generalized, non-reciprocal and non-discriminatory preferences beneficial to the developing countries" (BISD 18S/24).

138 Decision of the Contracting Parties on Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries, 28 November 1979, L/4903.

139 Gracia Marin Duran and Elisa Morgera, 'Case Note: WTO India-EC GSP Dispute: The Future of Unilateral Trade Incentives Linked to Multilateral Environmental Agreements' 2005, 14 Review of European Community & International Environmental Law 173, 173.

140 WTO, *European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries* AB Report 2004, WT/DS246/AB/R, para 99.

141 Ibid para 163.

142 Footnote 3 to paragraph 2a of the Enabling Clause.

143 AB Report *EC-Tariff Preferences* 2004, paras 162.

144 Council Regulation (EC) No 2501/2001 of 10 December 2001 applying a scheme of generalised tariff preferences for the period from 1 January 2002 to 31 December 2004.

The panel also considered a justification under Article XX(b) GATT, as the EC argued that narcotic drugs pose a risk to human life and health in the EC (inward-looking) and that the tariff preferences contribute to the fight against illicit production and drug trafficking, thereby reducing the supply to the EC. The panel held that the policy reflected in the Drug Arrangements was not designed for the purpose of protecting human life or health in the EC and therefore cannot fall under Article XX(b) GATT. This could be understood in two ways: firstly, the measure is not related to health; and secondly, the measure is not related to health *within* the EU. With regard to the first element, according to the panel, the EC measure aimed at eradication of poverty and promotion of sustainable development in the developing countries.[145] With regard to the second element, if that is what the panel aimed at, it did not clarify why Article XX(b) would require a territorial link with the imposing Member, and whether a measure aiming at the protection of health in general (including in the exporting countries) could possibly be justified if considered necessary.[146] The panel continued its analysis of Article XX but found that the measure was neither necessary, nor complied with the conditions of the *chapeau*. The issue was not appealed, and so the AB only addressed the Enabling Clause (under which the legal issue was not territory-related).

3.5 Conclusion

The jurisdictional scope of the WTO agreements in general, and more specifically Article XX GATT, is still subject to debate. There is no explicit jurisdictional limitation and neither the *travaux préparatoires* nor any relevant instruments or subsequent agreements reveal the intent of the parties in that regard. In a trade context, extraterritoriality can be understood in two ways: firstly, PPMs can be said to be extraterritorial in that they target production processes abroad (all PPMs are extraterritorial in this sense); and, secondly, they can aim at protecting concerns outside their territory (not all PPMs are extraterritorial in this sense). The first interpretation of extraterritoriality has not been subject to legal scrutiny in the case law. In principle, npr-PPMs can be acceptable trade measures. The next chapter will elaborate on the extraterritorial reach of PPMs from a public international law perspective.

More is to be said with regard to the second interpretation of extraterritoriality and the question whether npr-PPMs can protect concerns (partly) located outside the territory of the regulating Member. A useful distinction has been made in literature to distinguish between inward- and outward-looking measures: measures that aim at the protection of a non-trade concern within

145 WTO, *European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries* Panel Report 2003, WT/DS246/R, para.7.201.

146 Ibid para 7.210.

the territory (e.g. air pollution through gasoline combustion), as opposed to measures that aim at the protection of a concern outside the territory of the regulating state (e.g. the protection of a foreign threatened species). The wording of Article XX (except paragraph XX(e)) does not reveal the inwardly- or outwardly directed intent of the drafters. While the object and purpose of the GATT is the reduction of trade restrictions, it also aims at 'raising standards of living (…) while allowing for the optimal use of the world's resources in accordance with the objective of sustainable development, seeking both to protect and preserve the environment'.[147]

From the case law analysis, the following can be concluded: firstly, inward-looking measures do not seem to raise jurisdictional issues. Outward-looking measures, protecting concerns outside the territory of a WTO Member, can be accepted when a 'sufficient nexus' to the regulating state exists. It is yet unclear when a nexus could be considered 'sufficient'. Secondly, while a certain coercive effect is inherent to trade measures, measures should allow for sufficient leeway in reaching a required objective. Coercing other Members to adopt essentially the same policy will lead to unjustifiable discrimination. Thirdly, multilateral solutions are preferred over unilateral solutions. However, the question remains to what extent the degree of uni- or multilateralism can determine the acceptability of extraterritorial PPMs.

So far I have outlined the legal framework for PPMs, the muddled attempts by panels and the AB to clarify the legal status of PPMs, as well as the unresolved questions regarding the jurisdictional scope of Article XX GATT. As the WTO texts are silent on jurisdictional questions, the following chapters will seek guidance from other fields of law where extraterritoriality is regularly applied, in order to help develop a more consistent methodology to deal with the extraterritorial reach of trade measures. Even though the AB has clearly stated that trade law shall not be interpreted in isolation of public international law, the issue of extraterritoriality within the WTO has so far been interpreted rather isolated.

A number of broader policy questions currently remain unanswered. If an outward-looking interpretation of the WTO agreements would be accepted, is the WTO equipped to deal with the consequences of such interpretation, possibly leading to claims on labour rights, environmental rights, moral concerns and others? Who will furthermore decide on what standards should be adhered to or which substantive standards should be accepted, in the absence of international standards or agreements? Legitimate concerns in one state (e.g. protection of child labour) might not have the intended effect in the exporting state when not accompanied by other programs (leading for instance to more illegal work, or leading to higher poverty rates when there

147 Preamble Marrakesh Agreement.

is no adequate schooling).[148] To what extent can there be a duty to engage in technical and financial assistance to those affected by the measures? Should special efforts be made by developed countries towards developing countries? Large countries and important markets will inherently have more coercive power than weaker powers, and will thus be able to make easier and more effective use of PPMs. Should this inequity and 'unfairness' be taken into account into the discussion on jurisdictional limitations? The analysis in the following chapters will help to clarify these issues where possible from a legal perspective.

148 Gudrun Monika Zagel, 'WTO & Human Rights: Examining Linkages and Suggesting Convergence' 2005, 2 IDLO Voices of Development Jurists Paper Series, 24.

PART II

Zooming in: a WTO extraterritoriality decision tree

4 Jurisdiction and extraterritoriality: A theoretical framework

4.1 Introduction

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

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

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

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

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

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

4.2 The development of sovereign states and jurisdiction

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

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

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

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

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

5 For instance, criminal law, data protection and internet law, anti-fraud rules, competition law, international human rights law. See Ryngaert(2015).
6 Dan E. Stigall, 'International Law and Limitations on the Exercise of Extraterritorial Jurisdiction in US Domestic Law' 2012, 35 Hastings International and Comparative Law Review 323, 328.
7 Frederick A.P. Mann, 'The Doctrine of Jurisdiction in International Law' 1964, 111 Recueil des Cours of The Hague Academy of International Law 1, 17.
8 Ibid 19.
9 Crawford(2012), 449.
10 Christoph Schreuer, 'The Waning of the Sovereign State: Towards a New Paradigm for International Law?' 1993, 4 European Journal of International Law 447, 447.; James Gordley, 'Extra-Territorial Legal Problems In A World Without Nations: What The Medieval Jurists Could Teach Us' in Günther Handl, Joachim Zekoll and Peer Zumbansen (eds), *Beyond Territoriality: Transnational Legal Authority in an Age of Globalization* (Martinus Nijhoff 2012).
11 Daniel Betlehem, 'The End of Geography: The Changing Nature of the International System and the Challenge to International Law' 2014, 25 European Journal of International Law 9, 13.
12 Debora L Spar, 'Developments in the law: Extraterritoriality' 2011, 124 Harvard Law Review 1226, 1228.
13 Gemkow 3.

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

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

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

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

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14 E.g. through membership to the UN. States are recognized as such by other states and governments, through criteria as laid down in the Montevideo Convention on the Rights and Duties of States, being a) a permanent population; b) a defined territory; c) government; and d) capacity to enter into relations with the other states.
15 For an interesting legal perspective on the decolonization process, see Gerard Kreijen, 'The Transformation of Sovereignty and African Independence: No Shortcuts to Statehood' in Gerard Kreijen and others (eds), *State, Sovereignty, and International Governance* (Oxford University Press 2002).
16 Ankersmit, Lawrence and Davies (2012), 24.
17 Mann (1964), 24.
18 By Karolus de Tocco. Ibid 25.
19 Ibid.
20 Ulricus Huber, *De conflictu legum diversarum in diversis imperiis*, 1689. Translation by D.J. Llewelyn Davies.

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

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

4.3 Types of jurisdiction

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

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

22 Summarized by Mann (1964), 28.

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

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

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

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

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

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

25 (2008), 10.

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

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

28 Mann (1964), 138.

29 Akehurst (1972-1973), 147.

30 Ibid 146.

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

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

4.4 Defining extraterritorial jurisdiction

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

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

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

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

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

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

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

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

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

35 Howse and Regan (2000), 274.

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

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

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

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

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

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

38 Bartels (2002), 381.

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

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

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

42 Meng(1994), 75; 742.

43 Ibid 86.

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

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

44 Ibid 77.
45 Ibid 752.
46 See Bartels (2002), 389.: 'The Chapeau reflects, and may even go beyond, a proportionality requirement attaching to the exercise of extraterritorial jurisdiction under public international law'.
47 See also the AB's reference in *US-Shrimp* to the 'intended and actual coercive effect' of the US measure on harvesting methods of shrimp (condemning the measure for being inconsistent with the chapeau of Article XX). The AB referred to a coercive effect through the application of the measure, as the measure allowed for no flexibility in pursuing the objective of turtle protection. The GATT panel in the first *Tuna* case considered that 'if the broad interpretation of Article XX(b) suggested by the United States were accepted, *each contracting party could unilaterally determine the life or health protection policies from which other contracting parties could not deviate* without jeopardizing their rights under the General Agreement.' (GATT Panel *US-Tuna (Mexico)* 1991, para.5.27.). The second *Tuna* panel stated that 'if Article XX were interpreted to permit contracting parties to take trade measures *so as to force other contracting parties to change their policies* within their jurisdiction, including their conservation policies, the balance of rights and obligations among contracting parties, in particular the right of access to markets, would be seriously impaired. Under such an interpretation the General Agreement could no longer serve as a multilateral framework for trade among contracting parties.' (GATT panel *US-Tuna (EEC)* 1994, para.5.26.). See also chapter 3 for a discussion of these disputes.
48 Scott (2014), 90.
49 For instance, US sanctions against Iran.
50 For examples of measures with territorial extension in different policy domains, see Joanne Scott, 'Extraterritoriality and Territorial Extension in EU Law' 2014, 62 The American Journal of Comparative Law 87, 96.

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

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

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

51 Ibid 106.
52 See *infra* at 5.2 on the permissive rules for extraterritorial prescriptive jurisdiction under international law.
53 Werner Meng, 'Extraterritorial Effects of Legislative, Judicial and Administrative Acts' in Rudolf Bernhardt (ed), *Encyclopedia of Public International Law*, vol 2 (Elsevier 1995) 156.
54 See also chapter 7.6 on network power (market power) and the Brussels effect.
55 Bartels (2002), 378.
56 See *infra* at 4.5.3, as well as chapter 5 on comity in the context of competition law.

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

4.5 Principles of extraterritorial jurisdiction

4.5.1 Lotus: prohibitive or permissive?

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

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

58 Ryngaert(2015), 29.

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

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

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

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

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

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

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

4.5.2 Permissive principles governing prescriptive jurisdiction

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

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

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

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

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

67 Crawford(2012), 457.

68 Mann (1964), 13.

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

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

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

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

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

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

73 *Charming Betsy*, 6 US at 118.

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

75 Scott (2014), 93.

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

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

4.5.2.1 Subjective territoriality principle

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

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

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

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

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

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

84 Akehurst (1972-1973), 171.

85 See chapter 3 for a discussion of the case.

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

87 Mann (1964), 49.

88 Bartels (2002), 374.

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

4.5.2.2 Objective territoriality or effects

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

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

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

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

91 1986, 402(1)(c).

92 Ibid.

4.5.2.3 Active personality principle

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

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

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

93 In private international law, national law often follows the national outside the territory as far as his personal status is concerned. Courts may thus apply foreign law provided it does not violate domestic law. See Ryngaert(2015), 104.
94 Ibid 105.
95 Akehurst (1972-1973), 156.
96 Ibid.
97 L. Austen Parrish, 'Evading Legislative Jurisdiction' 2012, 87 Notre Dame Law Review 1673, 1679.
98 Akehurst (1972-1973), 189.
99 See for a more in-depth discussion De Schutter (2006), 9. See also Ani-Yonah Reuven, 'National Regulation of Multinational Enterprises: An Essay on Comity, Extraterritoriality and Harmonization' 2003, 42 Columbia Journal of Transnational Law 5.

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

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

4.5.2.4 Passive personality principle

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

100 Ryngaert(2015), 108.
101 OECD (2011), *OECD Guidelines for Multinational Enterprises*, OECD Publishing (first published in 1976 and revised in 2000 and 2011).
102 OECD Declaration on International Investment and Multinational Enterprises, 25 May 2011: I.
103 OECD (2011), *OECD Guidelines for Multinational Enterprises*, Part I: *Recommendations for Responsible Business Conduct in a Global Context: Concepts and Principles*, para.3.
104 For instance, the EU has exercised "subsidiary jurisdiction" in regulating the remuneration that may be paid to certain categories of staff employed by banks and investment firms (article 92 of Directive 2013/36 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms). See also Joanne Scott, 'The New EU "Extraterritoriality"' 2014, 51 Common Market Law Review 1, 10.
105 Crawford(2012), 461.

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

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

4.5.2.5 Protective principle

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

4.5.2.6 Universality principle

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

132 Ryngaert(2015), 118.

133 Ibid.

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

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

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

137 Crawford(2012), 468.

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

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

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

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

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

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

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

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

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

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

151 Crawford(2012), 470.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

162 542 US 692, 749 (2004).

163 Seibert-Fohr (2008), 1.

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

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

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

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

4.5.3 Comity, reasonableness and effective connection

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

166 US Supreme Court, *Kiobel v. Royal Dutch Petroleum Co.* US Supreme Court 2013, 133 S.Ct. 1659, 7.
167 Ibid 12.
168 Ibid 14.; The Court came to a unanimous conclusion (that in this case the ATS cannot be applied extraterritorially), however, four justices followed a different reasoning in a concurring opinion in judgment, with two other concurring opinions added.
169 Donald I. Baker, 'Extraterritorialiy and the Rule of Law: Why Friendly Foreign Democracies Oppose Novel, Expansive US Jurisdiction Claims by Non-Resident Aliens Under the Alien Tort Statute' 2013, 28 Maryland Journal of International Law 42, 44; Beth Stephens, 'Extraterritoriality and Human Rights After Kiobel' 2013, 28 Maryland Journal of International Law 256, 271.
170 Jansen and Lugard (1999), 535.
171 Some states have opposed the overbroad use of the ATS without a sufficient nexus to the territory, see for instance Netherlands and the United Kingdom, *Brief of the Governments of the United Kingdom of Great Britain and Northern Ireland and the Kingdom of the Netherlands as Amici Curiae in Support of the Respondents in Kiobel v Royal Dutch Petroleum Co.* (2012).

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

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

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

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

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

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

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

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

> 'under present conditions, international law does not impose hard and fast rules on States delimiting spheres of national jurisdiction… It does however … involve for every State an obligation to exercise moderation and restraint as to the extent of jurisdiction assumed by its courts in cases having a foreign element, and to avoid undue encroachment on a jurisdiction more properly appertaining to, or more appropriately exercisable by another State.'[187]

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

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

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

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

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

4.6 Conclusion

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

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

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

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

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

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

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

5 Extraterritoriality under competition law

5.1 Introduction

Extraterritoriality in a competition law context refers to the extraterritorial application of national competition laws. The rationale behind such application is to safeguard the objectives of competition rules, which would be impaired if competition could be applied exclusively to conduct of nationals (including legal persons). As Wagner-von Papp stated, 'a cartel is no less harmful just because the cartelists travelled to an exotic location for their meetings; and consumers are hardly interested in the nationality of those who exploit them'.[1] Theoretically, one could rely on a system of home jurisdiction, where states rely exclusively on antitrust enforcement by the jurisdiction in which the anticompetitive conduct takes place. However, domestic consumers will have no voice against a possible strong lobby of producers and exporters abroad. Furthermore, there is no guarantee that the home state has antitrust legislation in place or sufficient resources to enforce existing legislation effectively.[2] The home state may also be unwilling to enforce its competition law in respect of export cartels that do not affect its own market.[3]

The United States have taken a lead in this extraterritorial development, but other jurisdictions such as the EU and Japan have applied their competition rules to conduct taking place abroad. While there is an increasing number of bi- and multilateral cooperation agreements, in practice, the unilateral extraterritorial application of national competition laws is still the most effective tool to address foreign anticompetitive behaviour that affects domestic markets. Such extraterritorial application of competition rules relies upon the effects doctrine, referring to conduct abroad affecting or impacting on competition within the domestic market, or in other words conduct abroad that leads to harmful domestic effects.[4]

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1 Florian Wagner-von Papp, 'Competition Law and Extraterritoriality' in Ariel Ezrachi (ed), *Research Handbook on International Competition Law* (Edward Elgar Publishing 2012) 22.

2 Ibid 23.

3 See for example the US Webb-Pomerene Export Trade Act, 15 USC §§ 61-66 (2000), adopted first in 1918. See also Margaret Levenstein and Valerie Suslow, 'The Changing International Status of Export Cartel Exemptions' 2005, 20 American University International Law Review 785.

4 Dodge (2011), 692.

This chapter will explore the rationale of the effects doctrine as applied in (domestic) competition law, seeking to determine whether it can also be applied to npr-PPMs addressing environmental concerns outside the territory of the regulating state. The aim is not to give a technical analysis of competition law issues, but rather to identify why and how an extraterritorial application of laws through the effects doctrine is applied and accepted. A parallel will then be drawn between the rationale of the effects doctrine in competition law, and the rationale for relying on the effects doctrine in an environmental context to determine whether the extraterritorial effects of npr-PPMs could be permitted.

As noted in chapter 4, npr-PPMs are no extraterritorial measures in a strict sense, as they are only activated when market access is sought; rather, PPMs can be defined as measures with an extraterritorial effect. In contrast to competition law, where the effects on the market form the basis for states to exercise jurisdiction, with respect to npr-PPMs, the environmental effects would form part of the substantive analysis of the measure to determine whether the measure can be permitted under Article XX GATT. Nonetheless, the analysis of the effects doctrine in a competition context remains highly relevant for our analysis with respect to the rationale of relying on effects in order to act.

5.2 The effects doctrine and competition law

5.2.1 The legal basis of the effects doctrine

Under the effects doctrine states can legislate activities that originate abroad but that have a substantial, direct and foreseeable effect upon or in its national territory.[5] In other words, a state can exercise jurisdiction over acts taking place outside its territory because it is affected by those actions. Measures based upon the effects doctrine are defined as extraterritorial measures, even though reliance upon the effects doctrine as a legal basis does arguably justify such extraterritorial application.[6]

The recognition of this doctrine under general international law remains uncertain. The Third Restatement of Foreign Relations Law accepts prescriptive jurisdiction over foreign conduct that has or is intended to have substantial effects,[7] but only few countries, such as the US, actually recognize the effects doctrine as a separate legal basis. When not considered a separate legal basis,

5 See chapter 4 for a discussion of the territoriality principle and other bases for jurisdiction.
6 Whether a justified extraterritorial measure should then be qualified as 'territorial' is more a semantic question, but for the purpose of this study, I will refer as extraterritorial to all measures, which prescribe conduct outside the territory of the regulating state.
7 1986, §402(1)(c)., §415. See also chapter 4.

effects jurisdiction can be seen as a degree of territorial connection under the territoriality principle.[8]

While the effects doctrine is mostly known for its use in competition law, it does not originate there. Rather, within criminal law, the effects theory has been used by the state in which the effects of a crime were felt in order to exercise jurisdiction (see *Lotus)*.[9] When the effects test was first used, courts reasoned for instance that the shooter accompanied a bullet across state lines so that his conduct actually occurred in the state where the effects were felt.[10] In other fields as well, an application of the effects doctrine can be traced, such as securities regulation in the US[11] and rules on trade in financial instruments in the EU.[12]

§402 of the (third) Restatement states that conduct occurring outside a state may be subject to that state's law if the conduct has or is intended to have substantial effects within that state's territory.[13] The Restatement further requires that the exercise of jurisdiction is reasonable under §403. Extraterritorial jurisdiction may not be exercised when unreasonable or in direct conflict with domestic legislation of the other state. In the case of conflict, a state should defer to a state with a greater interest. This seems to point to a preference for exclusive legislative jurisdiction, even though it is possible, particularly

8 See for instance Alan C. Swan, 'The Hartford Insurance Company Case: Antitrust in the Global Economy – Welfare Effects and Sovereignty' in Jagdeep S. Bhandari and Alan O. Sykes (eds), *Economic Dimensions in International Law: Comparative and Empirical Perspectives* (Cambridge University Press 1997) 551. See chapter 4.

9 As discussed in chapter 4. See for instance Danielle Ireland-Piper, 'Prosecutions of Extraterritorial Criminal Conduct and the Abuse of Rights Doctrine' 2013, 9 Utrecht Law Review 68.

10 See e.g. Simpson v State, 17 S.E. 984, 985 (Ga. 1893) ('If a man in the State of South Carolina criminally fires a ball into the State of Georgia, the law regards him as accompanying the ball, and as being represented by it, up to the point where it strikes.').

11 Kathleen Hixson, 'Extraterritorial Jurisdiction Under the Third Restatement of Foreign Relations Law of the United States' 1988, 12 Fordham International Law Journal 127. See also the recent case of US Supreme Court, *Morrison v National Australia Bank Ltd.* 2010, 130 S. Ct. 2869.whereby the US Supreme Court held that Section 10(b) of the Exchange Act applies extraterritorially to foreign conduct that affects transactions in the United States.

12 The EU's Regulation on derivatives (European Market Instruments Regulation 648/2012) imposes clearing and risk-mitigating obligations on persons concluding certain types of derivative contracts. Contracts that are concluded exclusively between third country entities may be subject to these obligations where the contract in question has a direct, substantial and foreseeable effect within the EU. Also the Market Abuse Regulation 596/2014, on an integrated and transparent financial market refers to the effects of foreign transactions. In contrast to the EMIR, the qualifiers for effect are less pronounced: the effects must be 'likely' or 'intended' but there is no need for them to be either 'significant' or 'direct'. See Scott (2014), 15.

13 1986, §402(1)(c). See also chapter 4.

in the field of antitrust, to have instances of concurrent legislative jurisdiction.[14]

§415 of the Restatement, dealing specifically with antitrust, provides that agreements made, or conduct carried out predominantly, outside a state in restraint of that state's trade may be subject to the state's prescriptive jurisdiction if

> '(2) … if a principal purpose of the agreement or conduct is to interfere with the commerce of the United States, and the agreement or conduct has some effect on that commerce;
> (3) [in the case of other agreements] … if such agreements or conduct have substantial effect on the commerce of the United States and the exercise of jurisdiction is not unreasonable.'

The Restatement thus refers explicitly to effects on commerce, and the effects doctrine is likewise being applied by a growing number of states, such as Brazil, Singapore or Japan, in the field of competition law.[15]

The Court of Justice of the EU has not yet recognized the validity of the effects doctrine, but other approaches have been developed in order to address foreign anti-competitive behaviour.[16] A strict application of the subjective territoriality principle in cartel matters for instance, would prevent states from asserting jurisdiction over conduct that, even though taking place beyond their national borders, gravely affects their economic interests. Therefore the idea that the states should be empowered to prosecute and sanction conduct arising outside their borders does not generate major controversy (anymore).[17] Problems rather arise with the approaches used for the assertion of extraterrit-

14 Dodge argues that 'judicial unilateralism', whereby courts apply domestic legislation without taking into account possible conflicts of jurisdiction with other nations, would on the one hand correct for failures in the legislative process that lead to underregulation in areas like antitrust, and on the other also promote international negotiations in the long run. See William S. Dodge, 'Extraterritoriality and Conflict-of-Laws Theory: An Argument for Judicial Unilateralism' 1998, 39 Harvard International Law Journal 101.

15 The effects doctrine was approved by the International Law Association as a principle of international law at its 55th Conference in 1972 where the effect is a constituent element of the act. L'Institut de Droit International stated during its session in 1977 that the effects doctrine could be applied extraterritorially to anti-competitive behaviour of multinationals where effects where intentional or foreseeable, substantial, direct and immediate. These approvals bear no hard law value, however, their recognition has been important for growing support for the theory. See also below in this chapter for more examples of countries adhering to the effects doctrine.

16 See below. See also Yves Botteman and Agapi Patsa, 'The Jurisdictional Reach of EU Anti-Cartel Rules: Unmuddling the Limits' 2012, 8 European Competition Journal 365, 366., referring to the 'often muddied and convoluted approaches' the EU has used.

17 Ibid 365.

orial jurisdiction[18] and with the question how to resolve conflicts when they occur.[19]

5.2.2 Extraterritorial enforcement

When discussing an extraterritorial exercise of jurisdiction based on the effects doctrine, one usually refers to an extraterritorial exercise of prescriptive jurisdiction. However, in competition proceedings involving anti-competitive behaviour abroad, it seems that the effectiveness of such proceedings is also very much linked to enforcement of possible penalties imposed. As already noted, extraterritorial exercise of enforcement jurisdiction is not accepted under international law, unless the territorial state has given consent to such actions.[20]

With regard to penalties, Advocate General (AG) Darmon recognized, in his opinion to the *Wood Pulp* case, the distinction between prescriptive and enforcement jurisdiction.[21] He argued that the mere imposition of a pecuniary sanction is a matter of prescriptive jurisdiction, and only becomes a matter of (extraterritorial) enforcement jurisdiction where steps are taken for its recovery outside a state's territory. AG Darmon stated that imposing a fine is 'indissolubly linked (…) to the application of the law, and to deny the court the power to make such an order would render that 'prescriptive jurisdiction' nugatory'.[22] Ordering to pay a fine should be distinguished from the forcible execution of such fine. Enforcement thus remains territorial, whereby it is likely that companies refusing to pay their fines would face difficulties when conducting business in the EU in the future.

Enforcement in antitrust proceedings also includes the investigations into the anti-competitive behaviour in question. Under international law, countries cannot carry out investigations into the territory of another country absent permission. Investigated companies can supply information voluntarily, incentivized, for instance, by lenience procedures, which works especially well for powerful jurisdictions, such as the US or the EU. However, as will be described in the section below, there is also increasing cooperation on this matter between countries through informal understandings or formal bi- or multilateral agreements on, for example, collecting evidence and exchange of information.

18 Ibid 366., referring to the 'often muddied and convoluted approaches' the EU has used.
19 Eleanor M. Fox, 'Modernization of Effects Jurisdiction: From Hands-Off to Hands-Linked' 2009, 42 International Law and Politics 159, 160.; Dodge (1998).
20 See chapter 4.
21 Opinion AG Darmon, *Ahlström Osakeyhtiö and Others v Commission (Wood Pulp I)* Court of Justice of the European Union 1998, Joined cases 89, 104, 114, 116, 117, 125-129/85 ECLI:EU:C:1988:447.
22 Ibid.

5.2.3 A combination of approaches

Whereas anti-competitive behaviour was originally addressed in a unilateral way, attempts have been made to seek bi-, pluri- and multilateral ways to approach the matter as well. These are needed either as a *complement* to the unilateral approach where the latter proves to be deficient (enforcement gaps or 'underregulation'), or, as a *partial substitute* to the unilateral approach, where the lack of coordination of unilateral enforcement by multiple jurisdictions creates problems (enforcement overlaps or 'overregulation').[23]

The need for bi- and plurilateral approaches has increased tremendously. At the end of the 1970s only nine jurisdictions had competition rules in place, whereas at the end of 2013, about 127 jurisdictions had competition rules in place, of which 120 had a functioning competition authority.[24] This expansion is due to a number of factors, but mostly because it is recognized that competition policy promotes economic growth, consumer welfare and a vibrant market economy.

At the multilateral level, there are a few non-binding initiatives. As early as 1967 the OECD adopted its first recommendation encouraging its members to cooperate in antitrust issues by e.g. notifying other members when their important interests would be at stake; coordinating parallel investigations; disclosing information concerning investigations; exchanging information on anti-competitive behaviour.[25] In 1995, a recommendation was issued on international cooperation for enforcement.[26] In 1998 states adopted a recommendation to enforce laws against hardcore cartels.[27] In 2005, the OECD Competition Committee issued a series of Best Practices for the formal exchange of information between competition agencies in hardcore cartel investigations.[28] Many bilateral agreements have been modelled after the OECD's recommendations.

23 Wagner-von Papp(2012), 24. See also Eleanor M. Fox, 'Antitrust Without Borders: From Roots to Codes to Networks' in Andrew T. Guzman (ed), *Cooperation, Comity and Competition policy* (Oxford University Press 2011) 274.. For an overview of the costs of under- and overregulation, see OECD, *Challenges of International Cooperation in Competition Law Enforcement* (2014).

24 OECD (2014), 26.

25 Recommendation of the Council concerning Cooperation between Member Countries on Restrictive Business Practices Affecting International Trade of 5 October 1967, C(567)33(final). This recommendation was amended in 1973, 1979, 1986 and 1995.

26 Recommendation of the Council concerning Cooperation between Member-Countries on Anti-competitive Practices Affecting International Trade of 21 September 1995, C(95)130 (final).

27 Recommendation of the Council concerning Effective Action Against Hard-Core Cartels, C(98)35(final).

28 OECD, Best Practices for the Formal Exchange of Information Between Competition Agencies in Hardcore Cartel Investigations, October 2005, at http://www.oecd.org/competition/cartels/35590548.pdf.

In 1994 the WTO was created after the Uruguay Round, with more attention to non-tariff barriers, creating also a Working Group on the Interaction between Trade and Competition Policy at the end of the 1990s.[29] The Doha Development Round scheduled negotiations for a WTO Agreement with a hardcore cartel prohibition and provisions on non-discrimination, due process and technical assistance – but these were jettisoned not much later.[30] In 1997, an Agreement on Telecommunications Services was reached within the WTO Group on Basic Telecommunications.[31] The agreement included competition rules, creating a sector-specific competition law agreement.[32]

Apart from this WTO's agreement on telecommunications, the only multilateral (non-binding) competition agreement to date is the Restrictive Business Practices Code (RBP Code)[33] under the auspices of the United Nations Conference on Trade and Development (UNCTAD). Its substantive provisions deal with anti-competitive behaviour such as abuse of dominant position, price-fixing and market allocation.[34] While being the principal multilateral agreement, the Code has limited value because of its voluntary nature, its rather vague provisions, and the lack of support from developing countries (who wanted to see additional rules included in the agreement but were held back by the developed countries).[35] Another international forum for antitrust law is the International Competition Network (ICN). The ICN was created in 2001

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29 For information on and documents by the Working Group on the Interaction between Trade and Competition Policy (WGTCP) see https://www.wto.org/english/tratop_e/comp_e/comp_e.htm. The working group is currently closed down.

30 See among others Anu Bradford, 'International Antitrust Cooperation and the Preference for Non Binding Regimes' in Andrew T. Guzman (ed), *Cooperation, Comity and Competition Policy* (Oxford University Press 2011) 323.

31 The agreement took the form of a protocol to be attached to the GATS, designated as the Fourth Protocol to the GATS.

32 Almost all participating countries to the Fourth Protocol agreed to enter into additional commitments concerning regulatory principles to be applied in the telecommunications sector, laid down in a Reference Paper that was prepared by a group of countries in April 1996. Paragraph 1.1 of the Reference Paper for instance contains a commitment to enact appropriate measures to prevent anti-competitive practices by major suppliers. The Reference Paper is legally binding for those WTO Members who have appended the document to their schedules of commitments. (at https://www.wto.org/english/tratop_e/serv_e/telecom_e/tel23_e.htm) *See* Marco C.E.J. Bronckers and Pierre Larouche, 'Telecommunications Services and the World Trade Organization' 1997, 31 Journal of World Trade 5.; Marco C.E.J. Bronckers and Pierre Larouche, 'A Review of the WTO Regime for Telecommunications Services' in Kern Alexander and Mads Andenas (eds), *The World Trade Organisation and Trade in Services* (Martinus Nijhoff Publishers 2008) 330.

33 The Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices, UN Doc TD/RBP/CONF 10/Rev.1 (1980), endorsed by GA Res. 63, UN Doc A/RES/35/63 (1980), 19 ILM 813 (1980).

34 RBP Code, Section D, paras. 3-4. The substantive provisions of abuse of a dominant position have been reviewed in 2015, see TD/RBP/Conf.8/L.2; on restrictive agreements or arrangements in 2012, see TD/b/C.1/CLP/L.4.

35 Debra J. Miller and Joel Davidow, 'Antitrust at the United Nations: A Tale of Two Codes' 1982, Stanford Journal of International Law, 354.

under the auspices of the International Chamber of Commerce as an informal network among the world's competition agencies to explore and implement solutions to common problems, and has over 100 members today.[36]

Apart from these multilateral organizations, a number of regional organizations such as the European Competition Network (ECN), the Andean Community, the Asia-Pacific Economic Cooperation (APEC), the Association of Southeast Asian Nations (ASEAN), the Common Market for Eastern and Southern Africa (COMESA), the Caribbean Community and Common Market (CARICOM), the Southern Africa Development Community (SADC) and the West African Economic and Monetary Union (WAEMU) provide opportunities for national competition authorities to cooperate and continue a process of convergence of substantive competition standards.[37] With regard to enforcement cooperation, the most advanced example can be found in the European competition network between the competition authorities of the EU Member States, but examples can also be found among the Scandinavian countries, in Latin America, Africa and Asia.[38]

Outside these networks, bilateral agreements are the most important instruments to resolve some of the problems that have occurred due to the internationalisation of business practices. They are mostly cooperation agreements, and do not aim at harmonizing the competition laws of the countries involved, even though they can lead to convergence by better understanding the other laws and policies.[39] Other benefits include improved efficiency in investigations, avoidance of jurisdictional conflict, and protection for the legitimate interests of the cooperating parties etc.[40] Free trade agreements

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36 See the website of the International Competition Network, at http://www.iccwbo.org/Advocacy-Codes-and-Rules/Areas-of-work/Competition/International-Competition-Network-(ICN)/.

37 OECD (2014), 17; Daniel Sokol, 'International Antitrust Institutions' in Andrew T. Guzman (ed), *Cooperation, Comity and Competition Policy* (Oxford University Press 2011).

38 OECD, *International Enforcement Cooperation: Secretariat Report on the OECD/ICN Survey on International Enforcement Cooperation* (2013) 89.

39 The EU for instance has cooperation agreements with Canada (Agreement between the European Communities and the Government of Canada regarding the application of their competition laws (1999)); with Japan (Agreement between the European Community and the Government of Japan concerning cooperation on anti-competitive activities (2003); with the Republic of Korea (Agreement between the EU and the Republic of Korea concerning cooperation on anti-competitive activities (2009)); with Switzerland (Agreement between the European Union and the Swiss Confederation concerning cooperation on the application of their competition laws); and with the US (Agreement between the Government of the United States of America and the Commission of the European Communities regarding the application of their competition laws (1995) and Agreement between the European Communities and the Government of the United States of America on the application of positive comity principles in the enforcement of their competition laws (1998)).

40 See for a more comprehensive discussion Maher Dabbah, 'Future Directions in Bilateral Cooperation: A Policy Perspective' in Andrew T. Guzman (ed), *Cooperation, Comity and Competition Policy* (Oxford University Press 2011) 287.

(FTAs) can contain substantive (harmonized) principles of competition law, and may also contain clauses that allow for cooperation among competition enforcers, even though these may be less detailed than those in cooperation agreements.[41] Despite their benefits, the number of cooperation agreements remains limited: the US, for instance, has only nine cooperation agreements,[42] and the EU has only five.[43] Countries can also agree on non-binding Memoranda of Understanding. Informal cooperation has grown significantly over time but it faces important limits when it comes to activities that are restricted under national law, such as the exchange of confidential information.[44]

The most obvious example of formal bilateralism in the field of competition law is the cooperation between the EU and the US,[45] as the world's most advanced and most influential competition law regimes. Two agreements have been crucial in their cooperation: the 1991 and 1998 Agreements. The 1991 Agreement deals with, among others, the avoidance of conflict over enforcement activities. It also contains a positive comity provision,[46] providing that if either the US authorities or the European Commission believes their 'important interests' are being adversely affected by anticompetitive activities occurring within the other's territory that also violate the other's competition laws, the affected authority may request that the other initiate enforcement activities.[47] The Agreement did not oblige the authorities to follow up on such request, though. The 1998 Agreement, or 'positive comity' agreement, supplements the 1991 Agreement, providing, among others, guidelines to deal with positive comity requests. A request to investigate and remedy anti-competitive behaviour can be made 'regardless of whether the activities also violate

41 E.g. chapter 11 of the EU-South Korea Free Trade Agreement, dealing with competition rules.
42 Australia, Brazil, Canada, Chile, EU, Germany, Israel, Japan and Mexico.
43 US, Canada, Japan, Republic of Korea and Switzerland. Both the EU and the US have Memoranda of Understanding with other competition authorities, such as China and India.
44 OECD (2014), 18.
45 For a discussion of cooperation between the EU Member States in their own right and the US, see ABA Section of Antitrust Law, International Antitrust Cooperation Handbook (2004).
46 Whereas negative or traditional comity involves a country's consideration of how to prevent its laws and enforcement actions from harming another country's important interests, positive comity involved a request by one country that another country undertakes enforcement activities because anti-competitive behaviour are affecting the interests of the referring country.
47 Antitrust Cooperation Agreement 1991, art V(2). See also similar provisions in the Agreement between the EU and Japan concerning cooperation on anticompetitive activities (2003) and the Agreement between the European Communities and the Government of Canada regarding the application of their competition laws (1999).

the Requesting party's competition laws'.[48] These positive comity rules have rarely been invoked, however.[49]

The EU and the US furthermore have agreed on an Administrative Arrangement on Attendance,[50] whereby the respective competition authorities allow for attendance at certain stages of the procedures; and have set up a Merger Working Group with the principal objective of enhancing cooperation in global mergers control through a set of Best Practices.[51] They cover coordination on timing, collection and evaluation of evidence, communication between the reviewing agencies and the consistency of remedies. According to Mario Monti, then Commissioner, the Best Practices document was issued 'with a view to minimizing the risk of divergent outcomes in the interest of both businesses and consumers'.[52]

Despite the increase in cooperation over the last 20 years,[53] more cooperation is needed, but this remains challenging due to the substantive differences in competition policy. Business is ever more globalised and integrated; and more jurisdictions have adopted or are adopting competition rules. The OECD has measured the complexity of cooperation, measured by the number of pairs of competition authorities needing to cooperate, and found that by 2014 the complexity in cartel cases had increased by 53 times since 1990.[54] More cooperation would be beneficial for the companies involved in terms of costs.[55] Bilateral cooperation in competition matters, being a more realistic alternative than (binding) multilateral agreements, needs to be continued, and deepened.

48 Article III.

49 For examples, see Damien Geradin, Marc Reysen and David Henry, 'Extraterritoriality, Comity and Cooperation in EU Competition Law' in Andrew T. Guzman (ed), *Cooperation, Comity and Competition Policy* (Oxford University Press 2011) 32.

50 The Administrate Arrangement on Attendance (AAA) is an understanding about administrative arrangements to apply the 1991 Agreement.

51 See US-EU Merger Working Group: Best Practices on Cooperation in Merger Investigations, available at http://www.usdoj.gov/atr/public/international/docs/200405.htm.

52 Press Release, European Commission DG Competition, EU and US Issue Best Practices Concerning Bilateral Cooperation in Merger Cases (Oct 30, 2002).

53 The International Chamber of Commerce called upon increased international cooperation between antitrust authorities in a Policy Statement of 28 March 1996 (doc nr 225/450), at http://www.iccwbo.org/Advocacy-Codes-and-Rules/Document-centre/1996/International-Cooperation-between-Antitrust-Authorities/.

54 OECD (2014), 6.

55 David J. Gerber, 'Prescriptive authority: Global Markets as a Challenge to National Regulatory Systems' 2004, 26 Houston Journal of International Law, 299.

5.3 STATE PRACTICE ILLUSTRATIONS

5.3.1 The US

The US antitrust system[56] is largely based on criminal law, with financial and custodial penalties against individuals. Private enforcement plays an important role in the US system, where victims of anticompetitive practices can be awarded treble damages. The main purpose of US antitrust law is protecting consumer economic interests, aimed at structuring the market so as to maximize benefits to consumers (low prices). The US antitrust policy reflects in part a deregulatory approach.[57]

The Sherman Act (1890)[58] sets forth the basis antitrust prohibition against cartels and monopolies. The Sherman Act, dealing with foreign commerce and imports, has been amended by the 1982 Foreign Trade Antitrust Improvements Act (FTAIA) delineating the rules for conduct involving trade or commerce other than imports, and has also been amended by the Clayton Act (1914)[59] on mergers. The Sherman Act applies to conduct abroad under the broad language of the Commerce Clause of the Constitution, which gives Congress the power to regulate commerce with foreign nations and among the several states.[60] The Act itself is silent on its extraterritorial scope. Over the years, federal courts have interpreted its scope through different approaches, which will be discussed in the following section: a territorial approach in *American Banana Co v United Fruit Co*; an effects approach in *United States v Aluminium Co of America (Alcoa)* and a 'balancing' approach in *Timberlane Lumber Co. v Bank of America.* In *Hartford Fire Ins. Co v California* the Supreme Court was split between the latter two approaches.

Initially, the US application of the effects test triggered strong, adverse reactions from other countries. Some went so far as adopting so-called blocking statutes, prohibiting their companies from cooperating with US authorities.[61]

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56 For a full overview of the relevant legislation see US Department of Justice and the Federal Trade Commission, *Antitrust Enforcement Guidelines for International Operations*, 1995, at http://www.justice.gov/atr/public/guidelines/internat.htm.

57 Eberle (2009), 476.

58 15 U.S.C. §§ 1-7.

59 1914 (15 U.S.C. § 12-27), Section 7 Clayton Act.

60 US Constitution Article 1, sec.8, cl.3; Kelly L. Tucker, 'In the Wake of *Empagran* – Lights Out On Foreign Activity Falling Under Sherman Act Jurisdiction? Courts Carve Out a Prevailing Standard' 2010, 15 Fordham Journal of Corporate and Financial Law 807, 809.

61 There are discovery blocking statutes, aimed at preventing compliance with foreign state requests or order for documents or information; and there are judgment blocking provisions that declare unenforceable the decisions of a foreign court purporting to affect foreign nationals. See Note, 'Reassessment of International Application of Antitrust Laws: Blocking Statutes, Balancing Tests and Treble Damages' 1987, 50 Law and Contemporary Problems 197.. See for example Law 68-678 of the French Republic; Swiss Penal Code, Art.273 (1971); UK Protection of Tradition Interests Acts, 1980, 27 Eliz. 2, ch.11, *reprinted in* 21 Int'l Leg.

Interestingly, although the position of countries (like the EU and its Member States) has shifted over time, sometimes endorsing their own version of the effects doctrine, several of these blocking statutes remain on the books.[62]

5.3.1.1 *American Banana and a territorial approach*

The first Supreme Court decision to evaluate the extraterritorial application of the Sherman Act was the 1909 *American Banana Co v United Fruit Co*[63] case whereby the plaintiff alleged that United Fruit had effectively monopolized Central American banana trade in Panama and Costa Rica. The Court applied a doctrine of 'strict territoriality', holding that legislation is prima facie territorial and the Sherman Act did not extend to acts done abroad.

5.3.1.2 *Alcoa and effects*

The territoriality approach was seen as the basic approach in the following years, until the Court revaluated its stance in the *Alcoa* case in 1945.[64] With this case the extraterritorial application of antitrust laws in the US began.[65] When the case came to the US Supreme Court, the Court announced it could not assemble the requisite quorum of six judges qualified to hear the case,[66] and so the Second Circuit, court of last resort by special statutory designation, decided the case that was to become a landmark decision on the extraterritorial application of the Sherman Act. The Court had to assess whether the Sherman Act applied to a production quota agreement between a Canadian, a British, a French, a Swiss and two German corporations. Judge Learned Hand applied the Sherman Act to the cartel quota agreements and found these to be 'unlawful, though made abroad, if they were intended to affect imports and did affect them'.[67] The Court rejected the notion that domestic *effects* alone would suffice, but required *intent* in addition. Once *intent* was established, the burden of proof

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Mat. 834 (1982) (United Kingdom); Foreign Extraterritorial Measures Act, *reprinted in* 24 Int'l Leg. Mat. (1985) (Canada); Foreign Proceedings (Prohibition of Certain Evidence) Act, 1976, Australian Acts No.121, amended by Foreign Proceedings (Prohibition of Certain Evidence) Amendment Act, 1976, Australian Acts No.122.

62 The French blocking statute (Loi 68-678 of the French Republic, modified by Loi 80-538), originally adopted in light of US antitrust enforcement against shipping cartels, is a well-known example. See also Pierre Grosdidier, 'The French Blocking Statute, The Hague Evidence Convention and the Case Law: Lessons for French Parties Responding to American Discovery' 2014, 50 Texas international Law Journal 11.

63 213 US 347 (1909).

64 2d Cir., *US v Aluminium Co of America (Alcoa)* 1945, 148 F.2d 416

65 For an interesting historical overview of how and why extraterritoriality developed in the US, see James J. Friedberg, 'The Convergence of Law in an Era of Political Integration: The Wood Pulp Case and the Alcoa Effects Doctrine' 1991, 52 University of Pittsburgh Law Review 289, 297.

66 Six judges had recused themselves.

67 *Alcoa* 1945, 444.

for an absence of domestic effects shifted to the defendant.[68] Alcoa was an American aluminium company that did not itself participate in the cartel, but had created the Canadian company *Limited*, transferred nearly all of its assets located outside the US to Limited and issued all the shares in Limited to Alcoa's common shareholders, while Alcoa continued to have a substantial state in Limited. It was Limited, however, that participated in the international cartel. The Second Circuit accepted the District Court's assessment that Alcoa and Limited were separate entities, and this might have resulted in a broader extraterritorial application than would have been the case if both companies had been seen as a single entity. Lifting the corporate veil would have shown that the actors and beneficiaries of Limited were predominantly US citizens.[69] However, Judge Learned Hand only based his judgment on intention and effects.[70] With that notion of intent, Judge Learned Hand rejected jurisdiction over unintended effects, as 'almost any limitation on the supply of goods in Europe, for example, or in Latin America, may have repercussions in the United States, if there is trade between the two. Yet (…) Congress did not intend the Sherman Act to cover them'.[71] Intent was thus indispensable to avoiding 'international complications'.[72]

Subsequent courts have not always been very clear on the precise requirements and the relationship between intent and effects: are both required or could they be alternatives?[73] The Supreme Court in *Hartford Fire* seems to reaffirm *Alcoa*'s proposition that intent and effects are required cumulatively by stating that 'it is well established by now that the Sherman Act applies to foreign conduct that was *meant to* produce and did in fact produce some substantial effect in the United States'.[74]

The intent required is not a specific, but a general intention, which can be also be retraced in requirements of foreseeability and directness of effects.[75] It has been suggested that within the scope of the FTAIA – adopted to reduce tensions over the Act's extraterritorial application and to clarify the standards to be used by the courts (without much success)[76] – the requirement that effects be 'reasonably foreseeable' has replaced the 'intent' requirement, and that the foreseeability requirement is less demanding than the intent

68 Ibid 443ff.
69 Wagner-von Papp(2012), 28.
70 See for an interesting discussion of Judge Hand's reasoning Swan(1997), 568.
71 *Alcoa* 1945, 443.
72 Ibid.
73 See for instance 9th Cir., *Timberlane Lumber Co. v Bank of America* 1977, 549 F.2d 597, 613; 3d Cir., *Mannington Mills v Congoleum Corp.* 1979, 595 F.2d 1287, 1301
74 US Supreme Court, *Hartford Fire Insurance v California* 1993, 509 US 764, 796; 113 S.Ct. 2891.
75 Coppel (1993), 85.
76 Edward Swaine, 'Cooperation, Comity and Competition Policy: United States' in Andrew T. Guzman (ed), *Cooperation, Comity and Competition Policy* (Oxford University Press 2011) 7.

requirement.[77] However, these two elements might not differ all that much, as it has never been made entirely clear whether the 'intent' requirement refers to a subjective or objective intent. If objective intent would suffice, then that would arguably be fulfilled when domestic effects were reasonably foreseeable.[78]

The effects test can be criticized for being overly broad in scope: in theory almost everything can affect almost anything. The test is difficult to apply as it lacks doctrinal clarity. When are the effects considered sufficient to trigger the application of domestic rules to foreign conduct?[79] Courts and legislature have continuously tried to qualify the effects that are necessary to trigger an extraterritorial reach.[80]

The FTAIA requires that there must be 'direct, substantial and reasonably foreseeable' effects on domestic or import commerce.[81] However, it is not always very clear what each element entails and how they relate to each other. Firstly, when can an effect be said to be *direct*? The Department of Justice (DOJ)/Federal Trade Commission (FTC) Guidelines consider, for instance, that the domestic effect is sufficiently direct where a foreign cartel sells the affected products to an unrelated intermediary who will foreseeably sell them on to buyers in the US.[82] In this interpretation, the distinction between direct and reasonably foreseeable becomes blurred though, making the requirement of directness arguably redundant. Nevertheless, the emerging view seems to be that competition authorities must be able to *show* the direct effect on the market, as *assuming* that e.g. price-fixing will harm competition on the market is not good enough.[83] The Ninth Circuit has interpreted 'direct' as an 'immediate consequence' of the defendant's conduct,[84] whereas the Seventh and Second Circuits rejected that approach and read a 'reasonably proximate causal nexus' in directness.[85] Secondly, the requirement of *substantial* effects also raises questions. In *Alcoa* the potential effects were sufficient, as long as the absence of actual effect was not shown. The DOJ/FTC Guidelines also consider

77 Wagner-von Papp(2012), 30.
78 Ibid.
79 Robert Y. Jennings, 'Extraterritorial Jurisdiction and the United States Antitrust Laws' 1957, 33 British Yearbook of International Law 146, 159.; see also L. Austen Parrish, 'The Effects Test: Extraterritoriality's Fifth Business' 2008, 61 Vanderbilt Law Review 1455, 1480.
80 Parrish (2008), 1481.
81 See 15 U.S. Code § 6a – Conduct involving trade or commerce with foreign nations.
82 DOJ/FTC Antitrust Enforcement Guidelines for International Operations (April 1995), Section 3.121.
83 See e.g. CJEU, *InnoLux Corp., formerly Chimei InnoLux Corp. v European Commission* 9 July 2015, ECLI:EU:C:2015:451; US Court of Appeals, 7th Cir., *Motorola Mobility LLC v. AU Optronics Corp.* 26 November 2014, 775 F.3d 816
84 9th Cir., *United States vs LSL Biotechnologies* 2004, 379 F.3d 672, 680
85 2d. Cir., *Lotes Co. v Hon Hai Precision Indus.* 2014, 753 F.3d 395, 410 ; 7th Cir., *Minn-Chem Inc. v Agrium Inc.* 2012, 683 F.3d 845, 856-57

that potential harm can qualify as substantial under the FTAIA.[86] The third requirement of foreseeability seems to be the operative one. If it is foreseeable that conduct will have anticompetitive effects in the US, the rules can be applied to that conduct. If, however, somehow US markets are implicated in conduct in a way that the actors did not and could not foresee, then it is a matter of legal certainty not to apply foreign laws to these actors.[87]

The criteria of direct, substantial and foreseeable limit the application of US antitrust law to foreign conduct, and are usually considered as a 'jurisdictional limit' without which US authorities and courts have no jurisdiction over the conduct in question. As the effects doctrine functions as a legal basis to exercise jurisdiction, it is a logical consequence that the qualifications for such effect thus form part of the jurisdictional analysis. After the Supreme Court's ruling in *Arbaugh* in 2006 on subject-matter jurisdiction in the ambit of the Civil Rights Act,[88] the judiciary has begun to re-evaluate the jurisdiction-or-merits question with regard to the FTAIA as well. In 2011, for example, the Third Circuit in *Animal Science* considered the elements set forth by FTAIA as part of the substantive antitrust claim, rather than a jurisdictional limit.[89] In 2012, the Seventh Circuit in *Minn-Chem* followed suit.[90] The DC Circuit and the Ninth Circuit, however, have each held that the FTAIA presents a jurisdictional bar.[91] It may be up to the Supreme Court to resolve this issue. The distinction is more than an academic exercise, as considering the matter as a jurisdictional or a merits question will have an impact on the burden of proof, will postpone jurisdictional determinations to a later stage of proceedings, making them more costly and possibly undermining the principle of comity.[92]

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86 DOJ/FTC Antitrust Enforcement Guidelines for International Operations (April 1995), Section 3.121.

87 Wagner-von Papp(2012), 35.

88 US Supreme Court, *Arbaugh v. Y & H Corp.* 2006, 546 US 500; 126 S. Ct. 1235, paras.515ff. The Court noted that 'if the legislature clearly states that a threshold limitation on a statute's scope shall count as jurisdictional, then courts and litigants will be duly instructed and will not be left to wrestle with the issue. But when Congress does not rank a statutory limitation on coverage as jurisdictional, courts should treat the restriction as nonjurisdictional in character'. See also Abbott Lipsky and Kory Wilmot, 'The Foreign Trade Antitrust Improvements Act: Did Arbaugh Erase Decades of Consensus Building?' August 2013, The Antitrust Source, 6.

89 3d Cir., *Animal Science Products, Inc. v China Minmetals Corp.* 2011, 654 F.3d 462

90 *Minn-Chem Inc. v Agrium Inc.* 2012.

91 822 F.Supp. 2d 953 (N.D. Cal. 2011). See also US Supreme Court, *F. Hoffmann-La Roche Ltd. v. Empagran S.A.* 2004, 542 US 155 paras.159ff., treating the FTAIA as governing subject-matter jurisdiction.

92 Lipsky and Wilmot (August 2013), 8.

5.3.1.3 Seeking a Balance: tempering the effects doctrine?

The adoption of the FTAIA in 1982, limiting and defining the extraterritorial reach of the Sherman Act, with an explicit reference to the effects doctrine, capped an extended period of debate regarding the extraterritorial application of US antitrust laws. Very few actions were dismissed based on lack of jurisdiction, raising controversy with other countries. According to one commentator in 1981, 'there have been five diplomatic protests of US antitrust cases for every instance of express diplomatic support, and three blocking statutes for every cooperation agreement'.[93] During this period, US courts developed the effects doctrine to moderate the extraterritorial application of US jurisdiction, which they tempered by applying versions of a jurisdictional rule of reason, reasonableness test or comity analysis.[94]

In *Timberlane* the Court suggested that in addition to the effects test, one should also consider other interests.[95] The plaintiff, the US company Timberlane Lumber Co., alleged that the Bank of America had conspired with officials in Honduras to monopolize the timber industry. The conduct took place entirely in Honduras, it involved only foreign citizens and the economic impact was primarily felt in Honduras. The Court stated that it must be considered 'whether the interests of, and links to, to the United States – including the magnitude of the effect on American foreign commerce – are sufficiently strong, vis-à-vis those of other nations, to justify an assertion of extraterritorial authority'.[96] An effect on US commerce is alone not a sufficient basis to determine whether jurisdiction should be asserted 'as a matter of international comity and fairness'.[97]

In *Mannington Mills,* the Court indicated that a comity analysis was not part of a threshold inquiry into whether the conduct fell within the Sherman Act, but instead was a discretionary factor according to which courts could abstain from proceedings.[98] The defendant, Congoleum Corp., an American company, used patents that it owned in foreign countries to exclude the plaintiff, Mannington Mills, also an American company, from those foreign markets. The plaintiff claimed that the patents had been obtained fraudulently and breached US standards, so Congoleum should not be able to use those

93 Joel Davidow, 'Extraterritorial Antitrust and the Concept of Comity' 1981, 15 Journal of World Trade 500, 502. See for instance Swiss Penal Code, Art.273 (1971); Protection of Tradition Interests Acts, 1980, 27 Eliz. 2, ch.11, *reprinted in* 21 Int'l Leg. Mat. 834 (1982) (United Kingdom); Foreign Extraterritorial Measures Act, *reprinted in* 24 Int'l Leg. Mat. (1985) (Canada); Foreign Proceedings (Prohibition of Certain Evidence) Act, 1976, Australian Acts No.121, amended by Foreign Proceedings (Prohibition of Certain Evidence) Amendment Act, 1976, Australian Acts No.122.

94 Swaine(2011), 10. On comity and reasonableness, see chapter 4.3.2.

95 *Timberlane Lumber Co. v Bank of America* 1977.

96 Ibid.

97 Ibid 613.

98 *Mannington Mills v Congoleum Corp.* 1979.

patents in order to restrain US foreign commerce. The Court decided it had subject matter jurisdiction over the claim, but held it may abstain from jurisdiction if principles of comity so dictate. Thus, according to the Court, effects have to be analyzed first to determine whether jurisdiction exists, before determining whether to abstain based on comity factors.[99] In the wake of these initial decisions, a similar set of principles was developed in the Third Restatement of Foreign Relations Law, linking the comity inquiry to prescriptive jurisdiction and providing a list of criteria to determine whether the exercise of jurisdiction was unreasonable.[100]

In *Hartford Fire,*[101] the Supreme Court left open the question whether courts could engage in a comity analysis, but rather applied a test of 'true conflict': whether those accused of infringement cannot comply with the demands of foreign law and US law at the same time. The case involved a conspiracy by a group of London coinsurance companies to limit the kind of insurance offered in the US, such as limiting the coverage of various pollution damage claims. The UK defendants argued their conduct was lawful under British law. UK regulation permitted, but not compelled, action that was not allowed in the US, therefore not leading to 'true conflict' according to the majority of the court.[102] A person subject to regulation of both countries could comply with the laws of both countries. The Court was very much divided in that case (5-4), so the decision led to controversy and confusion. Justice Scalia, writing for the four dissenters, argued that any nation having a basis for prescriptive jurisdiction must nevertheless refrain from exercising that jurisdiction if such exercise would be unreasonable, referring to the Third Restatement.[103] According to the dissenters, a conflict of laws exists where two laws provide different substantive rules, without one necessarily compelling an act that is considered unlawful by the other.

In *Empagran,*[104] the Supreme Court took again into account comity considerations, albeit in a more summary form than in *Timberlane*. The case considered a class action suit brought by foreign purchasers of vitamins, alleging that certain US and non-US vitamin manufacturers and distributors had engaged in a price-fixing conspiracy that resulted in the rise of prices of

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99 Walter Steinberg, 'Mannington Mills, Inc v Congoleum Corp: A Further Step Toward a Complete Subject Matter Jurisdiction Test' 1980, 2 Northwestern Journal of International Law & Business 241, 244; 258.

100 1986, §401;403.

101 *Hartford Fire Insurance v California* 1993.

102 Swan(1997), 534.

103 *Hartford Fire Insurance v California* 1993, 819 (Scalia J. dissenting). For a further commentary, see Andreas F. Lowenfeld, 'Conflict, Balancing of Interests and the exercise of jurisdiction to prescribe: reflections on the Insurance Antitrust case' 1995, 89 American Journal of International Law 42; Phillip Trimble, 'The Supreme Court and International Law: The demise of Restatement Section 403' 1995, 85 American Journal of International Law 53.

104 *Empagran* 2004.

vitamins in the US and elsewhere.[105] Rather than domestic plaintiffs litigating against foreign defendants or foreign plaintiffs litigating against domestic defendants, in *Empagran,* foreign plaintiffs injured abroad brought a claim against a global cartel including foreign defendants.[106] The Court declined to extend the Sherman Act so as to apply to foreign purchasers as it held that US Courts do not have jurisdiction when the foreign injury is *independent* of any effect on US commerce.[107] Even though domestic plaintiffs might have suffered (domestic) injuries as well, where the foreign harm was wholly separate from the domestic harm, jurisdiction cannot be established.[108] The Court noted that it would be unreasonable to apply antitrust laws to foreign conduct where that conduct did not cause domestic injury,[109] referring amongst other to the differences that still exist among the antitrust laws of affected countries.[110] Any such application of US laws would then interfere with the interests of other nations. The Court thus resurrected comity to help construe the FTAIA's scope.[111]

Despite the attempts to rely on comity to mitigate the scope of the FTAIA and the effects test, courts have found comity to apply only in rare circumstances.[112] When applied, courts have differed in their approaches to comity issues, dismissing cases because of 'true conflict' issues, as well as because of comity concerns.[113] Furthermore, even if comity is applied, questions arise

105 Stigall (2012), 346.
106 When discussing the extraterritorial scope of US antitrust rules it is important to note that private enforcement plays an important role in the US antitrust system. Whereas extraterritoriality in the EU refers mainly to the European Commission or EU courts exercising jurisdiction over foreign companies, in the US the question also refers to whether victims injured abroad by anticompetitive conduct can bring suit in US federal courts under US antitrust laws when the conduct abroad also has an effect on domestic business.
107 To determine the standard of 'dependence' of foreign injury, the case was sent back to the DC Circuit Court (DC Cir, *Empagran SA v F. Hoffman-LaRoche Ltd (Empagran II)* 2005, 417 F.3 1267, 1270 That court found that a direct causal relationship or proximate cause is required: the domestic effects must be the proximate cause of the plaintiffs' injuries. It noted that 'a more flexible, less direct standard than proximate cause would open the door to just such interference with other nations' prerogative to safeguard their own citizens from anticompetitive activity within their own borders' (at 1271).
108 Tucker (2010), 824.
109 *Empagran* 2004, 169.
110 Ibid 167.
111 Lynn S. Diamond, '*Empagran*, The FTAIA and Extraterritorial Effects: Guidance to Courts Facing Questions of Antitrust Jurisdiction Still Lacking' 2006, 31 Brooklyn Journal of International Law 805, 828.
112 Parrish (2008), 1477.
113 Joseph P. Griffin, 'Extraterritoriality in US and EU Antitrust Enforcement' 1999, 67 Antitrust Law Journal 159, 166.

whether courts are able to assess foreign interests meaningfully, consistently, and/or do so in a neutral way, not favouring US interests.[114]

5.3.2 The EU

In contrast to the criminalized US antitrust system that includes private enforcement, the EU has an administrative system for the enforcement of its competition laws, in which companies are penalized with fines. EU competition law is most concerned with the protection of competitors' interests (smaller firms should not be driven out of the market by big firms) and the protection of consumer safety and well-being (consumers should not be exploited or misled by big firms). Compared to the US system, the EU approach is arguably more proactive in enforcing antitrust law, intervening where necessary to protect the market, society and culture.[115]

The EU competition rules are constituted by Articles 101 (cartels and concerted practices) and 102 TFEU (abuse of dominant position), as well as by various guidelines and regulations governing mergers and other relevant matters. The EU competition rules were drafted with the aims of advancing European integration and diminishing interstate tension through free trade. Also, the rules were intended to benefit European consumers.[116] The set-up within the EU is based on a two-tier system whereby the Commission and the national competition authorities have parallel competence to apply Articles 101 and 102 TFEU.[117] The Commission can furthermore assess possible mergers with a Community dimension, based on the Merger Regulation.[118]

Article 101 TFEU is silent on its territorial (or extra-territorial) reach, referring to conduct that 'may affect trade between Member States' and has as its 'object or effect the prevention, restriction or distortion of competition'. Under well-established case law, the test for determining whether the conduct may affect trade between Member States requires that it must be possible to foresee with a sufficient degree of probability, on the basis of a set of objective factors of law or fact, that the agreement or practice may have an influence, direct or indirect, actual or potential, on the pattern of trade between them.[119] The threshold for the effect on trade test is thus rather low: it is enough if

114 See also chapter 3 on comity. See also Notes, 'Predictability and Comity: Toward Common Principles of Extraterritorial Jurisdiction' 1985, 98 Harvard Law Review 1310, 1320.

115 Eberle (2009), 477.

116 Friedberg (1991), 295.

117 Council Regulation 1/2003 of Dec.16, 2002 on the implementation of the rules on competition.

118 Council Regulation 139/2004 of Jan.20, 2004 on the control of concentrations between undertakings.

119 Botteman and Patsa (2012), 367; CJEU, *Stichting Sigarettenindustrie and others v Commission of the European Communities* 10 December 1985, Joined cases 240, 241, 242, 261, 262, 268, and 269/82; ECLI:EU:C:1985:488, para.48.

conduct is *capable of* having an effect on intra-EU trade.[120] Even indirect influences on EU cross-border trade are captured by the test, for instance where the cartelised product is used as input for the final product that is traded between Member States.[121]

Whereas the EU originally strongly opposed the US exercise of extraterritorial jurisdiction in the field of antitrust, in the last decades of the 20th century, the EU slowly moved toward a similar approach, especially in the application of EU competition law by the Commission (to a lesser degree also by national competition authorities).[122] The EU has claimed jurisdiction in competition matters over conduct arising outside EU territory. The Commission and the courts have relied upon three doctrines: the single economic entity doctrine, the implementation doctrine, and the effects doctrine. The European Commission has since long attempted to assert jurisdiction on the basis of the effects that cartel conduct has within the internal market.[123] To date, the CJEU has never recognized the effects doctrine (but not rejected it either), rather relying on less contentious doctrines, such as the single economic entity doctrine or the implementation doctrine, however, the General Court did rely upon the effects doctrine in the context of merger control in *Gencor*.[124] The following part will discuss the main theories and their landmark judgments.[125]

5.3.2.1 Dyestuffs and the economic entity theory

In the *Dyestuffs* case, the question as to whether an extraterritorial application of EC competition rules could be accepted based on the effects doctrine, was

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120 CJEU, *Irish Sugar plc v Commission of the European Communities* 1999, T-228/97 [1999] ECR II-2969, para.170; CJEU, *Müller International Schallplatten GmbH v Commission of the European Communities* 1978, 19/77 [1978] ECR 131, para.15.

121 CJEU, *Bureau national interprofesionnel du cognac v Guy Clair* 1985, 123/83 [1985] ECR 391, para.29; *Innolux* 9 July 2015.,

122 Friedberg (1991), 291; Geradin, Reysen and Henry(2011); Botteman and Patsa (2012); Wagner-von Papp(2012). National courts have been reluctant to accept the effects doctrine, except for Germany. In *Phillip Morris, Inc v Bundeskartellamt* (1984 ECC 393) (Case Kart 16/82), the German Federal Cartel Authority embraced the effects doctrine.

123 See for instance Decision of EC Commission 64/233, March 11, 1964, No. IV/A-00061, OJ 58, *Grosfillex-Fillistorf.*

124 , *Gencor v Commission* General Court 1999, T-102/96 ECLI:EU:T:1999:65.

125 Extraterritorial elements can be traced in a number of other cases, however, very often the facts will allow the Commission to claim jurisdiction through territorial inks because of agreements with European companies. In few cases does the Commission explicitly argue for its extraterritorial jurisdiction, and in even fewer cases will the parties appeal on these grounds. For a discussion of more cases see for instance Botteman and Patsa (2012).; Chie Sato, 'Extraterritorial Application of EU Competition Law: Is It Possible for Japanese Companies to Steer Clear of EU Competition Laws?' 2010, Journal of Political Science and Sociology 23; Yves Van Gerven and Lorelien Hoet, 'Gencor: Some notes on Transnational Competition Law Issues – *European Court of First Instance 25 March 1999, T-102/96, Gencor Ltd. V Commission*' 2001, 28 Legal Issues of Economic Integration 195.

raised for the first time. Without much elaboration the Commission referred to effects felt in the common market, as a result of concerted practices among ten producers, among which the UK-based company (at the time the UK was not yet a EU Member State) Imperial Chemical Industries (ICI).[126] AG Mayras recommended that the Commission's decision should be upheld on the basis of the effects doctrine. He thereby referred to reasonably foreseeable and substantial effects and relied heavily on American precedents such as *Alcoa*.[127]

The ECJ upheld the Commission's decision by finding that the behaviour indeed constituted a concerted practice prohibited by Article 85(1) EEC Treaty (current Article 101 TFEU), but not by relying on the effects doctrine. Rather the Court based its judgment upon the single economic entity doctrine, according to which parents and subsidiaries can be considered as one undertaking where the subsidiary is acting on its parent's instruction.[128] The Court thereby noted that the conduct of ICI's subsidiaries established in the EU could be imputed to the parent company, and that they could be treated as one single economic unit.[129] In the case at hand, the ICI parent had ordered the subsidiaries to engage in the anticompetitive conduct in question and 'was able to ensure that its decision was implemented on that market'.[130] The Court, however, did not explain why it did not adopt the AG's opinion, nor why it did not reject the effects doctrine outright. The Court might have opted to keep its options open at that point, realizing that the effects doctrine was still controversial.[131]

5.3.2.2 Wood Pulp and the implementation theory

For fifteen years following the *Dyestuffs* case, the effects doctrine was not directly confronted in EU courts, mainly because the results yielded by the Commission's application of the effects doctrine and the Court's (flexible) economic unit theory were exactly the same. With the *Wood Pulp* case,[132] however, the Court was facing a factual situation in which the economic unit theory could not be stretched to cover truly non-EU actors. The case dealt with price-fixing practices involving forty-one producers of sulphate wood pulp

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126 OJ 1969, L195/11, para. 28.

127 , *Imperial Chemical Industries Ltd. v Commission (Dyestuffs)* Court of Justice of the European Union 1972, case 48/69 ECLI:EU:C:1972:70, 696.

128 Ibid 628.

129 Ibid 130.

130 Ibid 130.

131 Friedberg (1991), 312. *Dyestuffs* was an Article 101 TFEU case, and the single economic unit argument was also applied in the subsequent Article 102 TFEU cases *Continental Can* and *Commercial Solvents*. (CJEU, *Europemballage Corp and Continental Can Co v European Commission* 1973, 6/72 [1973] ECR 215; CJEU, *Instituto Chemioterapico Italiano and Commercial Solvents Corp v European Commission* 1974, 6/73 and 7/73 [1974] ECR 223.) See also for a discussion Friedberg (1991), 313.)

132 Court of Justice of the European Union *Wood Pulp I* 1998.

and two related trade associations, most of them having their registered offices outside the EU. Ten US companies and one trade association were initially charged by the Commission, which was a first where neither the enterprises involved nor any of their corporate affiliates were located within the Community. The economic entity theory could thus not be relied upon.

The Commission based its decision upon an *Alcoa*-style effects doctrine, an approach supported by Advocate General Darmon, who suggested the adoption of the criteria of direct and immediate, reasonably foreseeable and substantial effects.[133] The Court eventually adopted a modified version of the effects doctrine, without explicitly subscribing to it. Between the lines of the Court's judgment, one can nevertheless identify clear references to effects. In paragraph 13, the Court refers to a 'concertation which has the object and effect of restricting competition within the common market'. In paragraph 14, the Court confirms that 'the Commission has not made an incorrect assessment of the territorial scope of Article 85'.

The Court noted that an infringement of Article 101 TFEU consists of conduct made up of two elements: the formation of the agreement, decision or concerted practice; and the implementation thereof. Establishing jurisdiction must not depend on where the agreement was formed, as that 'would obviously give undertakings an easy means of evading those prohibitions', but must depend on the place of implementation of an agreement.[134] Such application would fall under the territoriality principle and hence not be controversial under public international law. The Court hereby relied on the objective territoriality principle, whereby (part of) an act occurred outside the state's territory, which in a competition law context more or less equals the effects doctrine, as the effects of anti-competitive behaviour are a necessary element for that behaviour to fall within the scope of the competition rules.[135] In *Wood Pulp*, the Court found that the producers implemented their pricing agreement within the common market, so it was immaterial whether or not they had recourse to subsidiaries, agents or branches within the Community.[136]

It is not clear to what extent the Court's 'implementation' theory actually differs from the effects doctrine.[137] In *Wood Pulp*, the anti-competitive acts were 'implemented' within the EU through price announcements and transaction prices. Such market conduct taking place within EU territory is according to the Court covered by the territoriality principle. However, can the selling of goods within the EU at 'cartelized prices' by non-EU companies also be seen as economic effects of foreign anti-competitive behaviour? That would undoubtedly be the case under the US understanding of the effects doctrine.

133 Opinion of Advocate General Darmon, ECLI:EU:C:1988:258, 36-42; 53.
134 Court of Justice of the European Union *Wood Pulp I* 1998, 16.
135 Ibid para.18. Coppel (1993), 83.
136 Court of Justice of the European Union *Wood Pulp I* 1998, para.17.
137 Griffin (1999), 186.

Rather than referring to the effects doctrine, the CJEU relied on an 'effects doctrine in disguise',[138] without indicating how an element of market conduct and 'implementation' differs from economic effects.[139] Arguably, implementation requires a direct conduct, for instance, the direct selling of products by the cartel members, whereas indirect sales could still be covered under the effects doctrine, in the example where a foreign cartel sells its products through a bona-fide non-EU intermediary purchaser who will then sell the products within the EU. Even though the prices in the EU will undoubtedly be affected, the cartel conduct would then not be regarded as directly implemented in the EU.[140]

An example of 'indirect' sales and effects was at issue in the recent case *InnoLux v Commission*.[141] Innolux, a Taiwanese company, produced LCD panels sold to its vertically-integrated non-EU subsidiaries.[142] They incorporated those LCD panels into finished products such as TVs and computer monitors which were then sold on to independent third parties within the EU. While it was not disputed that the Commission had jurisdiction to apply Article 101 TFEU to the cartel at issue as the cartel was implemented in the EU by selling finished products incorporating LCD panels,[143] the question was whether the Commission, when imposing its fine, could also take into account the intra-group sales of the input products that occurred outside of the EU and the European Economic Area (EEA).[144] In order to calculate the relevant EEA turnover,[145] the Commission looked at the first 'real' sale within the EEA of the LCD panel as such or integrated in a final product, thus taking into account

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138 Jürgen Basedow, 'International Antitrust: From Extraterritorial Application to Harmonization' 2000, 60 Louisiana Law Review 1037, 1040.

139 Wagner-von Papp(2012), 27.

140 Ibid 29.

141 *Innolux* 9 July 2015.

142 Authorities in Japan, Korea, the EU and the US investigated a cartel between LCD panel-makers that agreed on price-fixing from 1999 to 2006. All cartel meetings had taken place in Korea and Taiwan. Samsung had disclosed to the Commission the existence of a cartel on the market for LCD Panels.

143 *Innolux* 9 July 2015, para.73. For the Commission's reasoning on jurisdiction where it referred both to the implementation doctrine (para.230) and the effects doctrine (para.231), see Commission Decision of 8 December 2010, Case COMP/39309, para.238.

144 See OJ 2006 C210, Commission Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation EC 1/2003. The Commission shall establish the value of sales of the cartelized product to which the infringement related directly or indirectly. This should reflect the economic significance of the infringement and the relative size of the undertaking's contribution to it. Whether the relevant sales are to independent third parties or to entities belonging to the same undertaking should not matter, as that would otherwise give an unjustified advantage to vertically integrated companies by allowing them to avoid a proportionate fine. (See CJEU, *Guardian Industries and Guardian Europe v Commission* 2014, C-580/12P, EU:C:2014:2363, paras.57ff.).

145 For the purpose of calculating a fine in competition proceedings, the Commission will take into account the sales in the European Economic Area (EEA) rather than only the EU. (Article 23(2)(a) of Regulation (EC) No 1/2003 (OJ 2006 C 210).

direct sales of LCD panels to independent EU undertakings, as well as sales where the LCD panel was transformed within the same group into a TV or computer, and then sold within the EEA. Innolux argued that only the sales of the finished products into the EEA could be taken into account.[146] AG Wathelet agreed with Innolux, arguing that taking intra-group sales that have taken place outside of the EEA would be an unjust extension of the territorial scope of Article 101 TFEU.[147] The AG argued that intra-group sales outside the EEA could not be seen as 'implementation' of a cartel within the EU.[148] Even if the Court were to rely on the effects doctrine, these 'indirect' sales could not, according to the AG, be considered as immediate and substantial effects.[149] The CJEU did not follow the AG and did not elaborate on the jurisdictional question, finding the arguments on territorial jurisdiction 'irrelevant'.[150] The Court based its reasoning on the theory of a single (vertically-integrated) undertaking, justifying the Commission's decision to include internal intra-group sales of the goods concerned by the infringements, if the finished products are sold within the EU – even if those intra-group sales took place outside the EU.[151] The *Innolux* case can be seen as extending the Commission's territorial jurisdiction. However, that jurisdiction is not unlimited: the cartel must still be implemented through sales within the EEA.

Innolux leaves unanswered the question of double jeopardy. If the Commission, for instance, considers intra-group deliveries as the first sale, and includes those when imposing fines, there is a risk of concurrent penalties and jurisdictional conflict with other competition authorities that could pursue companies based on the same sales. The CJEU only stated that '*non bis in idem* nor any other principle of law obliges the Commission to take account of proceedings and penalties to which the undertaking has been subject in non-member States', an answer that seems unsatisfactory in light of international cooperation

146 Commission Decision of 8.12.2010, C(2010) 8761 final, para.9. The indirect sales of LCD panels to non-EU undertakings who would then sell the finished products into the EU are not included. (para.381).
147 AG Wathelet opinion (30 April 2015) to *Innolux* 9 July 2015., para.44.
148 Ibid, para.46.
149 Ibid, paras. 49-53.
150 CJEU *Innolux Corp.*, para.71.
151 Ibid, paras.65-70. This is contrary to a finding by the US 7th Circuit in a private enforcement case *Motorola* 26 November 2014. When Motorola, a US company, claimed damages from the LCD cartel, the Court found that the FTAIA's conditions had not been fulfilled because Motorola had based its claim on sales of the cartelized LCD panels to Motorola's non-US subsidiaries who subsequently delivered the finished products to their parent company in the US. The court found the effects to be too indirect. In a public enforcement case related to the LCD cartel, the US Court of Appeals for the Ninth Circuit did hold in an appeal by AU Optronics that the price-fixing by the LCD cartel had a direct and substantial effect in the US. (9th Cir., *United States of America v AU Optronics Corp et al* 10 July 2014, 12-10492 F.3d.).

in competition matters.[152] International cooperation agreements or comity considerations could be useful to determine in such situations which authorities should reasonably exercise jurisdiction.

5.3.2.3 Gencor and the effects doctrine

In 1999 the General Court did accept the application of the effects doctrine to a merger of two South-African companies in the *Gencor* case.[153] Mergers and acquisitions fall within the scope of competition law, as mergers will generally lead to fewer competitors, which could harm the competitive structure of the market and confer monopolistic power upon the surviving firm, which could lead to abuses of dominant market positions.[154] Over the last decades the EU's merger policy has shifted its focus from punishing actual abuse of market dominance to a pre-emptive approach whereby market structures and potential post-merger effects are scrutinized as a condition precedent to merger approval by the Commission.

The main rules for such assessment are laid down in the Merger Regulation 139/2004, which scope is defined exclusively by reference to a 'Community dimension' of the concentration, which exists whenever the undertakings concerned exceed both worldwide and Community-wide turnover thresholds.[155] The Community dimension can exist irrespective of the place of incorporation or main seat of the undertakings – they must only have substantial operations within the EU. In *Gencor*, a case concerning a joint venture between Gencor Ltd., a South African company whose metal activities are exercised by its South African subsidiary Implats; and Lonhro Plc, a British company whose metal activities are exercised by its South African subsidiary LPD, the territorial scope of the Merger Regulation[156] was discussed.[157]

152 *Innolux* 9 July 2015, para.75.

153 General Court *Gencor* 1999.

154 Kenneth J. Hamner, 'The Globalization of Law: International Merger Control and Competition Law in the United States, the European Union, Latin America and China' 2002, 11 Journal of Transnational Law and Policy 385, 388.

155 Article 1(2) of the Merger Regulation reads that a concentration has a Community dimension where the aggregate Community-wide turnover of all the undertakings concerned is more than EUR 5000 million, and the aggregate Community-wide turnover of each of at least two of the undertakings concerned is more than EUR 250 million, unless each of the undertakings concerned achieves more than two-thirds of its aggregate Community-wide turnover within one and the same Member State. According to Article 1(3) there can also be a Community dimension where the combined aggregate worldwide turnover of all the undertakings concerned is more than EUR 2500 million, with a combined aggregate turnover of all undertakings in at least three undertakings of more than EUR 100 million.

156 Note that at the time mergers were regulated under Council Regulation (EEC) 4064/89 of 21 December 1989 on the control of concentrations between undertakings, amended by Council Regulation EC/1310/97 of 30 June 1997. As Regulation 139/2004, the old merger regulation required a Community dimension for undertakings that could be established through minimum thresholds of worldwide and Community turnover.

Firstly, Gencor argued that the proposed concentration did not fall within the territorial scope of the Regulation as the economic activities were conducted in South Africa. The Court (then Court of First Instance) referred to the turnover criteria in the Merger Regulation, finding that the joint venture did fall within the scope of the Regulation. Secondly, Gencor argued that the Commission did not have jurisdiction under international law to examine the transaction. In this view, a finding that a transaction falls within the scope of the Regulation does not necessarily mean that there is international jurisdiction.[158] The Court noted that 'application of the Regulation is justified under public international law when it is *foreseeable* that a proposed concentration will have an *immediate* and *substantial effect* in the Community'.[159] The Court found there indeed to be immediate, substantial and foreseeable effects, without explicitly referring back to the turnover thresholds.[160] The transaction would give rise to a lasting alteration of the market structure and would have created conditions in which abuses were not only possible but economically rational.[161] It is not clear whether the Court, by referring to the effects of a transaction, imposed an additional requirement of substantive market analysis as a jurisdictional element, or whether that analysis in any case forms part of the merits (or to what extent this analysis of effects differs from the merits analysis of finding an impeding effect on competition). Neither in later case law, nor in the new 2004 Merger Regulation, is the requirement of effects presented as a condition to establish jurisdiction, but rather as part of the Commission's assessment of the concentration.[162] While the turnover requirements establish a nexus with the EU, it can be questioned whether that nexus is sufficient to establish jurisdiction under international law (for competition matters) when there are no or negligible effects on EU competition.[163]

The Court in *Gencor* distinguished between the application of the Regulation and actually exercising jurisdiction by prohibiting the merger. It examined whether exercising jurisdiction would violate the principles of non-interference and proportionality with respect to the South-African authorities, as the latter had already approved the transaction.[164] The Court relied on a *Hartford Fire*-like analysis of 'true conflict', stating that there was no conflict because the

157 General Court *Gencor* 1999.
158 Van Gerven and Hoet (2001), 204.
159 General Court *Gencor* 1999, 90.
160 Ibid paras.91ff.
161 Van Gerven and Hoet (2001), 197.
162 When a merger has no or negligible effects in the EU, joint ventures or mergers that exceed the turnover thresholds still need to notify the Commission, but the Commission will usually deal with such cases under the 'simplified procedure' involving a routine check, clearing them without substantive doubts. See Commission Notice 2013/C 366/04 on a simplified procedure for treatment of certain concentrations under Council Regulation EC/139/2004.
163 James Killick and Charlotte Burnett, 'Time to end the EU's needless review of extraterritorial joint ventures' February 2013, White & Case.
164 General Court *Gencor* 1999, 102.

South-African authorities had approved the transaction but they did not *require* that such an agreement be entered into.[165] It would then seem that the decision to exercise jurisdiction also depends on the thresholds of national competition law. The Court did not examine the substantive obligations of South-African merger control laws.

Another example of a possible conflict emerged with the proposed merger of Boeing and McDonnell in 1997, both US companies. The Commission exercised jurisdiction on the basis that both parties exceeded the Community turnover requirements.[166] The Boeing and McDonnell Douglas merger was opposed by the EU, but ultimately approved after a transatlantic trade dispute almost erupted. It was argued that the EU's concerns were protectionist in nature in order to promote Airbus,[167] but the Commission relented only after Boeing agreed to several major concessions.[168] More high-profile 'extraterritorial' cases include the blocked mergers of US telecom companies World Com and Sprint Corp in 2000, as well as the conditional approval of US entertainment giant Time Warner and Internet service provider AOL.[169] In 2001 the European Commission blocked the mega-merger between helicopter engine manufacturers General Electric Corporation (GE) and Honeywell, after the US Department of Justice and the US Federal Trade Commission had granted final approval for the merger.[170]

Over the last decade, blocked mergers by the Commission involved at least one EU company; which could be due to an increase of cooperation between competition authorities in competition proceedings and/or due to an increased awareness among companies of competition rules globally.[171] There is no official statement by the European Commission that would imply that the

165 Ibid 103.

166 Commission Decision of 30 July 1997 in case No IV/M.877 – Boeing/McDonnell Douglas, para.7.

167 Barbara Crutchfield-George, Lynn V. Dymally and Kathleen A. Lacey, 'Increasing Extraterritorial Intrusion of European Union Authority into US Business Mergers and Competition Practices: US Multinational Businesses Underestimate the Strength of the European Commission From *GE-Honeywell* to *Microsoft*' 2004, 19 Connecticut Journal of International Law 571, 576.

168 Case IV/M.877, Boeing/McDonnell Douglas v Commission, 1997 OJ (C372) 17. For a discussion of the case in this context, see Hamner (2002), 395.

169 Commission Decision of 28 June 2000 in case No COMP/M.1741 – MCI WorldCom / Sprint; Commission Decision of 11/10/2000 in case No COMP/M.1845 – AOL/Time Warner.

170 Commission Decision of 03/07/2001 in case No COMP/M.2220 General Electric/Honeywell. For a discussion of these mergers, see Sarah Stevens, 'The Increased Aggression of the EC Commission in Extraterritorial Enforcement of the Merger Regulation and Its Impact on Transatalantic Cooperation in Antitrust' 2002, 29 Syracuse Journal of International Law and Commerce 263.

171 Examples include Ryanair-Aer Lingus; UPS-TNT; NYSE Euronext-Deutsche Börse; Olympic Air-Aegean Airlines; Energias de Portugal-ENI-Gas de Portugal; Tetra Laval-Sidel. For an overview of all cases, see http://ec.europa.eu/competition/mergers/cases/.

Commission would be more reluctant in blocking non-EU mergers when these fall within the scope of EU law and hence the Commission's competence.

5.3.3 Extraterritoriality beyond the US and the EU

The following section aims to give a non-exhaustive overview of other significant economies, small or big, that have applied the effects doctrine in one form or another. Its purpose is to highlight that there is broader acceptance of extraterritorial application of competition rules, rather than giving an in-depth analysis of the legislation and jurisprudence.

5.3.3.1 Japan

The Japan Fair Trade Commission (JFTC), rather than Japanese Courts, has played a leading role in enforcing the Japanese competition rules, the Antimonopoly Act (AMA). Under the AMA, the JFTC has the power to enforce the Act, subject to judicial review. Originally, the Act contained very strict prohibitions on cartels, monopolies, mergers and even the existence of large enterprises. After the Korean War in 1953, the AMA was eased with regard to cartel restrictions.[172] The AMA is silent on its jurisdictional scope, even though Article 6 prohibits any international agreement that constitutes an unreasonable restraint of trade or unfair trade practices. There has, to date, been no judicial decision clarifying the scope yet and the possible extraterritorial application can thus only be judged by the JFTC's practices, which seem to allow for an application of the effects doctrine.

In its *amicus curiae* brief in the 1996 Nippon Paper case, where a Japanese company was prosecuted under the US Sherman Act, the Japanese government argued that the extraterritorial application of the Act was unlawful under international law.[173] An earlier report by the JFTC contradicts this position as it stated that 'presence in Japan of a foreign firm's branch or subsidiary is not necessarily a condition for the applicability of the Antimonopoly Act, with respect to acts which harm competition in the domestic market'.[174]

The effects and implementation doctrines are interpreted strictly in Japan, and international cartels involving foreign companies or mergers between two foreign companies may often not be covered, even though they might have

172 Charles A. Brill and Brian A. Carlson, 'US and Japanese Antimonopoly Policy and the Extraterritorial Enforcement of Competition Laws' 1999, 33 The International Lawyer, 82.
173 Brief of Amicus Curiae of the Government of Japan in the Nippon Paper Case, US Ct App 1st Cir, 18 November 1996. For an overview of the historical background and analysis of why Japan's competition policy differs from US policy, see ibid 76.
174 JFTC, Report of the Study Group for the Antimonopoly Act on External Affairs, February 1990.

been under other jurisdictions, such as the EU or the US.[175] For instance, in the Boeing/Mc Donnell Douglas merger, although Japan's flagship airline company was a major purchaser of passenger aircraft manufactured by the parties, the JFCT did not consider it had jurisdiction under the AMA because at least one of the parties had to be Japanese. The AMA was reformed in 1998, so as to also cover foreign mergers.

The first case in which the AMA was enforced against foreign companies was in the *Marine Hoses* cartel case of 2008.[176] This case involved an international cartel among Japanese and European companies on market allocation, whereby it was agreed that non-Japanese companies would not enter the Japanese market. As any fine is calculated on the basis of actual turnover on the market, and none of the foreign cartel participants generated any turnover in Japan, it was formally impossible for the JFTC to fine them. Thus only the Japanese company, Bridgestone Corporation, was subject to a fine.[177] By contract, in the Gas Insulated Switchgear cartel,[178] the European Commission fined the Japanese participants by looking at the aggregate combined turnover of the cartel participants, even though the Japanese participants had agreed not to enter the European market. These cases have lead to a feeling of unfairness in Japan and have stirred the debate as to whether the AMA should be amended.[179]

As there has been no explicit acceptance of the effects doctrine in Japan, the required magnitude of effects has never been specified. Article 2(3) AMA refers to a 'substantial restraint of competition' and 2(9) to 'a tendency to impede fair competition'. While slightly differently worded, similar elements as in the US and EU jurisdictions are required: effects or restraints must be 'substantial', and they can be 'actual or potential'. Subjective intent or foreseeability is, however, not required for the JFTC to be able to issue administrative orders.[180]

5.3.3.2 Israel

175 Kameoka. Etsuko, *Competition Law and Policy in Japan and the EU* (Edward Elgar Publishing 2014) 194.

176 *Marine Hoses*, JFTC Decision of 20 February 2008.

177 Sato (2010), 40. All participants to the cartel (except for the Japanese immunity applicant) were fined by the European Commission, see COMP/39406.

178 COMP F/38.899.

179 Etsuko Kameoka, *Competition Law and Policy in Japan and the EU* (Edward Elgar Publishing 2014) 196.

180 Naoki Uhkubo and Zenichi Shishido, 'Cooperation, Comity and Competition Policy: Japan' in Andrew T. Guzman (ed), *Cooperation, Comity and Competition Policy* (Oxford University Press 2011) 89.

The Israeli Restrictive Trade Practices Law 1988 incorporates international customary law, including the subjective and objective territoriality principle.[181] The latter was relied upon, and referred to as the effects doctrine, by the Israeli Antitrust Authority in the *James Richardson* case,[182] in order to apply the Israeli Restrictive Trade Practices Law 1988 to foreign perfume manufacturers. The anticompetitive effects had to be 'substantial, direct and intentional'.

5.3.3.3 Brazil

The Federal Antitrust Law of Brazil states that 'this law applies to acts wholly or partially performed within the Brazilian territory, or the effects of which are or may be suffered therein'.[183] The effects doctrine has to date not been applied in practice yet.[184]

5.3.3.4 China

The 2008 Anti-Monopoly Law of China[185] provides in Article 2 that even if monopolistic conduct occurs outside the territory of the People's Republic of China, if this conduct had exclusive or restrictive effects on competition in the domestic market, the Anti-Monopoly law will apply. The law does not specify the magnitude of the effects. The Act has been applied with regard to foreign companies who have engaged in anti-competitive behaviour with Chinese companies, but not yet in a fully extraterritorial context (foreign behaviour not involving Chinese companies).[186]

5.3.3.5 Singapore

181 Michal Gal, 'Extraterritorial application of antitrust – the case of a small economy (Israel)' 2009, Working Paper 09-03 NYU Center for Law, Economics and Organization, Law and Economics Research paper Series

182 Director of Israeli Antitrust Authority, *Selective Perfume Market – James Richardson*, 2002.

183 Federal Antitrust Law, Federal Law 8884 of 1994, Section 2.

184 Brendan Sweeney, 'International Governance of Competition and the Problem of Extraterritorial Jurisdiction' in John Duns, Arlen Duke and Brendan Sweeney (eds), *Comparative Competition Law* (Edward Elgar Publishing 2015) 378; Javier Tapia and Alexandre Ditzel Faraco, 'Latin American Antitrust Law and Policy: An Overview of Three Jurisdictions – Brazil, Chile and Colombia' in John Duns, Arlen Duke and Brendan Sweeney (eds), *Comparative Competition Law* (Edward Elgar Publishing 2015).

185 Zhonghua Renmin Gongheguo Fanlongduanfa ('†?¤H¥Á | @©M?¤Ï??ªk) [The AntiMonopoly Law of the Peoples' Republic of China] (promulgated by the Standing Comm. Nat'l People's Cong., Aug. 30, 2007, effective Aug. 1, 2008) 2007 Standing Comm. National People's Cong. Gaz. 68, art. 57 (China).

186 Michael Faure and Xinzhu Zhang, 'Towards an Extraterritorial Application of the Chinese Anti-Monopoly Law that Avoids Trade Conflicts' 2013, 45 George Washington International Law Review 101, 103.

Singapore's Competition Act (SCA) clearly states that an infringement can occur even if the relevant actors are outside of Singapore, or if the anti-competitive conduct has taken place outside of Singapore, as long as the conduct has as its 'object or effect the prevention, restriction or distortion of competition within Singapore'.[187] The Act was applied for the first time to extraterritorial conduct in 2014 in the *Ball Bearings* case, which involved four Japanese ball and ring bearings manufacturers and their Singapore subsidiaries, the anti-competitive activities of which took place both in and outside of Singapore.[188] In *Freigh Forwarding* the Competition Commission of Singapore (CCS) held that the fact that ten freight forwarding companies had engaged in anti-competitive behaviour taking place only in Japan was no bar to fall within the scope of the SCA.[189]

5.3.3.6 India

The Indian Competition Act 2002 empowers the Competition Commission of India (CCI) to inquire into any agreement, abuse or combination that has, or is likely to have, an appreciable adverse effect on competition in the relevant market in India.[190] In relation to competition law, the effects doctrine was first raised under the MRTP Act, the predecessor to the Competition Act in 2002. Under the MRTP Act, the Indian Supreme Court has consistently held that the Act did not include any extraterritorial jurisdiction.[191] With the explicit incorporation of the effects doctrine in the Competition Act 2002, this restriction is overcome. Till date there have not yet been any cases where the CCI exercised her powers extraterritorially based on the effects doctrine.[192]

5.4 THE EFFECTS DOCTRINE AND ENVIRONMENTAL EFFECTS

187 Competition Act of Singapore of 2004, section 34.
188 Infringement of the Section 34 Prohibition in Relation to the Supply of Ball and Roller Bearings, CCS 700/002/11 (27 May 2014).
189 Infringement of the Section 34 Prohibition in Relation to the Provision of Air Freight Forwarding Services for Shipments from Japan to Singapore, CCS 700/003/11 (11 December 2014).
190 Competition Act of India of 2002, No. 12 of 2003, section 32.
191 American Nature Soda Ash Corporation (ANSAC) vs. Alkali Manufacturers Association of India (AMAI) and Others (1998), CompLJ 252 MRTPC; Haridas Exports v. All India Float Glass Manufacturers Association (2002) 6SCC 600.
192 Kartik Maheshwari and Simone Reis, 'Extraterritorial Application of the Competition Act and Its Impact' 2012, January 2012 Competition Law Reports 144, 147; Nishith Desai, *Competition Law in India: A Report on Jurisprudential Trends* (June 2015).at http://www.nishithdesai.com/fileadmin/user_upload/pdfs/Research%20Papers/Competition_Law_in_India.pdf.

One of the main reasons for an extraterritorial application of competition law is the fact that the marketplace is expanding. A global economy increases the level of international economic transactions; transnational firms operate in different countries. In order to sufficiently safeguard the objectives of competition law, authorities and courts in a growing number of states rely upon the effects doctrine (or a variant thereof such as the implementation doctrine) to address foreign anti-competitive behaviour that affects or harms domestic interests. This line of reasoning can easily be transposed to environmental challenges.[193] More difficult is the actual application of the effects theory and determining the magnitude of the required effects in the context of environmental damage.

With regard to competition law, this chapter has shown that there is agreement that any effect must be direct, substantial and foreseeable. It has been discussed whether intent could also be required, but there does not seem to be a widespread adoption of an intent requirement. Any exercise of extraterritorial jurisdiction should furthermore respect the legitimate interests of other sovereign states, and should avoid conflict where possible through comity or the rule of reason. The principles of comity, rule of reason or proportionality all lead to the result that the country with the most important or primary interests will have jurisdiction. In a comity analysis two questions need to be considered: firstly, are the effects felt in one state more direct than those felt in other states; and secondly, are the effects felt in one state more substantial than those felt in other states?[194]

Applied to the protection of environmental concerns outside the territory of the regulating state,[195] a number of challenges arise with regard to these standards. It makes sense that jurisdiction based upon effects where such effects were an unintended consequence or a mere side effect, seems to create more resistance than where the effects were clearly intended. This requirement of intent, however, can be problematic when applied in an environmental context. In a competition law context, intent has a malevolent connotation, while that is not necessarily the case where environmental concerns are at issue. Rather, considering foreseeability seems more accurate: could the damag-

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193 Eckard Rehbinder, 'Extra-Territoriality of Pollution Control Laws From a European Perspective' in Günther Handl, Joachim Zekoll and Peer Zumbansen (eds), *Beyond Territoriality: Transnational Legal Authority in an Age of Globalization* (Martinus Nijhoff 2012) 128; Horn and Mavroidis (2008), 1133; Geert Van Calster, *International & EU Trade Law: The Environmental Challenge* (Cameron May Publishing 2000) 214.

194 Akehurst (1972-1973), 198.

195 See for support in literature that the effects doctrine can be applied to environmental law, Rehbinder(2012), 128; Jeremy Remy Nash, 'The Curious Legal Landscape of the Extra-Territoriality of US Environmental Laws' in Günther Handl, Joachim Zekoll and Peer Zumbansen (eds), *Beyond Territoriality: Transnational Legal Authority in an Age of Globalization* (Martinus Nijhoff 2012) 163.; see also Philippe Sands, *Principles of International Environmental Law* (CUP 2003) 238; Patricia Bernie, Alan Boyle and Catherine Redgwell, *International Law and the Environment* (3d ed. edn, Oxford University Press 2009) 712.

ing effects have been foreseen by the party causing the damage? Also, are the effects a direct result of the actions taken? Are the actions taken the sole cause of the environmental effects, and if not, to what extent have they contributed to the damage? Can effects be foreseen if other factors contributing to environmental damage are uncertain, and if the aggregate effects of all factors combined are also uncertain? Foreseeability of effects also raises the question of future effects: environmental damage can take much longer to realise than the speed of a bullet hitting its victim, or the reactions of financial markets. Can states, in the absence of sufficient scientific evidence, rely upon the precautionary principle when determining effects? Closely related to foreseeability is the matter of directness of effects: when is an environmental effect direct? Can severe droughts on the African continent be considered direct effects of pollution from steel producers in China? Must there necessarily be damaging effects to the environment in the territory of the imposing state itself, or could moral concerns about environmental damage occurring fully outside a state's territory (for instance, a severely polluted lake located in another state) also be taken into account? This option of moral concerns would seem too indirect to qualify as an environmental effect. Next to foreseeable and direct, the effects doctrine also requires effects to be substantial. But what is the standard for substantial effects? Must the effects be appreciable?

The three notions of direct, substantial and foreseeable effects are closely linked, but as in competition law, their precise interpretation can be much dependent on the circumstances. Equally, there is no exact definition of how they should be interpreted to give full meaning to them in the context of environmental concerns. What is clear, though, is that determining effects in an environmental context will require a scientific analysis; the details, requirements and limitations of which will depend on the specific environmental concern, on the knowledge available on a specific topic, as well as the information available within a certain time frame. This analysis will inform the criteria of direct, substantial and foreseeable. When proposing the extraterritoriality tree in chapter 6, the questions put forward here will be elaborated upon. Furthermore, the body of international environmental law can be of relevance when assessing environmental effects: in contrast to competition law, where there are no relevant international rules, there is an extensive body of (mostly soft law) environmental instruments. Considering these instruments could justify a more lenient approach to the requirements of direct, substantial and foreseeable in an environmental context: where state action is supported by a formal instrument recognizing the urgency of an environmental threat, even weaker or uncertain effects taken in light of precaution could suffice to justify the extraterritorial effects of npr-PPMs.

While raising challenging questions with regard to its application to environmental concerns, the effects doctrine allows for a more feasible and widely applicable assessment of environmental damage. In the landmark WTO decision in which jurisdiction was shortly touched upon, *US-Shrimp*, the AB relied on a 'sufficient nexus' between the US and the sea turtle species that the US aimed to protect through its measures. The AB seemed to imply a territorial link, as it referred to 'some of the turtles' crossing US waters 'some of the time'.[196] It failed, however, to define or further qualify what such nexus could consist of. Looking beyond the specific circumstances of migrating sea turtle species, a 'sufficient nexus' test creates considerable vagueness and uncertainty of what a nexus could consist of. Can such a nexus be imagined in a context of climate change, air pollution, or global commons? The effects doctrine offers a better-suited tool to determine whether states can impose trade measures that aim at protecting environmental concerns located outside the territory of the regulating state, and whether they are affected by activities abroad that have an impact on the environment. Can the extraterritorial effect of environmental npr-PPMs be permitted? The existence of direct, substantial and foreseeable effects could establish a link with the regulating state permitting the extraterritorial reach. The effects doctrine would permit npr-PPMs that aim at the protection of inward-looking concerns, and partly outward-looking concerns. Those concerns that do not affect the regulating state in any way would not be justifiable through the effects doctrine.

5.5 Conclusion

The current chapter has shown that there is increasing acceptance of a unilateral extraterritorial application of competition law where anti-competitive behaviour abroad affects domestic interests. Effects must be direct, substantial and foreseeable. Whereas the first cases whereby the US relied upon the effects doctrine to exercise jurisdiction with regard to foreign companies were met with protest and controversy, an increasing internationalization of business markets has led to a growing number of countries adopting competitions laws, and applying these laws. A considerable number of recent competition laws refers explicitly to effects of foreign anti-competitive behaviour. Unilateral approaches to competition law enforcement are combined with strong bilateral cooperation, either formal or informal, as well as multilateral cooperation through organizations such as the OECD or the ICN. In a globalized and interdependent world, unilateral action could be seen as a good alternative to a lack of international action and agreement. Unilateral action could also be seen as an incentive for states to invest in finding multilateral solutions and cooperation between national competition authorities.

The effects doctrine could be applied to environmental concerns and could form a useful test in assessing the extraterritorial effect of npr-PPMs aiming to protect environmental concerns outside the territory of the regulating state. Those concerns that are inward-looking, or partly outward-looking and that

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

affect the regulating state could be permitted through reliance on the effects doctrine. The practical application of direct, substantial and foreseeable effects in an environmental context raises a number of questions that must be considered on a case-by-case basis. Chapter 6, proposing the extraterritoriality decision tree, as well as chapter 7, applying the tree to case studies of npr-PPMs, will elaborate on these.

In light of the existing body of international environmental law – consisting of a wide array of soft law in addition to a few binding instruments –, it could be argued that also weaker or uncertain effects could lead to justification of the extraterritorial effects of npr-PPMs, when the norm imposed by the PPM is supported by such an international instrument. The following chapter on international human rights law will take a closer look at the multilateral or common nature of substantive norms in an extraterritorial application of laws, to further determine whether that element can be taken into account next to an application of the effects doctrine when assessing environmental trade measures with an extraterritorial effect. For instance, if the environmental effects are weaker, could a state then still impose trade measures extraterritorially when the substantive norm imposed through those measures stems from a binding international agreement? Likewise, would it matter whether the norm imposed is based on soft law norms or is unilateral in character, when the effects are sufficiently strong? The following chapters will turn to these questions.

6 Extraterritoriality under international human rights law

6.1 Introduction

Extraterritoriality under international human rights law refers to an extension of states' obligations to respect and protect human rights not only within their own territory, but also when acting outside their territory. International human rights obligations stem from regional and international human rights treaties, which have been interpreted by regional and international human rights bodies to also apply outside the territory of the state party to the human rights treaty. Also when acting outside their home state territory, state actors remain bound by their duty to respect human rights. Even though such a concept of extraterritoriality (extension of a state's own obligations to its own actions abroad) differs from the concept of extraterritorial effect of npr-PPMs (extending a national measure to apply outside the regulating state's territory with the objective to address concerns outside its territory), the analysis of human rights law is relevant as it raises a number of questions that may be useful to assessing environmental npr-PPMs: why did the regional and international human rights bodies opt for a broad scope of application of the treaties? What is the legal ground for such extraterritorial application? How far do these extraterritorial obligations extend? Are states willing to stretch the boundaries of traditional territorial jurisdiction and sovereignty when transboundary or global concerns are at issue?

The debate on extraterritorial human rights obligations has been steered by the case law of the regional and international human rights bodies, which will be the object of study of this chapter. The purpose of this chapter is to give an overview of when obligations have been applied extraterritorially and upon which grounds.

The chapter will first outline the development of regional and international human rights law. Secondly, an overview of the existing legal framework will be given. Thirdly, the question of jurisdiction will be discussed through the case law of human rights bodies: the meaning of jurisdiction in a human rights context, the jurisdictional clauses in the treaties and the interpretations thereof by the respective human rights bodies. The analysis will not be exhaustive, but will focus on the common patterns discernible throughout the decisions of the different bodies.[1] After the formal discussion on jurisdiction, a closer look will be taken at the substantive content of the rights and at the question whether a correlation can be found between the substantive obligation and its extraterritorial application. Lastly, a possible transposition of the human rights findings to a trade-environment context will be explored upon which the extraterritoriality decision model as proposed in chapter 6 could build.

6.2 States protecting individuals' rights

Throughout history, religious and secular 'human rights' advocates have made pleas for the protection of a variety of rights of individuals.[2] The term 'human rights' itself, however, is a relatively recent notion. The Universal Declaration of Human Rights, adopted by the United Nations General Assembly on 10 December 1948, marks the beginning of contemporary international human rights protection.[3] The focus of human rights protection hitherto had been on the protection of citizens as an internal state matter in which interference by other states was not acceptable.[4] After World War II this perception changed: human rights were so massively violated during this war that a different approach was very much needed.[5] The Universal Declaration contains a wide range of rights to be protected, including basic rights such as the right to life, civil liberties such as freedom of opinion, and a series of economic, social and cultural rights such as the right to education. For the first time in history, states agreed at a global level on a list of core guarantees that serve

1 For a more comprehensive and in-depth analysis of extraterritoriality and human rights, see among others, Karen Da Costa, *The Extraterritorial Application of Selected Human Rights Treaties*, vol 11 (Martinus Nijhoff Publishers 2013).; Marko Milanovic, *Extraterritorial Application of Human Rights Treaties: Law, Principles and Policy* (Oxford University Press 2011).; Fons Coomans and Rolf Künneman (eds), *Cases and Concepts on Extraterritorial Obligations in the Area of Economic, Social and Cultural Rights* (Intersentia 2012).

2 Michael Haas, *International Human Rights: A Comprehensive Introduction* (2 edn, Routledge 2014) chapter 2. Haas gives an interesting overview of human rights in religions from Hinduism to Islam, as well as human rights advocated by philosophers from Aristotle to Marx. In chapter 3 an overview is given of early documents of human rights, starting with the Code of Hammurabi in 1780BCE.

3 UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III).

4 Walter Kälin and Jörg Künzli, *The Law of International Human Rights Protection* (Oxford University Press 2009) 6. For an overview of the historical development of human rights protection, see Kälin and Künzli, chapter 1.

5 The preamble of the Charter of the United Nations, adopted in 1945, states that "we the peoples of the United Nations, determined to save succeeding generations from the scourge of war, (…) and to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women of nations large and small, and to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained, and to promote social progress and better standards of life in larger freedom…".

to protect the dignity of human beings, regardless of their nationality, race or gender.[6] The Declaration itself is a non-binding instrument, but its content is now firmly established in a number of legally binding conventions, such as the international UN human rights treaties;[7] in regional instruments, such as the European Convention on Human Rights (ECHR); and in domestic law, often via Bills of Rights in constitutions.

These international and regional instruments impose obligations on states, meaning they can be invoked only against states.[8] As they cannot be directly invoked against private actors, international human rights in this sense differ from the fundamental rights that can be guaranteed in national constitutions.[9] In principle, depending on the jurisdictional scope of the treaty in question,[10] all individuals within a state's jurisdiction can rely upon the state's obligation to protect human rights. As will be discussed below, in certain circumstances also individuals beyond a state's jurisdiction – in the general public international law sense referring to sovereign territory – can invoke human rights obligations against a state: this in cases where the human rights obligations of states are applied to state actions outside their territory, i.e. extraterritorially.

International human rights obligations entail both positive and negative obligations. States must refrain from interfering with the enjoyment of rights

6 Kälin and Künzli(2009), 3.

7 International Covenant of Economic, Social and Cultural Rights, 16 December 1966, 993 UNTS 3; International Covenant on Civil and Political Rights, 19 December 1966, 999 UNTS 171; Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948, 78 UNTS 277; International Convention on the Elimination of All Forms of Racial Discrimination, 21 December 1965, 660 UNTS 195; Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984, 1465 UNTS 85; Convention for the Protection of All Persons from Enforced Disappearance, 20 December 2006, 2715 UNTS; Convention relating to the Status of Refugees, 28 July 1951, 189 UNTS 137; Convention on the Elimination of All Forms of Discrimination against Women, 18 December 1979, 1249 UNTS 13; Convention on the Rights of the Child, 20 November 1989, 1577 UNTS 3; Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, 18 December 1990, A/RES/45/158; Convention on the Rights of Persons with Disabilities, 24 January 2007, A/RES/61/106.

8 Kälin and Künzli(2009), 31.

9 If national law does not ensure sufficient protection of its obligations it has signed onto, then that failure could lead to a claim against the state before the regional or international human rights bodies. For an interesting overview of the status of human rights violations by private persons and entities, see Ineta Ziemele, 'Human Rights Violations by Private Persons and Entities: The Case Law of International Human Rights Courts and Monitoring Bodies' 2009, EUI Working Papers.

10 The jurisdictional scope of the main treaties will be discussed in more detail below. While most treaties explicitly refer to the 'jurisdiction' or 'territory' of states, the European Charter of Fundamental Rights for instance, as a *sui generis* human rights treaty is only applicable to acts of EU institutions and Member States when implementing EU law. Because of the special character of the European Charter of Fundamental Rights that is characteristic for the EU context, the Charter will not be discussed further within this chapter.

(negative obligations) as well as take action to ensure protection of human rights (positive obligations). In other terms, the obligations of states can be classified as the duty to respect (no interference), the duty to protect (through both preventive and remedial action) and the duty to fulfil (ensure the fulfilment of rights).[11] For instance, a state is respecting the freedom of press when not interfering with the press. A state complies with its duty to protect by ensuring police protection where necessary, or by taking the required safety measures in order to limit possible damage that can occur through natural disasters. The duty to fulfil adds an additional layer to the duty to protect as it requires the adoption of wide-ranging legislative or administrative measures to ensure human rights protection.[12] For instance, in order to ensure a fair trial, the state has to provide for operative investigative authorities and an independent judiciary; in order to realize of the right to education, the state has to provide schools; with regard to the right to health, the state has to provide adequate health services. The availability of resources can then determine the actual scope of the right, which can be different for each state.

A violation by a state of an international obligation can lead to state responsibility. The ILC Articles on State Responsibility[13] can give guidance on the determination of the state organs or agents whose conduct can be attributed to the state. The Articles establish that a state is accountable for all its organs in legislative, executive or judicial functions, including at regional or local level.[14] Even when state agents are not implementing state policy, but are exceeding their official authority (*ultra vires*), the actions are still attributable to the state as long as the agents are acting in an official capacity.[15] When private persons perform public functions, their actions can also be attributable to the state. *De facto* agents, not formally entrusted with public functions, but acting under the direction or control of a state, will be seen as state agents for the purpose of state responsibility.[16] Groups revolting against a state in the context of civil war and thereby committing civil war, will not be seen as emanations of the state, unless they exercise *de facto* governmental power: in that case the state will be accountable for their actions.[17] Also when

11 For a comprehensive overview of the different obligations, see among others Kälin and Künzli(2009), 96.
12 Ibid 112.
13 International Law Commission, Articles on Responsibility of States for Internationally Wrongful Acts (Articles on State Responsibility), Report of the ILC on its fifty-third session, 2001, UN Doc A/56/10, Supplement no.10.
14 ARSIWA, Article 4.
15 ARSIWA, Article 7.
16 ARSIWA, Article 5.
17 ARSIWA, Article 9.

insurgent groups take over the control of the country or create a new state, that state will be accountable for their actions retrospectively.[18]

Strictly private actions,[19] including human rights violations by insurgents who are not under the control of a foreign state or who do not assume any (*de facto*) governmental power, are not attributable to the state (unless the state failed to take the necessary steps to protect the victims against these private actors, in which case the omission can lead to a breach of the state's human rights obligations).[20] Undoubtedly, private entities can pose threats to human rights protection as well, but it is then up to states to take the appropriate (national) measures.[21] The question whether international organizations should become subject to human rights obligations is very relevant in a time where such organizations can make binding decisions which can violate human rights. The *Kadi* case where the European Court of Justice indirectly reviewed a UN Security Council Resolution by reviewing the Commission's implementing measure and found that the measures in question did not sufficiently respect fundamental rights, supports that point.[22] The legal adoption of the European Charter of Fundamental rights imposes human rights obligations on the EU institutions as well as the EU Member States in their implementation of EU law.[23] The ongoing accession negotiations of the EU to the ECHR shows the willingness on the one hand to become accountable as an (*sui generis*) organization, but also the practical difficulties of such action, such as the appointment of a 'national' judge.[24]

18 ARSIWA, Article 10. For an overview with references to jurisprudence, see Kälin and Künzli(2009), 78.

19 Private actions are usually remedied under domestic (civil and criminal) law. These traditional remedies are seriously tested where private entities operate on a transnational or global scale.

20 Kälin and Künzli(2009), 81.

21 The 1981 African Charter does address individuals, but with little legal impact. Article 27 of the African Charter for instance states that 'every individual shall have duties towards his family and society, the State and other legally recognized communities and the international community'. Article 28 then states that 'every individual shall have the duty to respect and consider his fellow beings without discrimination, and to maintain relations aimed at promoting, safeguarding and reinforcing mutual respect and tolerance'. Despite an arguable lack of clarity content wise, the Charter does not foresee in any complaint mechanism against individuals, so the duties laid down in Articles 27 and 28 lack enforcement options.

22 Court of Justice of the European Union, *Kadi and Al Barakaat International Foundation v Council and Commission*, C-402/05 P, 2008. See also Juliane Kokott and Christoph Sobotta, 'The Kadi Case – Constitutional Core Values and International Law – Finding the Balance?' 2012, 23 European Journal of International Law 1015.

23 Charter of Fundamental Rights of the European Union (2000/C 364/01). The Charter became legally binding when the Treaty of Lisbon entered into force on 1 Dec. 2009.

24 See for an overview of the issues Paul Craig, 'EU Accession to the ECHR: Competence, Procedure and Substance' 2013, 36 Fordham International Law Journal 1114. See also the CJEU's Opinion on the EU's accession to the ECHR in which the court held that the Draft Agreement on the accession is incompatible with E law: CJEU, Opinion 2/13, 18 December

From the perspective of individuals, the internationalization of human rights protection has created individual rights under international law that can be invoked against states, rather than being dependent on the (at times arbitrary) will of the state as a protector of rights. Nevertheless, despite the creation of mechanisms for individuals to complain to international bodies about human rights violations, protection remains deficient in a number of ways.[25] Firstly, these mechanisms are principally only available to individuals in those states who have ratified a relevant treaty. Secondly, not all decisions of treaty bodies have binding value. Even though the decisions of the UN human rights bodies are often seen as authoritative,[26] there are no enforcement options in respect of non-complying states. The ECtHR,[27] the IACtHR[28] and the ACtHPR[29] can issue binding decisions and impose penalties, but these courts have little leeway to 'force' persistent states to change their behavior, apart from political pressure – a 'pitfall' common under international law. Thirdly, the invocation of the internationally recognized rights before domestic bodies depends on the domestically regulated relationship between international and national law (monism v dualism).[30] While the domestic laws of some states contain substantive human rights obligations that need to be respected by the state and individuals alike, other states have not transposed these obligations, allowing the direct applicability of the treaties.[31] In contrast to for instance trade law, individuals and private entities are significantly more empowered in the field of human rights law.

2014.

25 Kälin and Künzli(2009), 15.

26 Rosanne van Alebeek and André Nollkaemper, 'The Legal Status of Decisions by Human Rights Treaty Bodies in National Law' in Helen Keller and Geir Ulfstein (eds), *Human Rights Treaty Bodies: Law and Legitimacy* (Cambridge University Press 2011).

27 European Convention on Human Rights, Article 46.

28 American Convention on Human Rights, Article 68. Individuals cannot bring a complaint directly to the Court, but only to the Inter-American Commission on Human Rights (who can herself lodge complaints to the Court after the prescribed procedures). See ACHR, Articles 41; 44; 61.

29 Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, Article 30. Individuals have no direct right to submit complaints to the Court, but the Court may entitle them to institute cases directly before it (Article 5(3) of the Protocol). Individuals cannot petition the African Commission, but the Commission's mandate include ensuring the protection of human rights as laid down by the Charter (Article 45 of the African Charter on Human and Peoples' Rights).

30 Kälin and Künzli(2009), 15. None of the human rights treaties contains a clause that it is directly applicable in the national legal orders.

31 Marc Bossuyt, 'The Direct Applicability of International Instruments on Human Rights' 1980, 15 Revue belge de droit international 317.

6.3 Legal framework

This section will discuss the main international and regional human rights courts and monitoring bodies[32] and their (quasi-)judicial decisions to discuss the extraterritorial application of human rights law.

6.3.1 International human rights treaties

The UN treaty system consists of nine core international human rights treaties. Next to the International Covenant on Economic, Social and Cultural Rights 1966[33] (ICESCR) and the International Covenant on Civil and Political Rights 1966[34] (ICCPR), they include the International Convention on the Elimination of All Forms of Racial Discrimination 1965;[35] the Convention on the Elimination of All Forms of Discrimination against Women 1979;[36] the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984;[37] the Convention on the Rights of the Child 1989;[38] the Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families 1990;[39] the Convention for the Protection of All Persons from Enforced Disappearance 2006;[40] and the Convention on the Rights of Persons with Disabilities 2006.[41] All treaties have their own monitoring bodies, however, for the purpose of this chapter only the decisions of the International Court of Justice (ICJ), the Human Rights Committee (HRC) (monitoring the ICCPR) and the Committee on Economic, Social and Cultural Rights (CESCR) (monitoring the ICESCR) will be discussed. The decisions of these bodies illustrate well their considerations on jurisdiction and an extraterritorial interpretation of the notion.

Both Covenants foresee in an individual petition system and inter-State complaints through optional Protocols.[42] The Committee on Economic, Social and Cultural Rights can initiate inquiries into alleged serious, grave or systematic violations of the Covenant by a State party.[43] The ICESCR has a member-

32 For a very comprehensive overview of regional human rights approaches globally, see Haas(2014), 413.
33 993 UNTS 3.
34 999 UNTS 171.
35 660 UNTS 195.
36 1249 UNTS 13.
37 1465 UNTS 85.
38 1577 UNTS 3.
39 2220 UNTS 3.
40 2715 UNTS.
41 2515 UNTS 3.
42 Optional Protocol of 2008 foresees in the complaint procedure for the ICESCR, whereas Optional Protocol of 1966 provides for a right to individual petition under the ICCPR.
43 Article 11 ICESCR.

ship of 165 State parties. The US has signed the Covenant but has not yet ratified it. The ICCPR has a membership of 169 State parties, including the US and the Russian Federation. China has signed but not yet ratified. The ICJ is not a human rights court, but in the state-to-state contentious cases before it and in its advisory opinions, it has dealt with and interpreted the scope of human rights obligations.[44] Some human rights treaties such as the 1948 Convention on the Prevention and Punishment of the Crime of Genocide contain provisions referring disputes to the Court,[45] whereas the Convention on Racial Discrimination permits referral to the Court after the exhaustion of its own treaty-specific dispute settlement procedure.[46]

6.3.2 Regional human rights treaties

6.3.2.1 Europe

The European Convention on Human Rights (ECHR) was adopted by the Council of Europe on 4 November 1950.[47] It remains the most important human rights instrument in Europe today. The rights protected in the Convention are complemented by 16 additional protocols. Next to the ECHR, the European Social Charter 1961 (revised text 1996) and special conventions[48] complement human rights protection in Europe. Under the ECHR, individuals have private standing to bring cases, when national remedies have been exhausted.[49]

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44 Article 36 of the Statute of the International Court of Justice grants the ICJ jurisdiction in dispute on the interpretation of treaties and any question of international law. Article 38 refers to the sources of law the Court shall apply in resolving disputes, including international conventions. Where relevant, those cases with a jurisdictional implication will be discussed below.

45 Article IX. 78 UNTS 227.

46 Article 22 International Convention on the Elimination of All Forms of Racial Discrimination 1965.

47 Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14*, 4 November 1950, ETS 5.

48 European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment 1987; Framework Convention for the Protection of National Minorities 1995; European Charter for Regional or Minority Languages 1992; Convention on Human Rights and Biomedicine 1998 and protocols on the Prohibition of Cloning Human Beings 1998, on the Transplantation of Organs and Tissues of Human Origin 2002, on Biomedical Research 2005; Convention on Action Against Trafficking in Human Beings 2005; Convention on the Avoidance of Statelessness in Relation to State Succession 2006; Convention on the Protection of Children Against Sexual Exploitation and Sexual Abuse 2007.

49 ECHR, Articles 34, 35.

6.3.2.2 Americas

The Inter-American human rights system was created with the adoption of the American Declaration of the Rights and Duties of Man in 1948, as the first formal international human rights catalogue.[50] At the same time the Charter of the Organization of American States (OAS) was adopted, foreseeing among others the establishment of the Inter-American Commission on Human Rights in order to promote the observance and protection of human rights. In 1959 the Commission was established, but the opportunity for the Commission to examine state and individual claims was only introduced in 1965.

In 1969 the American Convention on Human Rights (ACHR) was adopted,[51] establishing the Inter-American Court of Human Rights. The Convention is an important human rights instrument in the Americas – despite the lack of ratification by the US, Canada, Brazil and a number of Caribbean states and the withdrawal by Venezuela in 2013.[52] Content-wise, the ACHR is largely identical to the ECHR and contains some additional rights such as nationality rights (article 20) and the right to minimum social rights (article 26). Next to the ACHR other conventions exist in the region dealing with specific human rights, such as the Inter-American Convention to Prevent and Punish Torture of 1985.[53]

Either the Commission or a state party can refer cases to the Court. Individuals cannot bring complaints before the Court, in contrast to the individual complaint procedure under the ECHR. Individuals can, however, lodge their complaint with the Commission, which will consider its admissibility. If the Commission finds the claim to be admissible and the state is deemed at fault, the Commission can issue recommendations. Only when those recommendations are not adhered to, can the Commission refer the case to the Court. The Court can furthermore issue advisory opinions regarding the interpretation of human rights protection in the Americas.

50 The Universal Declaration of Human Rights was adopted by the UN approximately eight months later.

51 The Convention entered into force in 1978.

52 The US signed but never ratified the Convention. Brazil and Canada have not signed the Convention. The American Commission on Human Rights has stated on several occasions that even if states are not party to the Convention, the Commission can still investigate based on their Membership to the American Declaration. (see among others *Armando Alejandro Jr. and others v Cuba (Brothers to the rescue)*, IACHR Report o 86/99, case no 11.589, 29 September 1999, Ann. Rep. IACHR 1999, 586, para 23.)

53 Also the Inter-American Convention on the Forced Disappearance of Persons 1994; the Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women 1994; the Inter-American Convention on the Elimination of All Forms of Discrimination Against Persons with Disabilities 1999.

6.3.2.3 *Africa*

The African Charter on Human and Peoples' Rights (the Banjul Charter) was adopted on 26 June 1981 by the Organization of African Unity (the African Union as from 2002).[54] In addition to a list of civil, political, economic, social and cultural rights for individuals, the Charter also contains collective rights, such as the rights of peoples to equality, self-determination, development, peace and a satisfactory environment (articles 22-24). The African Commission for Human and Peoples' Rights is the monitoring body for the Charter, while individuals, but also NGO's, may submit complaints about human rights violations.[55] In 1998 a Protocol on the establishment of an African Court was adopted,[56] which entered into force in 2004. The Court and the Commission have complementary tasks, and both institutions can refer cases to one another where they consider that appropriate.[57]

6.3.2.4 *Middle East*

The Council of the League of Arab States adopted the Arab Charter on Human Rights on 15 September 1994.[58] Its provisions mainly correspond to the Universal Declaration of Human Rights and the two UN Human Rights covenants. The Charter entered into force in 2008 after the seventh ratification. The Charter lays down basic rights, as well as economic, social and cultural rights. Specific minority rights are also recognized. The Charter is monitored by the Arab Human Rights Committee, which can only review state reports and cannot deal with individual or state complaints. The League is currently in the process of strengthening its human rights system by establishing an Arab Court of Human Rights.[59]

6.3.2.5 *Asia*

South and South-East Asia have no regional human rights convention. The Association of Southeast Asian Nations (ASEAN) is mainly concerned with issues of stability and economic integration. However, in 2007 a new ASEAN

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54 Organization of African Unity (OAU), African Charter on Human and Peoples' Rights ("Banjul Charter"), 27 June 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982).
55 Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, 10 June 1998, Article 5(3).
56 Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, 10 June 1998.
57 Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, 10 June 1998, Article 6(3).
58 League of Arab States, Arab Charter on Human Rights, 15 September 1994.
59 The Stature for the Human Rights Court is criticized for not including individual complaint procedures, see International Commission of Jurists, *The Arab Court of Human Rights: A Flawed Statute for an Ineffective Court* (2015).

Charter has been adopted,[60] establishing a human rights body (the ASEAN Intergovernmental Commission on Human Rights) that can review human rights standards among ASEAN members, without however adopting a specific human rights catalogue.[61] This implies that the human rights situation will be reviewed in accordance with the standard set by the UN Conventions, to which the ASEAN members are parties.

The South Asian Association for Regional Cooperation (SAARC) refers in its Charter to 'providing all individuals the opportunity to live in dignity',[62] without including a specific list of human rights either. In 2002, the SAARC adopted the Convention on Regional Arrangements for the Promotion of Child Welfare[63] and the Convention on Preventing and Combating Trafficking in Women and Children for Prostitution.[64] Under the Child Protection Convention, members must ensure that national laws protect children and that the UN standards are adhered to. In 2004, a Social Charter was adopted, obliging members to take measures in the areas covered by economic, social and cultural rights.[65] None of these instruments, however, establish an adjudicatory body that can receive complaints and issue binding decisions.

6.4 Jurisdictional scope

6.4.1 The concept of jurisdiction in a human rights context

The extraterritorial application of human rights treaties depends on the jurisdictional scope of those treaties. Most treaties have jurisdictional clauses that limit their reach. These clauses will be discussed below, but first a clear understanding of the term 'jurisdiction' in the human rights context needs to be ensured.

Different notions of jurisdiction can be distinguished.[66] The international human rights jurisprudence builds on a concept of jurisdiction distinct from the general international law understanding of jurisdiction. Whereas the latter refers to the lawful or unlawful exercise of jurisdiction (prescriptive, enforcement, judicial) by a state within or outside its territory (*de jure* jurisdiction),

60 ASEAN, Charter of the Association of Southeast Asian Nations, 20 November 2007 at http://www.asean.org/storage/images/ASEAN_RTK_2014/ASEAN_Charter.pdf.
61 ASEAN Charter, Article 14.
62 SAARC Charter of 8 December 1985, Art 1(b).
63 SAARC Convention on Regional Arrangements for the Promotion of Child Welfare in South Asia, 5 January 2002.
64 SAARC Convention on Preventing and Combating Trafficking in Women and Children for Prostitution, 5 January 2002.
65 Social Charter of the South Asian Association for Regional Cooperation, SAARC/SUMMIT.12/SC.29/27 – annex V.
66 For a thorough analysis of the different notions of jurisdiction, see Milanovic(2011), chapter II.

the human rights courts and monitoring bodies use jurisdiction as a *factual* concept, in which the factual authority or control over a territory and persons forms the basis for a state's obligations, both within and outside its sovereign territory. *De jure* jurisdiction refers to the *right* and the power to regulate and enforce regulation, whereas jurisdiction as factual control refers to the *duty* to respect human rights. If states would only have human rights obligations when lawfully exercising their jurisdiction abroad, this would create an unacceptable legal vacuum, whereby states would have no human rights obligations when they are not acting lawfully. In that case, bombings, abductions, killings etc. would not be covered under the human rights treaties to which the responsible states are a party.[67] *De jure* and *de facto* jurisdiction can of course fully overlap: where states have sovereignty over a territory, it is obvious that their human rights obligations apply.

Jurisdiction as factual authority is no judicial invention by the human rights courts and monitoring bodies, as other treaties show that international law has more than one *ordinary* meanings of the word 'jurisdiction'.[68] An example can be found in Article 9(2) of the Disappearances Convention:

> 'Each State Party shall likewise take such measures as may be necessary to establish its *jurisdiction* over the offence of enforced disappearance when the alleged offender is present in any territory under its *jurisdiction*, unless it extradites or surrenders him or her to another State in accordance with its international obligations or surrenders him or her to an international criminal tribunal whose *jurisdiction* it has recognized.'

The first use of jurisdiction refers to the lawful jurisdiction to prescribe and enforce; the second use of jurisdiction refers to a factual authority; the third refers to the competence of an international court.[69] This second notion of jurisdiction is also found in human rights treaties, and it is this concept of jurisdiction upon which the doctrines of effective control over territory or physical control over persons are built – as will be discussed below.

Duttwiler has argued that while jurisdiction under the human rights treaties indeed differs from the general international law concept of jurisdiction as the legitimate power to prescribe and enforce, it entails more than just 'factual control'.[70] In order to 'exercise actual authority', a state must aim at prescribing conduct (irrelevant whether it has the legal power to do so under international law): it imposes orders on individuals, whereby the territory is not

67 Hugh King, 'The Extraterritorial Human Rights Obligations of States' 2009, 9 Human Rights Law Review 521, 536.
68 Milanovic(2011), 30.
69 Ibid 31.
70 Michael Duttwiler, 'Authority, Control and Jurisdiction in the Extraterritorial Application of the European Convention on Human Rights' 2012, 30 Netherlands Quarterly of Human Rights 137, 157.

relevant. By enforcing such orders, the state is exercising actual authority over a person. The 'control' thus refers to the enforcement of orders. However, as the legitimacy of an exercise of jurisdiction is irrelevant, it remains unclear when a state is 'prescribing' and 'enforcing'. Are orders such as 'do not cross this line', or 'do as I say' sufficient to be seen as prescribing orders? If so, is there any difference from 'factual control'? Besson refers to an additional requirement of 'normative guidance' or authority to assess whether an act or omissions falls within the jurisdiction of state party, next to the elements of effective power and overall control over a person or territory.[71] She argues that the state's power should be effective and exercised, and not merely claimed; should be exercised not one time only and over a single matter only; and it should be exercised with a normative, rather than solely coercive, approach.

In *Bankovic v Belgium et al,* the ECtHR the notion of jurisdiction as 'factual control' was seriously challenged as the Court held that jurisdiction must be understood as defined in public international law,[72] contradicting its earlier position on the matter.[73] According to the Court, only territories where a state would be lawfully exercising its prescriptive and enforcement jurisdiction (i.e. when it is authorized to so either by the territorial state or by international law) would fall within the scope of Article 1 ECHR. The applicants were victims of a NATO missile strike on *Radio Televizije Srbije* that killed 16 and injured 16 persons during NATO's campaign against the Federal Republic of Yugoslavia in 1999 and argued that the NATO states had effective control through their actions.[74] The question at issue was whether the victims fell within the jurisdiction of the NATO Member States parties to the ECHR. The Court first considered jurisdiction as a notion under general international law, referring to the power to prescribe and to enforce. The Court then interpreted its previous case law very narrowly by stating that extraterritorial application of the ECHR is exceptional because it is only possible when the respondent State 'exercises all or some of the public powers normally to be exercised by' the territorial State.[75] Effective control cannot be interpreted in such a way that it would amount to a 'cause-and-effect' notion of jurisdiction, in which any

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71 Samantha Besson, 'The Extraterritoriality of the European Convention on Human Rights: Why Human Rights Depend on Jurisdiction and What Jurisdiction Amounts to' 2012, 25 Leiden Journal of International Law 857, 873.

72 ECHR, *Bankovic et al v Belgium et al* Grand Chamber (Adm Dec) 12 December 2001, 52207/99, para.59.

73 See below at 4.4.3. Before *Bankovic,* extraterritorial jurisdiction in the ECtHR's case law was accepted in cases such as *Cyprus v Turkey* (ECHR, *Cyprus v Turkey* Grand Chamber 10 May 2001, 25781/94.), *Loizidou v Turkey* (ECHR, *Loizidou v Turkey* Grand Chamber 23 March 1995, 15318/89.) or *Ramirez Sanchez v France* (ECHR, *Ramirez Sanchez v France* Adm Dec 1996, 28780/95.).

74 Grand Chamber (Adm Dec) *Bankovic* 12 December 2001, para.46.

75 Ibid para.71.

adverse effect of a state act (such a bombing and the killing of innocent people in this case) could lead to jurisdiction.[76]

The Court then introduced the notable concept of '*espace juridique*' or 'legal space', meaning that ECHR obligations could only apply extraterritorially within the legal space of the ECHR.[77] According to the Court, extraterritorial obligations can extend only to the territory of another ECHR party (within the ECHR legal space), because of the 'essentially regional context' of the ECHR.[78] This reasoning makes little sense. Since jurisdiction in the human rights treaties refers to a factual situation of control over persons or territory, entailing a duty to respect human rights, why would it matter whether that control is exercised on the territory of another state party to the ECHR or not? The territorial state is irrelevant, as it is the state exercising the extraterritorial control whose obligations are at stake. Either the protection is purely territorial and thus regional, or protection extends extraterritorially and then the location will be determined by the location of the actions of ECHR party states. Any other interpretation would lead to a legal vacuum in human rights protection. The distinction is basically a non-issue, and despite the attention it received in literature,[79] has not been reiterated in later jurisprudence.[80]

It seems that the ECtHR in *Bankovic* cut corners in order to avoid more difficult questions due to the complex facts of the case, such as attribution of conduct to an international organization (NATO) or whether a bombing can lead to sufficient control over an individual, rather than over a territory, to

76 Ibid para.75.

77 Ibid para.80. See also amongst others Ralph Wilde, 'The 'Legal Space' or 'Espace Juridique' of the European Convention on Human Rights: Is It Relevant for Extraterritorial State Action?' 2005, 10 European Human Rights Law Review 115.

78 Grand Chamber (Adm Dec) *Bankovic* 12 December 2001, para.80.

79 See among others Rick Lawson, 'Life After Bankovic: On the Extraterritorial Application of the European Convention on Human Rights' in Fons Coomans and Menno T. Kamminga (eds), *Extraterritorial Application of Human Rights Treaties* (Intersentia 2004); Milanovic(2011).

80 In an analysis of ECHR jurisprudence, since *Bankovic* in 2001 until end of 2013, 18 cases can be identified in which acts occurring outside a state territory were subject of claims brought before the ECtHR, and where the Court addressed jurisdiction. In 15 of them the extraterritoriality claim was accepted, while in three cases the Court held there was no jurisdiction, for different reasons. In ECHR, *Behrami and Behrami v France* AdmDec 2007, 71412/01.the Court had determined that the acts were not attributable to the defendant country, but to an international organization such as the UN who had control over the operations. In ECHR, *Mohamed Ben Al Mahi v Denmark* AdmDec 2006, 5853/06. and ECHR, *Djokabi Lambi Longa v the Netherlands* AdmDec 2012, 33917/12.the Court did not find any jurisdictional link between the act and the complaint. The facts of *Behrami* took place in Kosovo as was the case in *Bankovic*, but the Court did not make reference to the 'legal space'. If it had wanted to make the argument, it should have been addressed as part of the jurisdiction assessment, before addressing attribution. In the cases where the Court did accept extraterritorial jurisdiction, eight cases took place within the legal space, while another seven took place outside the legal space. Based on these findings, one can likely conclude that the *Bankovic* judgment served as an exception rather than establishing a new rule.

determine jurisdiction. Through the legal space argument, the Court did not have to answer whether the states would have been held 'in control' if the actions had taken place within the ECHR's legal space, in for instance Amsterdam, Brussels or Berlin. The Court's very narrow interpretation in *Bankovic* on extraterritorial human rights protection is rather ironic seeing that the main stated purpose of the NATO's involvement in Yugoslavia was to defend the human rights of the people in Yugoslavia.[81] Later Strasbourg case law rightly left this line of reasoning and confirmed that jurisdiction under Article 1 ECHR indeed refers to a situation of *factual* control, being either over territory or over persons.[82]

6.4.2 Jurisdictional treaty clauses

Most, but not all, human rights treaties contain a jurisdictional clause. The African Charter, for instance, does not contain an explicit provision limiting the states parties' obligations to realizing the rights and freedoms in their respective territories or jurisdictions. Rather Article 1 states that

> 'The Member States of the Organisation of African Unity, parties to the present Charter shall recognise the rights, duties and freedoms enshrined in the Charter and shall undertake to adopt legislative or other measures to give effect to them.'

Despite the absence of a clause, it is not to be understood that states assume obligations to assist other states to fulfil their obligations without limits, nor that there is an implicit limitation to state territory. The lack of a limiting clause might just imply that the Drafters left open the option for extraterritorial guarantees of rights.[83] There are, however, substantive provisions with an extraterritorial reach, such as the right for an individual abroad to return to his state of origin.[84] For the interpretation of the Charter and its jurisdictional scope, the Charter mandates the African Commission to 'draw inspiration' from rules of international law and international human rights law.[85] It is thus no surprise that the Commission has repeatedly referred to the case law

81 Eric Roxstrom, Mark Gibney and Terje Einarsen, 'The NATO Bombing Case (*Bankovic et al v Belgium et al*) and The Limits of Western Human Rights Protection' 2005, 23 Boston University International Law Journal 55, 62.
82 ECHR, *Al-Skeini v UK* Grand Chamber 7 July 2011, 55721/07, paras.133. For an interesting discussion of the case, see Marko Milanovic, 'Al-Skeini and Al-Jedda in Strasbourg' 2012, 23 European Journal of International Law 121. See also *infra* at 6.4.3.
83 Takele Soboka Bulto, 'Patching the 'Legal Black Hole': The Extraterritorial Reach of States' Human Rights Duties in the African Human Rights System' 2011, 27 South African Journal on Human Rights 249, 259.
84 Article 12(2) African Charter.
85 Articles 60 and 61 African Charter.

of the other regional and international human rights bodies, which do have jurisdictional clauses.[86]

The common limit of a state's jurisdiction (in the context of factual control of a state) is the national territory of that state. However, none of the regional or international human rights treaties refer to 'national territory' as the sole frame of reference. Article 1 ECHR and Article 1 ACHR refer to persons 'within their jurisdiction', whereas Article 2(1) ICCPR refers to 'individuals within its territory and subject to its jurisdiction'. It is up to the treaty bodies to interpret the scope of that 'jurisdiction'. Under international law and the rules on treaty interpretation, there is neither a presumption *against* an extraterritorial interpretation of the scope of a treaty, nor is there any presumption in *favour* of extraterritoriality.[87] Therefore one can only look at the text, object and purpose of each particular treaty.

The first draft of the ECHR provided that 'the Member States shall undertake to ensure to *all persons residing within* their territory' the protection of human rights.[88] In order to 'widen as far as possible the categories of persons who are to benefit by the guarantees contained in the Convention', it was proposed and accepted to replace the words 'residing within' by 'within its jurisdiction' in the current Article 1 ECHR.[89] Article 1(2) ACHR refers to the rights of 'all persons subject to [the States Parties'] jurisdiction'. Article 2(1) ICCPR is stricter then Article 1 ECHR as it obliges the state parties 'to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant'. These conditions can be read conjunctively by requiring states to ensure the protection of rights only to those individuals who are in its territory and hence subject to its jurisdiction. This is the position long held by the US.[90] A second interpretation is disjunctive, followed by the

86 Bulto (2011), 264.
87 Milanovic(2011), 10.
88 A.H. Robertson (ed.), *Collected Edition of the Travaux Préparatoires of the European Convention on Human Rights* (1975), part II, 276 (8 Sept. 1949).
89 Travaux ECHR, 200 (5 Feb. 1950); For an in-depth discussion of the drafting history, see Barbara Miltner, 'Revisiting Extraterritoriality After *Al-Skeini*: The ECHR and Its Lessons' 2012, 33 Michigan Journal of International Law 693, 717.
90 See Da Costa(2013), 66. The US position has been highly criticized from within and outside. The US Legal Adviser Harold Koh issued a Memorandum Opinion on the jurisdictional scope of the ICCPR, arguing that an analysis of text, travaux, jurisprudence and state practice cannot require the "extraordinarily strict territorial interpretation that the United States has asserted". He suggested that the obligation to *respect* human rights should apply outside the territory, while the positive obligation to *ensure* rights should only apply to individuals within the territory and subject to its jurisdiction. (Office of the Legal Advisor, Memorandum Opinion on the Geographic Scope of the ICCPR, October 19, 2010, p.3; p.56) The Government did not follow his opinion though and did not alter its official position. In its Concluding Observation of the US Periodic Review in March 2014, the Human Rights Committee reiterated its regret over the US' position 'despite the contrary interpretation of article 2(1) supported by the Committee's established jurisprudence, the jurisprudence of the International Court of Justice and state practice'. It thereby added that the US should

Human Rights Committee and the International Court of Justice.[91] In *Lopez-Burgos*, a claim brought by a former Uruguayan trade-union leader living in Argentina, who was kidnapped in Buenos Aires and then tortured by Uruguayan security forces, the Human Rights Committee considered that despite the language in Article 2(1) ICCPR it could review the case:

Article 2(1) does not imply that the State party concerned cannot be held accountable for violations of rights under the Covenant, which its agents commit upon the territory of another State, whether with the acquiescence of the Government of that State or in opposition to it. (…) It would be unconscionable to so interpret the responsibility under Article 2 of the Covenant as to permit a State party to perpetrate violations of the Covenant on the territory of another State, which violations it could not perpetrate on its own territory.[92]

In its General Comment 31, the Human Rights Committee reiterated its position, stating that

> 'A State Party must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of the State Party, even if not situated within the territory of the State Party.'[93]

The ICJ has held that the ICCPR 'is applicable in respect of acts done by a State in the exercise of its jurisdiction outside its own territory',[94] both with regard to Israel and the Palestinian territories[95] and with regard to armed activities perpetrated by Uganda on Congolese territory.[96] It would be wrong if states could do abroad what they have undertaken not to do at home. As the ECtHR noted in *Cyprus v Turkey*, 'any other finding would result in a regrettable vacuum in the system of human rights protection'.[97]

'review its legal position so as to acknowledge the extraterritorial application of the Covenant'. (Concluding Observations on the Fourth Report of the United States of America, adopted by the Committee at its 110th session (10-28 March 2014). See also Beth Van Schaack, 'The United States' Position on the Extraterritorial Application of Human Rights Obligations: Now is the Time for Change' 2014, 90 International Law Studies 20.

91 For a comprehensive overview of cases, general comments and observations by the HRC, see Da Costa(2013), 41.

92 *Lopez-Burgos*, views of 29 July 1981, Communication no. R.12/52, UN doc. A/36/40, 176, para.12.3.

93 HRC General Comment 31: Nature of the General Legal Obligation Imposed on States Parties to the Covenant, 26 May 2004, CCPR/C/21/Rev.1/Add.13; 11 IHHR 905 (2004) at para.10.

94 ICJ, *Legal Consequences of the construction of a wall in the occupied Palestinian territory* Advisory Opinion 2004, ICJ Reports 2004, 136, para.111.

95 Ibid paras.109;113.

96 ICJ, *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)* 19 December 2005, paras.179; 216.

97 Grand Chamber *Cyprus v Turkey* 10 May 2001, para.78.

Treaties in the field of economic, social and cultural rights, such as the ICESCR, seem to have better anticipated potential extraterritorial application. The ICESCR for instance does not contain a jurisdictional limitation, but Article 2(1) ICESCR obliges states parties 'to take steps individually and through international assistance and cooperation' with a view to achieve the full realization of the rights laid down in the Covenant. No reference is made that measures taken should be limited to the territory of a state, nor that states should only aim at realizing human rights protection within their territory. Rather, the emphasis on international assistance and cooperation supports that states must also contribute to *realizing* protection of economic, social and cultural rights (ESC rights) outside their territory. The extraterritoriality debate in the context of ESC rights focuses more on the *type* and *extent* of extraterritorial obligations: are these limited to negative obligations – should states only *respect* ESC rights abroad –, or do they include positive obligations (obligation to *fulfill*) as well? This will be discussed in greater detail under title 4.5 of this chapter on the nature of extraterritorial human rights obligations.

6.4.3 Jurisdictional grounds for extraterritoriality

The grounds upon which the international and regional human rights bodies have based their extraterritorial application of the treaties can be classified under two main headings. The first ground is founded upon a link with the territory such as control over territory, and can be classified as spatial jurisdiction.[98] The second ground refers to a relationship of control over an individual, and can be classified as personal jurisdiction.[99] In the section below the two jurisdictional grounds will be discussed, with references to jurisprudence from the different bodies.

6.4.3.1 Spatial Jurisdiction: Effective control over an area

6.4.3.1.1 Effective control and public powers

Loizidou was the first case for the ECtHR (rather than the Human Rights Commission) to take a clear stand on the extraterritorial reach of the Convention. The applicant, the Greek-Cypriot Mrs. Loizidou, had been forced out of her home during Turkey's invasion in 1974. During more than twenty years, she attempted to return to her home but was denied entry into the Turkish occupied part of Cyprus by the Turkish army. The Court found that Turkey could be held responsible for its actions in Cyprus, as Turkey had 'effective overall control' over the *territory*. The Court elaborated on this control:

98 Grand Chamber 7 July 2011, paras.138ff.
99 Ibid paras.133ff.

> 'Having effective overall control over northern Cyprus, its responsibility cannot be confined to the acts of its own soldiers or officials in northern Cyprus, but must also be engaged by virtue of the acts of the local administration, which survives by virtue of Turkish military and other support.'[100]

The Court made clear in *Loizidou* that in order to determine jurisdiction it is irrelevant whether such control is legitimate, but that it depends upon a factual situation.[101]

In *Ilascu et al v Moldova and Russia*, the ECtHR introduced the notion of 'decisive influence'. The events took place in Transdniestria, where Moldovan citizens were arrested and convicted and their property confiscated because of their political activities supporting the unification of Moldova and Romania. They were detained in the Transdniestrian part of Moldova. The applicants complained that they did not have a fair trial and that they were subject to inhuman prison conditions. The Court determined that the applicants fell within the jurisdiction of Moldova because of the detainment on Moldovan territory, but that they fell within the jurisdiction of Russia as well. The Court motivated its decision by stating that the authorities of the Moldovian Republic of Transdniestria, in whose detention the applicants found themselves,

> 'remained under the effective authority, or at the very least *under the decisive influence*, of the Russian Federation, and in any event that it survived by virtue of the military, economic, financial and political support given to it by the Russian Federation.'[102] (emphasis added)

In *Victor Saldaño v Argentina* the Inter-American Commission cited the European Commission for Human Rights and the ECtHR for expanding the concept of jurisdiction to include extraterritorial obligations of the ACHR to situations of effective control.[103] The victim, an Argentine citizen, was sentenced to death by a US court and detained in a Texas prison. His mother lodged a complaint against Argentina for failure to protect his human rights. Despite recognizing the possibility of extraterritorial obligations, the Inter-American Commission found Argentina's obligations did not extend extraterritorially in this case, as the violations occurred in the US, carried out by US authorities.

The African Commission considered in the *DRC Invasion* case that Burundi, Rwanda and Uganda had violated a number of rights under the African Charter in the territory of the Democratic Republic of the Congo. Even without an explicit jurisdiction clause, the Commission held the defendant states responsible for the violations within DRC territory that they brought under

100 Grand Chamber *Cyprus v Turkey* 10 May 2001, para.77.
101 Grand Chamber *Loizidou v Turkey* 23 March 1995, para.62.
102 ECHR, *Ilascu and others v Moldova and Russia* Grand Chamber 8 July 2004, 48787/99, para.392.
103 IACHR, *Victor Saldano v Argentina* Petition 11 March 1999, IACHR Report No 38/99, para.19.

their effective control.[104] The ICJ also referred to effective control where it dealt with the extraterritorial scope of the ICCPR. In the *Wall Advisory Opinion*, the question was whether Israel was under any human rights obligations in the Occupied Palestinian Territories. The Court referred to the object and purpose of the ICCPR, the 'constant practice of the Human Rights Committee' on extraterritoriality, and the *travaux préparatoires* of the Covenant. These show, according to the Court, that

> 'in the wording chosen, the drafters of the Covenant did not intend to allow States to escape from their obligations when they exercise jurisdiction outside their national territory. They only intended to prevent persons residing abroad from asserting, vis-à-vis their State of origin, rights that do not fall within the competence of that State, but of that of the State of residence.'[105]

The Court concluded that the ICCPR 'is applicable in respect of acts done by a State in the exercise of its jurisdiction outside its own territory'.[106] The ICJ reiterated this position in the case of *Democratic Republic of the Congo v Uganda*, where it confirmed that human rights law may extend extraterritorially, also where that factual jurisdiction is exercised in a much shorter time frame and might thus not equate to effective control over territory. Furthermore, the Human Rights Committee, in its 2003 Concluding Observations on Israel, held that Israel's obligations under the ICCPR applied to the Occupied Palestinian Territories:

> 'The provisions of the Covenant apply to the benefit of the population of the Occupied Territories, for all conduct by the State party's authorities or agents in those territories that affect the enjoyment of rights enshrined in the Covenant (…).'[107]

6.4.3.1.2 Loss of de facto *control over* de jure *territory*

Related to spatial jurisdiction is the question whether states that have lost *de facto* control over their *de jure* territory can still hold human rights obligations. While that would not be an extraterritorial application of obligations in the narrow legal sense, it only seems a logical consequence of the effective control doctrine that where states lose control they also cannot hold the same duties regarding human rights protection. As Cassel contended, 'if responsibility is

104 Communication 227/1999, *Democratic Republic of the Congo (DRC) v Burundi, Rwanda and Uganda*, 20th Annual Activity Report (2006), para 93.
105 Advisory Opinion 2004, para.109.
106 Ibid para.111.
107 Concluding Observations of the Human Rights Committee regarding Israel, 21 august 2003, CCPR/CO/78/ISR, para.11.

to follow blame, it should depend more on conduct than territorial sovereignty'.[108]

In the admissibility decision in *Ilascu,* the Grand Chamber of the ECtHR declared the case admissible regarding both Moldova and Russia.[109] Despite the fact that Transdniestra was under *de facto* Russian control, because of military presence and support given by the Russian Federation to the Moldovan Republic of Trandsdniestria (MRT), the Court found that Moldova, both in *Ilascu* and the later case of *Catan*,[110] still held some positive obligations (which it violated). The Court thereby stated that it

> 'must examine all the objective facts capable of limiting the effective exercise of a State's authority over its territory as well as the State's positive obligations under the Convention to take all the appropriate measures which are still within its power to take to ensure respect for the Convention's rights and freedoms within its territory.'[111]

While it makes sense, on the one hand, to indeed look at the factual situation of control, on the other hand, it seems that the Court is holding on to a contorted notion of territoriality. As Judge Loucaides stated in his dissent:

> 'It seems to me incomprehensible and certainly very odd for a High Contracting Party to escape responsibility under the Convention on the ground that the throwing of bombs from its aeroplanes over an inhabited area in any part of the world does not bring the victims of such bombing within its 'jurisdiction' (i.e. authority) but a failure on the part of such Party 'to take all the measures in its power whether political, diplomatic, economic, judicial or other measures … to secure the rights guaranteed by the Convention to those formally [*de jure*] within its jurisdiction' but in actual fact outside its effective authority ascribes jurisdiction to that State and imposes positive duties towards them.'[112]

One can indeed wonder about how to reconcile the finding of jurisdiction for Moldova compared to the outcome of *Bankovic* if a state's actual control (over persons or territory) is the reference point.

The Court seemed to have moderated its position in a later admissibility decision, *Azemi v Serbia*,[113] where it found that the applicant in Kosovo was not within Serbia's jurisdiction as Serbia lacked effective control over Kosovo

108 Douglass Cassel, 'Extraterritorial Application of Inter-American Human Rights Instruments' in Fons Coomans and Menno T. Kamminga (eds), *Extraterritorial Application of Human Rights Treaties* (Intersentia 2004) 178.
109 See above 5.2.1.
110 ECHR, *Catan and others v Moldova and Russia* Grand Chamber 19 October 2012, 43370/04, 8252/05 and 18454/06.
111 Grand Chamber *Ilascu v Moldova and Russa* 8 July 2004, paras.313;331.
112 Ibid Dissenting opinion of Judge Loucaides.
113 ECHR, *Azemi v Serbia* 5 November 2013, 11209/09.

after its 1999 withdrawal. The applicant claimed a violation of his right to fair trial under Article 6§1 ECHR. The Court did not find sufficient evidence to conclude that Serbia exercised any control over Kosovo's judiciary or support to Kosovo's institutions, neither during nor after the presence of the United Nations Interim Administration Mission in Kosovo (UNMIK).[114]

6.4.3.2 Personal Jurisdiction: Authority and control by state agents

In *Cyprus v Turkey,* the European Commission on Human Rights expressed for the first time that Turkey's actual authority over persons may bring them within Turkey's jurisdiction.[115] Unfortunately, the Commission did not elaborate on the nature of 'actual authority'. It did state, however, that 'these armed forces (…) bring any other persons or property within the jurisdiction of Turkey (…) to the extent that they exercise control over such persons or property'.[116] Control over persons was also the ground for extraterritorial obligations in detention cases. In *Medvedyev et al v France,* the applicants were on board of a Cambodian ship and arrested by the French authorities because of drug trafficking. The ECtHR held that as soon as the prisoners were detained by a state (in casu France), they fell under the control, and therefore the jurisdiction, of that state.[117] In *Öcalan v Turkey*, Öcalan had been arrested in Kenya and handed over to Turkish agents. The ECtHR held that, once handed over, he was under 'effective Turkish authority' and thus within Turkey's jurisdiction under Article 1 ECHR.[118]

In the case of *Al-Saadoon v UK* the applicants were detained in Iraq and held in UK-run prisons before being handed over to the Iraqi authorities. The ECtHR found that the UK had had *de facto* control over the detention facilities, which was sufficient ground to bring the applicants within the UK's jurisdiction.[119] The Inter-American Commission adopted this position of 'control' with regard to Guantanamo.[120] One can question whether control over detention facilities should be seen as control over territory or an area, or whether it should be classified as control over persons. The classification of a detention facility, or even a cell as 'territory' or an 'area' can be rather artificial, especially

114 UN Mission in Kosovo established resulting UNSC Resolution 1244, assuming all executive, legislative and judicial powers after 1999.
115 ECHR, *Cyprus v Turkey* Adm Dec 1975, 6780/74 and 6950/75.
116 Ibid para.10.
117 ECHR, *Medvedyev and others v France* Grand Chamber 29 March 2010, 3394/03, para.67.
118 ECHR, *Öcalan v. Turkey* 12 March 2003, 46221/99, para.93.
119 ECHR, *Al-Saadoon and Mufhdi v United Kingdom* AdmDec 30 June 2009, 61498/08, para.88.
120 Christina M. Cerna, 'Extraterritorial Application of the Human Rights Instruments of the Inter-American System' in Fons Coomans and Menno T. Kamminga (eds), *Extraterritorial Application of Human Rights Treaties* (Intersentia 2004) 264.; For instance IACHR, *Request for Precautionary Measures Concerning the Detainees at Guantanamo Bay, Cuba* 12 March 2002, 41 ILM (2002) 532.

if jurisdiction can also be established through control over the persons within that room or detention facility.

In *Al-Skeini v UK*, one Iraqi national was killed while in custody in a UK detention facility in Iraq, while five others were killed by British troops on patrol. The complaint was lodged by their relatives, who claimed the victims were within UK jurisdiction when killed and that there had been no effective investigation into their deaths. The UK House of Lords held that detention facilities run by states, such as the detention facility in Basrah run by the UK, fell within the scope of 'effective control over an area'.[121] The ECtHR avoided the question of spatial jurisdiction over the 'area' (including the 'area' of detention facilities), but noted that the UK exercised some of the public powers in the region through its military presence, leading to exercising 'authority and control over individuals killed in the course of such security operations'.[122] The Court thus combined personal jurisdiction with spatial jurisdiction by emphasizing the exercise of public powers, which would make the exercise of personal jurisdiction more exceptional. The Court had earlier referred to its previous case law where it had found that 'what is decisive … is the exercise of physical power and control over the person in question'.[123] While overruling *Bankovic* with regard to the 'espace juridique' of the ECHR,[124] the Court also seemed to have wanted to achieve a harmonious interpretation of its earlier case law. By explicitly referring to the exercise of public powers, the Court seemed to hang on to *Bankovic*, allowing confusion on the grounds of extraterritorial application of the ECHR to remain, and leaving important issues unresolved. If the exercise of public powers is indeed a condition to extend obligations extraterritorially, how would one then assess attacks by drones, when they are fired from another continent, without any exercise of public powers in the target state? In *Hassan v UK*, the case concerned an earlier period in Iraq in which the UK did not yet hold the same public powers as in *Al-Skeini*. The ECtHR found that Hassan was within 'the physical power and control of the UK soldiers' when taken into custody.[125] No reference was made to public powers anymore.

121 House of Lords, Great Britain (UK), *Al-Skeini and others v Secretary of State for Defence* 13 June 2007, [2007] UKHL 26.

122 Grand Chamber 7 July 2011, para.150. At this point, the Court combined a concept of spatial jurisdiction through exercising public powers in the area with a concept of personal jurisdiction (physical control over a person), as will be further discussed below.

123 Ibid para.136.

124 Ibid para.142.

125 ECHR, *Hassan v UK* Grand Chamber 16 September 2014, 29750/09, para.76. The case of *Hassan* is also of importance with regard to the relationship between international human rights law and international humanitarian law. For a discussion see Rosalind English, 'Law of armed conflict means that anti-detention provision in ECHR may be disapplied by Iraqi detainee'' 16 September 2014, UK Human Rights Blog; Lawrence Hill-Cawthorne, 'The Grand Chamber Judgment in Hassan v UK' 16 September 2014, EJIL Talk.

Furthermore, with regard to one of the victims in *Al-Skeini*, it could not be determined who had killed her, as the woman had been killed during an exchange of fire between British troops and unidentified gunmen. The fact that it was unknown which side had fired the fatal shot could not withhold jurisdiction to be established. The firing occurred during a UK security operation, and British soldiers had taken part in the fight.[126] This example shows the difficulty in distinguishing jurisdiction from attribution. While it is true that in establishing personal jurisdiction, the link between the acts at stake and the state agents need to be assessed at the same time,[127] the control over an individual that is necessary to establish jurisdiction does not require that the act (*in casu* firing a shot) is attributable to the state. It can very well be that in exercising control over an individual, the state or state agent failed to sufficiently protect the individual's rights from violence by third parties.

In *Jaloud v Netherlands*, a fatal shooting had occurred by Dutch troops at a checkpoint in Iraq.[128] The Netherlands denied jurisdiction, arguing that public authority was in the hands of the US and the UK as the occupying powers.[129] The ECtHR found, however, that the Dutch troops retained full command over their contingent, even though the contingent was under the operational control of a British officer. Despite the lack of 'public powers' as seemingly required by *Al Skeini*, jurisdiction could thus be established.[130] This interpretation risks to be over-inclusive: when are national troops deemed in command, and when are they exercising powers which do not belong to their sending States?[131]

In *Issa v Turkey*, the ECtHR had to consider whether Iraqi shepherds allegedly killed by Turkish forces on Iraqi territory close to the Turkish border fell within Turkey's jurisdiction.[132] The Court found that there was insufficient proof that the Turkish forces were responsible for the deaths of the shepherds (a question of attribution) but did not mention that the shepherds would have been outside of Turkey's jurisdiction. The events clearly occurred outside of Turkish territory, in an area over which Turkey did not have effective control. The mere act of killing the shepherds would apparently have been enough for the Court to establish jurisdiction, because it implied sufficient control over an individual. In the case of *Isaak v Turkey*, a Cypriot was assaulted in the neutral UN buffer zone in Cyprus, and later died of his injuries. As Turkish-Cypriot police officers had taken part in the assault, the Court held that the

126 Grand Chamber 7 July 2011, para.150.
127 Besson (2012), 867.
128 ECHR, *Jaloud v Netherlands* Grand Chamber 20 November 2014, 47708/08.
129 In accordance with UN Security Council Resolution 1483.
130 Grand Chamber *Jaloud v Netherlands* 20 November 2014, paras.143;149.
131 Aurel Sari, 'Jaloud v Netherlands: New Directions in Extra-Territorial Military Operations' 21 November 2014, EJIL Talk.
132 ECHR, *Issa and others v Turkey* 16 November 2004, 31821/96.

victim 'was under the authority and/or effective control of the respondent state through its agents'.[133]

Extraterritorial jurisdiction based on control and authority over persons is not unique to the ECtHR. The Human Rights Committee in *Lopez Burgos* adopted a similar position. A Uruguayan trade-union leader was kidnapped and detained in Argentina by Uruguayan security and intelligence forces. The HRC observed that the reference to jurisdiction in the ICCPR is

> 'not to the place where the violation occurred, but rather to the *relationship between the individual and the State in relation to a violation* of any of the rights set forth in the Covenant, wherever they occurred. (…) Article 2(1) … does not imply that the State party concerned cannot be held accountable for violations of rights under the Covenant which its agents commit upon the territory of another State, whether with the acquiescence of the Government of that State or in opposition of it.'[134]

The question is then how such a relationship between State and individual is triggered. Is the mere fact that the state (by its agents) causes the human rights violation sufficient to trigger jurisdiction? In its General Comment 31, the HRC referred to 'those within the power or effective control of the forces of a State Party acting outside its territory'.[135] The Committee on Economic, Social and Cultural Rights affirmed the effective control test,[136] as did the ICJ in its Advisory Opinion on the Palestinian wall.[137] Also the Inter-American Commission has confirmed the extraterritorial application of rights for persons subject to a state's authority and control.[138]

In *Brothers to the Rescue,* the Inter-American Commission regarded victims that were shot by Cuban state agents outside Cuba's territory (the aircraft they were flying was shot down in international air space) as to fall within the authority and control, and thus jurisdiction, of the Cuban agents.[139] The Commission thereby held that extraterritorial obligations can apply 'when the person is present in the territory of a State but subject to the control of another State, generally through the actions of that State's agents abroad'.[140] Control thus seems to be equated with sufficient power over that person to violate

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133 ECHR, *Isaak v Turkey* AdmDec 28 September 2006, 44587/98, p.21.

134 Human Rights Committee, *Lopez Burgos v Uruguay* 29 July 1981, Communication No 52/1979, UN Doc CCPR/C/13/D/52/1979, IHRL 2796 (UNHRC 1981), para.12.2.

135 General Comment 31, para.10.

136 Concluding Observations of the Committee on Economic, Social and Cultural Rights: Israel, 23 May 2003, para 31 (E/C.12/1/Add.90).

137 Advisory Opinion 2004, paras.102;113.

138 See for instance IACHR, *Coard et al v the United States* 29 September 1999, Report No 109/99, Case No 10.951, para.41.

139 IACHR, *Armando Alejandro Jr. and others v Cuba (Brothers to the rescue)* 29 September 1999, IACHR Report no 86/99, Case no 11.589.

140 Ibid para.23.

his rights. In its Report on the US Military Intervention in Panama, the Commission stated

> 'Where it is asserted that a use of military force has resulted in non-combatant deaths, personal injury, and property loss, the human rights of the noncombatants are implicated. In the context of the present case, the guarantees set forth in the American Declaration are implicated. This case set forth allegations cognizable within the framework of the Declaration. Thus the Commission is authorized to consider the subject matter of the case.'[141]

This overview of personal jurisdiction cases shows the difficulty to determine the exact meaning of authority or control over persons. Can one say that the fact that a state has the capacity to hurt another person suffices to establish authority over that person, as there is *de facto* control over that person?[142] Or is a more legal relationship required?[143] Is it sufficient that a person is *affected* by a state act? Lawson suggests a direct and immediate link between the extraterritorial conduct of a state and the alleged violation of an individual's right to trigger jurisdiction. He argues it would go too far to assume that anybody who is in some way 'affected' by the conduct of states would fall within the scope of jurisdiction within the context of for instance Article 1 ECHR. The decision to cut development aid for instance should not be sufficient ground to fall within the scope of the Convention. On the other hand, it would be too restrictive to require a formal legal or structural relationship, as this would unjustifiably exclude jurisdiction in situations of factual control.[144]

6.4.3.3 *Effects of state acts*

An interesting, but to my knowledge unique, case to note is the *Burundi Embargo* case, whereby the African Commission considered alleged human rights violations by Ethiopia, Kenya, Tanzania, Rwanda, Uganda, Zaire and Zambia for imposing an embargo against Burundi, protesting the coup d'état by the retired military ruler Major Pierre Buyoya in 1996.[145] At a summit in 1996, the respondent states adopted the embargo following the unconstitu-

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141 IACHR, *US Military Intervention in Panama* 14 October 1993, IACHR Report No 31/93, case No 10.573.

142 Would an attack by drones lead to sufficient control to establish jurisdiction? See Jordan J. Paust, 'The Bush-Cheney Legacy: Serial Torture and Forced Disappearance in Manifest Violation of Global Human Rights Law.' 2012, 18 Barry Law Review 61.

143 Lawson(2004), 95.

144 Rick Lawson, 'The Concept of Jurisdiction and Extraterritorial Acts of State' in Gerard Kreijen and others (eds), *State, Sovereignty, and International Governance* (Oxford University Press 2002) 294.

145 African Commission, *Association Pour la Sauvegarde de la Paix au Burundi v Tanzania, Kenya, Uganda, Rwanda, Zaire and Zambia* 2004, Communication 157/96 – 17th Annual Activity Report (2004).

tional change of government, out of an interest in peace and stability in the region. Burundi argued that the embargo violated among others the right to life and right to education. Even though the defendants were held not to have violated the Charter, the Commission emphasized the importance of taking the effect of state acts into account and carefully monitor them.[146] If the actions (the trade embargo) would have been 'disproportionate', the Commission was apparently ready to find the states responsible for human rights violations.

6.4.4 A normative perspective on extraterritorial human rights protection

After having discussed the legal reasoning on extraterritoriality by the courts and monitoring bodies, it is worth considering the policy reasons behind the idea that states can indeed be bound by human rights obligations outside of their territory, in order to determine whether similar reasoning can be applied in a trade context.

The protection of human rights is an (almost) universal concern, affirmed in binding treaties and non-binding declarations. That universality should, however, be taken with a sense of perspective and is not absolute. Relativists argue that some societies are not developed enough, economically or politically, to allow for an application of human rights standards as developed in more 'advanced' countries.[147] A variation is that Western norms cannot just be transposed in different cultures, with differing norms and values,[148] or that they should not, as this would lead to human rights imperialism.[149]

While there is certainly some validity in these arguments – one can think of rights that are more culturally-sensitive (non-discrimination of homosexuals for instance) – they do not hold for the full range of human rights. Rights such as the right not to be killed (right to life) or the prohibition on torture are not culture-related and are more absolute (even though other aspects of the right

146 Ibid para.75.
147 Milanovic(2011), 83.
148 This argument was even brought up by the ECtHR in *Bankovic* stating that "the Convention is a multi-lateral treaty operating (…) in an essentially regional context and notably in the legal space of the contracting states. (…) The Convention was not designed to be applied throughout the world, even in respect of the conduct of Contracting States. Accordingly, the desirability of avoiding a gap or vacuum in human rights' protection has so far been relied on by the court in favour of establishing jurisdiction only when the territory in question was one that (…) would normally be covered by the convention." (para.80) The Court's highly criticized reliance on the legal space of the Convention has been discussed above.
149 For an interesting overview of fundamental human rights in different cultures, see Stefan Kadelbach, 'The Territoriality and Migration of Fundamental Rights' in Günther Handl, Joachim Zekoll and Peer Zumbansen (eds), *Beyond Territoriality: Transnational Legal Authority in an Age of Globalization* (Martinus Nijhoff 2012) 308 et al.

to life such as abortion or euthanasia raise much more controversy). Furthermore, human rights protection is no longer a 'Western issue': many non-Western states are parties to the international human rights treaties as well as to a regional system, thereby recognizing the universal importance of human rights protection.

Milanovic rightly observes that 'the issue is not so much whether the ECHR and its case law are contrary to the cultural mores of the territory where it is to be applied, but whether the obligations arising from this treaty can be realistically complied with'.[150] The answer can only lay in a reasonable approach towards the substantive obligation, taking into account a margin of appreciation, with respect for the local culture, circumstances and both the domestic and international legal framework. Or, as Milanovic puts it, universality should be balanced with considerations of effectiveness and reasonableness in order to persuade governments and courts.[151]

Another reason supporting an extraterritorial application of human rights obligations based on factual control is that such approach can prevent arbitrariness:[152] the lack of sovereignty over territory cannot become a tool for states to shield off human rights responsibilities and obligations. Without a factual understanding of jurisdiction, States could escape their obligations by denying sovereignty. For instance, if the US does not have formal sovereignty over Guantanamo, but it does have full effective control over it, would it be acceptable that its international obligations were not to apply?[153]

Through an extraterritorial application of human rights obligations, the regional and international human rights bodies can offer remedies where victims would otherwise be left without any domestic remedy. Instances where states fail to respect human rights obligations outside their territory can occur without the knowledge or involvement of the state on whose territory human rights violations are committed. It can be that these states do not adhere to the same human rights standards or that the violations have occurred fully beyond the control of the territorial state. Whatever the reason, individuals can be left without domestic remedy. They cannot in those instances rely upon the territorial state's responsibility. Bringing a complaint against the committing

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150 Milanovic(2011), 94.

151 Ibid 110. He identifies four main considerations: flexibility, real impact, regime integrity and clarity and predictability. A proportionality requirement as suggested by the African Commission in the *Burundi Embargo* case (*supra* note 989) could be considered as well.

152 Ibid 96.

153 As also stated by the Justice Kennedy in *Boumedienne v Bush (*US Supreme Court, *Boumedienne v Bush* 12 June 2008, 553 US 723; 128 S Ct 2229*.)*: 'Yet the Government's view is that the Constitution had no effect there, at least as to noncitizens, because the United States disclaimed sovereignty in the formal sense of the term. The necessary implication of the argument is that by surrendering formal sovereignty over any unincorporated territory to a third party, while at the same time entering into a lease that grants total control over the territory back to the United States, it would be possible for the political branches to govern without legal constraint'. (Opinion of the Court, p.35)

state (that was acting outside its legal territory) increases the victim's chances to a remedy – if, apart from jurisdiction, the conditions of attribution and responsibility have been met.

Miller has made a practical, but normatively weak, argument for a narrow interpretation of extraterritorial jurisdiction under the ECHR. She argues that a 'control entails responsibility' approach would lead to an increase of cases that would transform the current character of the system:

> 'to give thousands, if not millions, of individuals round the world the ability to mount a challenge to such practices [violations of individuals' rights abroad] in the forum of the European Court would strain the Court's already stretched resources to breaking point.'[154]

These cases would furthermore take the Court's focus away from human rights violations within the signatory states.[155] While these comments are certainly valid, they cannot support any legal analysis of the jurisdiction debate.

6.4.5 Application of lessons learned to a trade context

As has already been noted, the concept and use of extraterritoriality in a human rights context differs from that in a trade context. Whereas the extraterritorial application of international human rights treaties relates to an extension of the *own* human rights obligations of a state when acting abroad – obligations that a state has committed to within its own sovereign territory –, extraterritoriality through npr-PPMs imposes obligations *on others*. In a human rights context, a state's own obligations are 'activated extraterritorially' to apply to its own actions abroad in cases of factual control over persons or territory, whereas in a trade context, a state's rules are extended to apply to the actions of others (foreign producers), through the trigger of market access. While clearly different, there is a common element: concerns about human rights and concerns about the environment can arguably be seen as shared, global or universal concerns. The purpose of protecting human rights as well as the environment in an extraterritorial manner envisages the protection of those who are not immediately linked to the sovereign territory of the acting state in the traditional sense, but are undeniably linked through a common 'concern'. A lack of human rights protection can lead to abuse of state power, insecurity and instability, which can have an impact beyond state borders – either factually, through spill-over effects, or morally. Likewise, a lack of environmental

154 Sarah Miller, 'Revisiting Extraterritorial Jurisdiction: A Territorial Justification for Extraterritorial Jurisdiction under the European Convention' 2009, 20 European Journal of International Law 1223, 1235.

155 Ibid.

protection does not only affect one state, and environmental harm does not stop at the border. Depending on the environmental concerns at issue, their impact will spread more or less quickly and will cause more or less harm, but it is without doubt that we have to share our planet, and are thus all affected by a lack of environmental protection. The common element in the human rights case law, and in what this thesis seeks to demonstrate, is the need for an extension of jurisdictional boundaries in case of common, transboundary or global concerns.

The analysis of jurisdictional clauses in human rights treaties will be of little help to the interpretation of the scope of the WTO agreements, as these do not contain a jurisdictional clause. The jurisdictional limits of the WTO agreements seem to coincide with the jurisdictional limits of sovereign states: the *de jure* demarcation of territory in which a state can exercise prescriptive and enforcement jurisdiction. The interpretation of jurisdiction by the human rights bodies as *factual* jurisdiction (linked to control over either territory or individuals) makes little sense in a trade context: the question in the latter is whether it is lawful to 'regulate' over actions occurring abroad through npr-PPMs with the objective address non-trade concerns located outside the territory of the regulating state, without any factual control over the territory in which production is occurring or over the producers: the only control is exercised through conditioning market access. The human rights law analysis is nevertheless relevant, because human rights courts and tribunals have shown willingness to think creatively in order to address transboundary concerns so as to avoid a legal vacuum in human rights protection. That willingness and creativity could be applied in a trade-and-environment context as well, because of the current legal vacuum in (certain areas of) environmental protection.

The recourse to npr-PPMs should be seen as a second-best alternative, as binding international agreements on environmental commitments should be the preferred solution. However, npr-PPMs for environmental purposes can be useful instruments when international agreement is still lacking. In that way environmental npr-PPMs aim to fill a legal vacuum that exists because common environmental concerns cannot be dealt with by one state alone. International cooperation is required in order to protect our planet, and to protect those most vulnerable to the consequences of, for example, climate change. Under international and regional human rights law, the legal vacuum originates from attribution challenges (if a state has no effective control over a territory or its residents, can human rights violations be attributed to that state?), and without an extraterritorial application, human rights victims could effectively fall without any means to redress. In an environmental context, environmental victims cannot hold states accountable if they are not able or willing to protect the environment.

The need to fill the legal vacuum in international human rights protection, – and the consequent attempt to push jurisdictional boundaries –, stems from the urgent need to protect the common values that have been recognized by such a number of states through the regional and international human rights treaties. Precisely because states have committed themselves to respect those rights within their jurisdiction, they should accept an extension of their obligations through an extraterritorial application of the human rights treaties. The functional equivalent to human rights treaties in environmental protection is the large body of soft law, complemented with some binding agreements laying down objectives and targets, such as the 2015 Paris Agreement on Climate Change. The small number of binding environmental agreements is not necessarily due to an ignorance or denial of environmental threats, but may be more related to the practical interpretation and execution of commitments, such as historical responsibilities, common but differentiated responsibilities, measuring methods etc. Even though states cannot be coerced into complying with obligations that have not agreed to, the question is whether this large body of soft law could – in addition to binding environmental agreements –, be considered as a strengthening factor for the justification of the extraterritorial effects of npr-PPMs that address environmental concerns located (partly) outside the territory of the regulating state, when the urgency of the concern at issue has been recognized in soft law instruments.

6.5 The nature of extraterritorial obligations

6.5.1 Respect, protect and fulfill?

Human rights ordinarily apply to subjects situated within the territorial boundaries of the state, but there are circumstances in which they *can and should* also apply outside those boundaries.[156] The remaining question relates to the extent of those extraterritorial obligations. Could it be that some rights can be applied extraterritorially and others not? Do substantive rights only extend extraterritorially when they can logically and practically be applied?[157] Do extraterritorial obligations extend to all degrees of protection, negative and positive, namely to duties respect, protect, *and* fulfill rights? Nearly all jurisprudence is limited to the duty to *respect* human rights obligations, or in other words, the negative obligation not to interfere with the enjoyment of rights. A state shall not do abroad what it cannot do at home. What about the positive obligations, the duty to fulfill? Article 1 ECHR states that states must *secure* the protection of rights within their jurisdiction. But what is the exact scope of 'securing' rights? The title of Article 1 ECHR furthermore refers to 'the obligation to respect', even though there is a clear difference between 'securing rights' and 'respecting rights'. The latter is much more narrow in scope than the former. Surprisingly, this distinction has not been addressed in great detail

156 Besson (2012), 862.
157 Van Schaack (2014), 49.

in the jurisprudence. This can, at least partly, be explained by the fact that most claims brought to the regional or global bodies dealt with a violation to respect a right, or in other words, factual circumstances in which the state interfered with an individual's enjoyment of her/his human rights. The majority of cases involving an extraterritorial claim concerned negative human rights obligations in a military context such as the failure to respect the right to life and the prohibition on torture.[158]

In the *DRC v Uganda* case, the ICJ held that Uganda's human rights obligation as an occupying power comprised

> 'the duty to *secure respect* for the applicable rules of international human rights law and international humanitarian law, to *protect the inhabitants* of the occupied territory against acts of violence, and *not to tolerate such violence* by any third party.'[159]

In *Loizidou v Turkey*, a case concerning the enjoyment of property in the occupied territory of Northern Cyprus brought by a Cypriot national, the ECtHR referred to an 'obligation to secure', as in Article 1:

> '[b]earing in mind the object and purpose of the Convention, the responsibility of a Contracting Party may also arise when as a consequence of military action – whether lawful or unlawful – it exercises effective control of an area outside its national territory. The *obligation to secure*, in such an area, *the rights and freedoms* set out in the Convention derives from the fact of such control (…).'[160]

In *Cyprus v Turkey*, the Court further elaborated that because of the Turkish military and other support to the local administration:

> 'Turkey's 'jurisdiction' must be considered to extend to securing *the entire range of substantive rights* set out in the Convention and those additional Protocols which she has ratified, and that violations of those rights are imputable to Turkey.'[161]

What does this entail exactly? Is this case particular to the overall control of Turkey over Northern Cyprus, including control over the local administration, or does the Court believe that states in general have positive obligations as well in an extraterritorial context? While this has not been explicitly clarified yet by the ECtHR, it seems logical that the extent of positive obligations would

158 Note that in a situation of belligerent occupation, a second layer of rules international humanitarian law applies as well and can overlap. See Andreas Zimmermann, 'Extraterritorial Application of Human Rights Treaties – The Case of Israel and the Palestinian Territories Revisited.' in Isabelle Buffard and others (eds), *International Law Between Universalism and Fragmentation: Festschrift in Honour of Gerhard Hafner* (Martinus Nijhoff 2008) 766.

159 *Congo v Uganda* 19 December 2005, para.178.

160 Grand Chamber *Loizidou v Turkey* 23 March 1995, para.62.

161 Grand Chamber *Cyprus v Turkey* 10 May 2001, para.77.

be proportional to the administrative control that is being exercised as positive obligations require administrative power (which normally belongs to the sovereign territorial state).[162]

Extraterritorial obligations of states differ from the full range of human rights obligations within a state's territory. Where a state holds all public powers, it must comply with its treaty obligations, without exceptions, including ensuring that a legal framework is in place to protect citizens from human rights violations by private parties. However, the nature of some obligations makes it difficult, if not impossible, for a state to provide protection without that same degree of public powers. Positive rights require positive action by a state, and hence require a different degree of control over a territory, whereby full control would equal annexation. Only in instances of full control could one expect the controlling state to bear responsibilities regarding, for instance, education or health care. Could there be a legal as well as moral duty to, for instance, alleviate worldwide human suffering and eliminate poverty for states who would have the capabilities to contribute to those goals?[163] That seems a serious stretch of the legally enforceable human rights obligations. De Schutter has argued that where a state does not hold governmental powers in a territory abroad, only the negative obligation not to violate the rights of the Convention could be imposed on that state.[164] However, if extraterritorial obligations differ between circumstances and degrees of power held by states, how will a state know what precise obligations it owes in particular circumstances?[165]

The ECtHR already stated that even within a territorial situation the positive obligations on states shall not be disproportionate:

> 'The scope of the positive obligations *must be interpreted in a way that does not impose an impossible or disproportionate burden on the authorities*. Not every claimed risk to life can therefore entail for the authorities a Convention requirement to take operational measures to prevent that risk from materializing. For a positive obligation to arise, it must be established that the authorities knew or ought to have known at the time of existence of a real and immediate risk to the life of an identified individuals from the criminal acts of third part and that they failed to take measures

162 See also the requirement of reasonableness in determining the substantive obligation, supra note 994.

163 Fons Coomans, 'The Extraterritorial Scope of the International Covenant on Economic, Social and Cultural Rights in the Work of the United Nations Committee on Economic, Social and Cultural Rights' 2011, 11 Human Rights Law Review 1, 6. See for a discussion of moral human rights, Thomas Pogge, 'Severe Poverty as a Human Rights Violation' 2004, UNESCO Poverty Portal.

164 Olivier De Schutter, 'Globalization and Jurisdiction: Lessons from the European Convention on Human Rights' 2006, 6 Baltic Yearbook on International Law 185, 245.

165 Chimene I. Keitner, 'Rights Beyond Borders' 2011, 36 Yale Journal of International Law 55, 67.

> within the scope of their powers which, judged reasonably, might have been expected to avoid that risk.'[166]

In *Gentilhomme v France,* three French women, married to Algerian nationals and living in Algeria, whose children formerly attended a French state school in Algiers, brought a complaint against France.[167] In 1988, Algeria decided that the French state school could no longer enroll Algerian children. The applicants complained that France violated their rights to family life and education by refusing to provide their children with an education.[168] The ECtHR, however, found that the unilateral decision by Algeria to limit the provision of French education was a sovereign decision within its own territory. In such a situation, France could not owe human rights obligations to these children, as its control was restricted by the lawful and sovereign authority of Algeria.[169] The case was therefore declared inadmissible. If the decision to no longer enroll Algerian children had been taken by France, then most likely the applicants would have fallen within France's 'jurisdiction'.

Positive obligations, requiring positive action, are more intrusive of the sovereignty of the territorial state than negative obligations.[170] The provisions on the territorial scope of human rights treaties were most likely drafted with a 'normal' situation in mind of people within a territory seeking protection against the state ruling over that territory. Through its treaty obligations, the state has committed itself to ensuring protection of human rights in all aspects of public action. Some rights can only be sufficiently protected where a state indeed has full control over all public powers and tasks; other rights only have to be protected where a state has effective control over territory. For instance, where personal jurisdiction through factual control over a person is established extraterritorially, the state cannot be required to secure rights dependent on judicial institutions.[171] States must still respect the lawful authority of the sovereign territorial state, and if an extraterritorial right to fulfill would exist, these duties should then always be complementary to domestic state obligations.[172] A gradual scope of obligations that is proportionate to the degree of control seems the most reasonable and realistic solution. The level of control and exercise of public powers determines how much an individual can be

166 ECHR, *Osman v United Kingdom* 28 October 1998, 23452/94, para.116.
167 ECHR, *Gentilhomme, Schaff-Benhadji et Zerouki v France* 14 May 2002, 48205/99, 48207/99 and 48209/99.
168 Ibid para.20.
169 Ibid.
170 King (2009), 538.
171 Ibid.
172 Wouter Vandenhole, 'EU and Development: Extraterritorial Obligations under the International Covenant on Economic, Social and Cultural Rights' in Margot Salomon, Arne Tostensen and Wouter Vandenhole (eds), *Casting the Net Wider: Human Rights, Development and New Duty-Bearers* (Intersentia 2007) 87.

affected by state action and thus what obligations the state has in relation to such control.[173]

In *Ilascu*, the ECtHR recognized that Convention obligations can be 'divided and tailored' by holding both Russia and Moldova responsible for different violations (even though Moldova did not have control over the territory or over the individuals).[174] The Court seemed to take a different stance in *Bankovic,* where it held that

> 'the wording of Article 1 does not provide any support for the applicants' suggestion that the positive obligation in Article 1 to secure 'the rights and freedoms defined in section I of the Convention' can be divided and tailored in accordance with the particular circumstances of the extraterritorial act in question.[175]

The UK House of Lords in the domestic procedures of *Al-Skeini* relied upon this statement and found that the victims who were shot in the course of fire exchanges during patrols (rather than in detention) did not fall within the UK's jurisdiction.[176] As the applicants did not only complain of the unlawful killings under Article 2, but also relied on the positive obligation of states to conduct an investigation into a killing, their Lordships found that if the UK did not have sufficient control to secure the entire package of rights, its acts cannot fall within the scope of the UK's 'jurisdiction'.[177] The ECtHR in its judgment in *Al-Skeini* did not follow this all-or-nothing approach. The Court reiterated its earlier position that where a state has effective control, it must secure the entire range of substantive rights of the Convention. The Court added, however, that where a state only had control over an individual (rather than holding actual public powers over an entire population), the protection of rights would depend on the factual circumstances:

> '[t]he State is under an obligation (…) to secure to that individual the *rights and freedoms (…) that are relevant to the situation of that individual*. In this sense, therefore, the Convention rights can be divided and tailored.'[178]

An interesting case is pending before the Human Rights Committee between Palestinian citizens and Canada. Canadian contractors and builders in the Occupied Palestinian territories are alleged to have acted in violation of human

173 Francoise Hampson, 'The Scope of the Extraterritorial Applicability of International Human Rights Law' in Geoff Gilbert, Francoise Hampson and Clara Sandoval (eds), *The Delivery of Human Rights: Essays in Honour of Professor Sir Nigel Rodley* (Routledge 2011) 169; Van Schaack (2014), 51.

174 Grand Chamber *Ilascu v Moldova and Russa* 8 July 2004, paras.441ff.

175 Grand Chamber (Adm Dec) *Bankovic* 12 December 2001, para.75.

176 *Al-Skeini and others v Secretary of State for Defence* 13 June 2007.

177 Ibid para.83 (per Lord Rodger); para.129 (per Lord Brown); para.97 (per Lord Carswell).

178 Grand Chamber *Al-Skeini v UK* 7 July 2011, para.139.

rights law, and the complainants wish to hold Canada accountable for not ensuring respect for human rights obligations.[179] If the Committee were to find that by not prescribing their companies how to act, Canada was acting in breach of its human rights obligations, that decision would be groundbreaking for an extraterritorial duty to respect and protect, as this would broaden the scope of state's extraterritorial obligations considerably – basically requiring states to regulate (and to ensure adequate enforcement) for the extraterritorial behaviour of their nationals (non-state agents). Whereas from a human rights perspective, extraterritorial regulation of nationals – including corporations – may be encouraged, it is unlikely that the Committee will reach this conclusion.

In summary, the following substantive obligations can be discerned: within the sovereign territory over which a state has full control, the full range of both negative and positive obligations applies. Outside the sovereign territory of a state, but where a state exercises effective control over territory, the range of rights depends on the extent of public powers exercised by the foreign state. A state will in any case have the negative obligation to *respect* all human rights, but will only have positive obligations where that can reasonably be expected. Where a state has physical control over an individual, only those rights that are relevant to the situation of that individual apply.

6.5.2 Economic, social and cultural rights

The jurisprudence discussed above stems mostly from human rights bodies under civil and political rights treaties (the so-called first generation rights that mainly focus on individual liberties and act as a counterweight to state excesses). Economic, social and cultural rights (ECS rights, the so-called second generation rights) are mainly related to equal conditions and treatment. Unless a state is effectively occupying foreign territory with full public power, examples where a foreign state would be the sole duty bearer of ECS obligations are difficult to imagine. When states cooperate (e.g. in a development cooperation project) the facts of the case will determine which state is in effective control and whose ECS obligations would be triggered.[180]

In case of military occupation, the question is whether the occupying state is under a legal obligation to also observe the economic, social and cultural rights of the people residing in the occupied territory. International human-

179 The complainants argue for instance that Canada has violated its extraterritorial obligations to ensure respect by failing to provide effective remedies to hold the building companies accountable for their violations, as well as by failing to adequately regulate the companies in order to ensure that their activities would not violate the ICCPR. (Individual Complaint to the Human Rights Committee under the Optional Protocol to the ICCPR, Bil'in et al v Canada, 28 February 2013, p.8).

180 Coomans (2011), 6.

itarian law undoubtedly applies in those situations,[181] but do occupying states also have obligations towards education or working environments for instance? The Committee on Economic, Social and Cultural Rights (CESCR) has to some extent dealt with this question when discussing the State reports of Israel regarding the Occupied Palestinian Territories. The Committee was of the view that Israel's ECS obligations applied also to the Occupied Palestinian Territories as 'the State's obligations under the Covenant apply to all territories and populations under its effective control'.[182] Israel denied it had such effective control over the Occupied Palestinian Territories.[183] Setting aside whether or not Israel had effective control, this discussion suggests that also ECS obligations follow the effective control doctrine, both over territory or people. The Committee, however, did not elaborate on the substantive obligations that would apply. Is it only the obligation to respect, or in other words, refrain from interfering in the free enjoyment of rights, or also the obligations to protect and fulfil? Can development aid be considered an obligation or only a commitment and a moral responsibility? It is reasonable that the degree of control would determine the scope of the obligations, whereby it is unlikely that obligations to *fulfill* ECS obligations outside a state's territory could lead to state responsibility under international law. The Committee on Economic, Social and Cultural Rights has, as of yet, never engaged in a detailed analysis of the different types of obligations.

Coomans describes how the taking of sanctions under Chapter VII of the UN Charter might have serious human rights implications (apart from the human rights violations that the sanctions intend to punish).[184] Without stating explicitly that sanctions can be seen as acts giving rise to the extraterritorial application of the ICESCR, the Committee on Economic, Social and Cultural Rights has strongly hinted at this point of view in its General Comments.[185] In General Comment no 8 on the relationship between economic sanctions and respect for economic and social rights, the Committee argued that when imposing sanctions states are still bound by their own human rights stand-

181 In particular the Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 12 August 1949, 75 UNTS 287.

182 Concluding Observations regarding Israel's Initial Report, 4 December 1998, E/C.12/1/Add27, para.8.

183 Summary Record of the 18th Meeting, 4 June 2003, E/C.12/2003/SR.18, paras.22-24. Israel argued that the ICESCR cannot apply in a context of armed conflict because of the distinction under international law between human rights and humanitarian law. (Israel, Additional information submitted by State Parties to the Covenant following the consideration of their reports by the Committee on Economic, Social and Cultural Rights, 14 May 2001, E/1989/5/Add14) The Committee did not agree with that statement and held that the CESCR applied notwithstanding.

184 Coomans (2011), 11.

185 See General Comment no 8; Ibid 12.

ards.[186] Hence states have to take into account the extraterritorial effects of the imposed sanctions. For instance, they cannot impose sanctions that restrict the supply of medicines and medical equipment.[187] States (or the international organization) imposing sanctions also have an obligation to respond to 'any disproportionate suffering experienced by vulnerable groups within the targeted country'.[188] This does not mean, however, that the sanctioned state no longer has to comply with its own obligations: its obligations to realize ESC rights for its citizens continue to apply.[189]

Interpretative guidance for the extraterritorial scope of ECS rights can be found in the non-binding Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural rights.[190] The principles aim to bridge a divide between civil and political rights, and economic, social and cultural rights. Most jurisprudence on extraterritorial human rights obligations deals with civil and political rights, and focuses on the effective control doctrine. The Maastricht Principles suggest a broader scope of extraterritorial obligations for ECS rights. The Principles do not claim to be a codification of existing international law: apart from the preamble stating that the principles are 'drawn from international law', no clear references are made to the legal basis for extraterritorial obligations.
The Maastricht Principles define extraterritorial obligations as

> 'a) obligations relating to the acts and omissions of a State, within or beyond its territory, that have effects on the enjoyment of human rights outside of that State's territory; and

186 General Comment no 8: The relationship between economic sanctions and respect for economic and social rights, 4 December 1997, E/C.12/1997/8; 5 IHHR 302 (1998).
187 General Comment no 14: The right to highest attainable standard of health (art.12), 4 July 2000, E/C.12/2000/4; 8 IHRR 1 (2001), para 41.
188 General Comment no 8, para 14.
189 General Comment no 8, para 10.
190 Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights, 2012. The Maastricht Principles were developed over a two-year period between 2009 and 2011 and subsequently adopted by human rights experts at a meeting in 2011 convened by Maastricht University and the International Commission of Jurists. Signatories include current and former members of UN human rights treaty bodies, former and current Special Rapporteurs of the Human Rights Council, along with academics and legal advisers of leading non-governmental organizations. The Extraterritorial Obligations Consortium, created in 2007 and composed to date of leading academics and NGO's played a pivotal role throughout the process. (Olivier De Schutter and others, 'Commentary to the Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights' 2012, 34 Human Rights Quarterly 1084, 3.) They are the opinion of an international group of experts suggesting extraterritorial obligations needed to fill a legal vacuum in the sphere of economic, social and cultural rights.

> b) obligations of a global character that are set out in the Charter of the United Nations and human rights instruments to take action, separately and jointly through international cooperation, to realize human rights universally.'[191]

Paragraph (a) refers to situations where states would be able to regulate activities within their territory and abroad that have effects outside of their territory. An effect could be, for example, that a state ensures that a corporate actor within its jurisdiction does not provide loans to projects leading to forced evictions.[192] Paragraph (b) refers to obligations as, for instance, laid down in Article 55 of the UN Charter, referring to non-discrimination based on race, sex or religion, but to which no legal consequences can be attached as assistance and cooperation cannot be enforced.[193] How far could and should states go in their unilateral action to realize human rights universally? From an international law perspective states can only prescribe and enforce norms within their own jurisdiction, so the obligations seem to refer mainly to international cooperation.

With regard to the jurisdictional grounds, Principle 9 lists three grounds establishing jurisdiction. Firstly, the exercise of authority or effective control; secondly, where state acts or omissions bring about foreseeable *effect* on the enjoyment of rights within or outside its territory; and thirdly, and very notably,

> 'situations in which the State, acting separately or jointly, whether through its executive, legislative or judicial branches, is *in a position* to exercise *decisive influence* or to take measures to realize economic, social and cultural rights extraterritorially, in accordance with international law.'[194]

It is not clear what the drafters meant exactly with 'in a position to exercise decisive influence'. Do they refer to influence over activities abroad? The Commentary to the Maastricht Principles does not elaborate on this point. Can powerful markets that are in a position to address non-trade concerns through trade measures be seen as being 'in a position to exercise decisive influence'? Even though it would be unlikely that the failure to take such measures could lead to state responsibility on the basis of omission, could this be seen as a duty nonetheless for powerful states?

This latter basis for jurisdiction seems to open endless opportunities (for success and for abuse) but is very much limited again by the addition of 'in accordance with international law', reiterated by Principle 10, explicitly stating that extraterritorial obligations cannot be exercised in violation of general

191 Maastricht Principles, 2012, Principle 8.
192 De Schutter and others (2012), 1101.
193 Ibid 1102.
194 Maastricht Principles, 2012, Principle 9.

international law.[195] As long as there is no clarity on what *is* exactly in accordance with international law, the third base for jurisdiction remains vague. In the Commentary to Principle 24, it seems as if one of the situations envisaged by the drafters is the control and influence over transnational corporations with their main seat under a state's jurisdiction, but operating abroad.[196] While the legal status of npr-PPMs within WTO law remains unclear, as has been pointed out in chapter 4, it is very unlikely that imposing PPMs would be *per se* in direct violation international law.[197]

Principle 25 sets out 'the relevant bases to exercise extraterritorial (prescriptive) jurisdiction by a state'.[198] It reads that 'States must adopt and enforce measures to protect economic, social and cultural rights through legal and other means' when among others 'the harm or threat of harm originates or occurs on its territory' (as a codification of the active personality principle).[199] This would indeed imply a double task for states: firstly, avoid any violations occurring within a state's territory, also those violations which could result in harm outside that territory (environmental harm as an obvious example); and secondly, prevent harm from activities abroad. The Commentary to Principle 25 confirms that the restrictions on extraterritorial jurisdiction remain debated. However, the 'specific nature of state regulations that seek to impose compliance with human rights or that seek to contribute to multilaterally agreed goals such as the Millennium Development Goals' should be taken into account.[200] As these concerns are of interest to all, in such cases 'a more flexible understanding of the limits on prescriptive extraterritorial jurisdiction may be justified'.[201]

Principle 26 expands on the position of states to influence the conduct of non-state actors:

> 'States that are in a position to influence the conduct of non-State actors *even if they are not in a position to regulate such conduct*, such as through their public procurement system or international diplomacy, should exercise such influence, in accordance with the Charter of the United Nations and general international law, in order to protect economic, social and cultural rights.'

Protecting such rights through trade measures, for instance restricting market access unless exporters respect certain environmental standards, seems to fall

195 The Commentary to the Maastricht Principles refers to the example of Article 2(4) of the UN charter, condemning the use of force against the territorial integrity or political independence of states.
196 De Schutter and others (2012), 1137.
197 The trigger of market access or market activation creates a territorial link allowing states to impose measures on goods that seek access to its territory. See chapter 3.
198 De Schutter and others (2012), 1139.
199 Ibid.
200 Ibid 1142.
201 Ibid.

within the scope of this Principle: a state is not actually regulating conduct, but exercising its influence if certain values are not respected. As both regulation and enforcement would then happen within the territory of the imposing member state, there seems to be no breach of international law.[202]

In summary, the non-binding Maastricht Principles have suggested a framework of extraterritorial ECS obligations. The effective control doctrine that applies to civil and political rights also counts as a starting point for ECS rights – where a state has control, it needs to protect human rights to the extent possible –, but the Principles extend the scope of ECS obligations to also take into account the effects of state action outside that state's territory, as well as the need to prevent the effects of acts by other states within the state's territory. While they emphasize the need for international cooperation and assistance, it is unclear to what extent states could take unilateral action to ensure a higher protection of rights abroad. How else, if not through international agreement, can a state influence activities abroad that have effect within a state's territory? Principles 25 and 26 imply that as long as states are acting in accordance with international law, they should use the tools available to influence conduct that may affect the enjoyment and protection of ECS rights.

6.5.3 Application of lessons learned to a trade context

As a general rule, the substantive obligations of states depend upon their factual control and powers: what is practically feasible? The greater the extent of public powers, the greater the positive human rights obligations on a state acting outside of its territory. However, the exercise of public powers in foreign territory is irrelevant in a trade context with respect to npr-PPMs. The Maastricht Principles make suggestions concerning the scope of international obligations with regard to ECS rights that could be more useful to our analysis of npr-PPMs. Firstly, the Principles point to a possible duty for states that are in a position to influence to help to realize ECS rights extraterritorially. This could be translated into a duty for states with a powerful market to use their market power to help realize transboundary or global environmental protection. Secondly, the Principles refer not only to a state's duty to avoid violations and harm within its own territory, but also to prevent harm from activities abroad. The specific nature of common goals, such as the Millennium Development Goals (MDGs), should be taken into account in order to allow for a more flexible understanding of jurisdictional limits. MDG 7, the goal to ensure environmental sustainability, emphasizes the common nature of environmental threats. In light of this common goal, npr-PPMs with the objective of environmental protection could contribute to preventing harm from activities abroad. Thirdly, according to the Principles, states should also aim at influencing the

202 See chapter 4.

conduct of non-state-actors to help realizing ECS rights. By targeting producers and their production processes, npr-PPMs are a preeminent example of such influence on non-state-actors.

Surely, the exercise of these powers requires a sound system of checks and balances to avoid abuse. In a trading context, these checks can be found in the non-discrimination principles, both in the substantive obligations and under the general exceptions (e.g. the *chapeau* to Article XX). The use of power by strong actors – whether economic, diplomatic or military –, may have a flavour of 'imperialism'. Even for 'good' and 'legitimate' causes, such as human rights or environmental protection, a powerful actor is likely to base its actions on its own beliefs and perspective. It is thus key that the common nature of the objective pursued by a PPM is emphasized and that a unilateral trade measure is based to the extent possible upon multilaterally agreed norms, standards or concerns, relying to the extent possible on international hard or soft law.[203] Considering the inadequate legal framework for environmental protection, it is submitted that international support can also be found through scientific reports or widely-supported initiatives of environmental NGO's. While less effective and not a legal basis to act upon against another state, these sources may nevertheless demonstrate an urgency and concern felt by society. A npr-PPM cannot be qualified as an act against another state though when it targets private producers through the odious production process, rather than states.[204] Furthermore, not being a true extraterritorial measure through the link of market access, the relevant question is whether the extraterritorial *effect* of a npr-PPM can be justified (as a substantive question rather than a jurisdictional question). In such a context, it is submitted that, in addition to international soft and hard law instruments, non-legal norms can also be taken into consideration to determine the common sense of urgency with regard to a particular environmental threat.

6.6 Conclusion

This chapter has shown that human rights treaty bodies have frequently applied obligations as laid down in regional and international human rights treaties to extra-territorial state conduct. Based on the shared and universal value of human rights protection, and in order to avoid a legal vacuum, regional and international human rights bodies have interpreted the juris-

203 See among others Ian Manners, 'The Normative Ethics of the European Union' 2008, 84 International Affairs 45. (arguing that the EU promotes a series of normative principles that are generally acknowledged to be universally applicable). Questioning the real normative model of the EU, see Kalypso Nicolaidis and Robert Howse, ''This Is My EUtopia...': Narrative as Power' 2002, 40 Journal of Common Market Studies 767.

204 See chapter 7 where a distinction is made between process-based PPMs, and the much more controversial country-based PPMs.

dictional scope of their respective treaties broadly. Jurisdiction is thereby interpreted as a *factual* situation of power, extending the scope of the treaties to territories and individuals abroad, where states exercise authority and control over these territories and/or individuals.

Little attention has been given in the jurisprudence to the type of right and the question whether extraterritorial obligations for certain rights can be triggered more easily than others. Nevertheless, a form of legal-functional reasonableness can be identified with respect to the substantive scope of the obligations: one can only require from a state acting outside its territory what is reasonable in relation to the control exercised, thereby also respecting the sovereign rights (prescriptive and enforcement jurisdiction) of the territorial state. Whereas respecting human rights obligations can hardly be seen as an intrusion on any state's sovereignty, positive obligations to fulfill will increase proportionally to the extent of the authority and control of a state over foreign territory: some obligations require a higher degree of public powers than others.

With regard to positive obligations a moral duty can be more easily discerned than an actual enforceable legal obligation. The Maastricht Principles advocate extraterritorial obligations for states to contribute to the universal realization of economic, social and cultural rights. Jurisprudence is still lacking on this point, but moral obligations definitely raise a number of questions: who carries that moral duty? States that have 'effective control' over territory, or also those states that are in a position to influence human rights protection (as suggested in the Maastricht Principles) through, for instance, their market power? Is there a duty on the states *able* to act or only on the *willing* – which may turn that duty into a *right*? And if the willing states are able to ensure better human rights protection – and by analogy, environmental protection – extraterritorially, with respect for the sovereignty of the foreign state, is there any legal ground to deny this? For each separate right the parameters will have to be analyzed separately. The variety in the substantive rights does not allow a generalization or oversimplification of the substance of their extraterritorial application.

Despite the obvious differences between the extraterritorial application of international human rights and the territorial extension of environmental policy through trade measures, the analysis of human rights practice can still be of guidance for npr-PPMs. The human rights perspective offers valuable insight on the general willingness to protect common values and concerns. By the creative interpretation of the human rights treaty bodies of jurisdiction as factual control, these bodies have shown that where necessary, the notions of jurisdiction and sovereignty can be elastic. The extraterritorial application enshrines the 'normative basis for the protection of fundamental rights as rights of human beings rather than as rights of citizens',[205] a statement that could be equally applied to the right to a cleaner environment. Where the common nature of human rights is evidenced by the almost universal membership of the UN human rights treaties, as well as by the extensive membership of regional human rights treaties, the common nature of environmental concerns can be evidenced by hard law and soft law, but also, in lack thereof, by civil society and science.[206] A more lenient approach in this regard is justified with respect to environmental standards prescribed by a npr-PPM, as npr-PPMs do not impose any legal duty on states – in contrast to the human rights context, where an extraterritorial application of human rights obligations does impose a legal duty on the state that is bound by those obligations.

Thus, even though the human rights bodies' factual interpretation of jurisdiction as 'effective control' is not relevant to a trade context, the willingness to move towards a more flexible understanding of jurisdiction is. As will be further discussed in chapter 7, this elasticity of jurisdictional limits in light of common values and concerns seems to add support for a broad interpretation of the jurisdictional limits of GATT with respect to PPMs addressing common environmental concerns. In addition to environmental effects on the territory, as discussed in chapter 5, international support that evidences the common nature of an environmental concern could further justify the extraterritorial effect of a npr-PPM addressing that concern.

205 Stephen Gardbaum, 'Human Rights and International Constitutionalism' in Jeffrey L. Dunoff and Joel P. Trachtman (eds), *Ruling The World? Constitutionalism, International Law, and Global Governance* (Cambridge University Press 2009) 233.

206 See e.g. common concern of mankind (UN General Assembly Resolution 43/53 Para.1 (climate change)); IPPC Fifth Assessment Report 2014.

PART III

Zooming in: a WTO extraterritoriality decision tree

7 The proposal of a WTO extraterritoriality decision tree

7.1 Introduction

Protecting environmental concerns through npr-PPMs raises two distinct but related extraterritoriality questions. Firstly, extraterritoriality related to the location of the activity that has detrimental effects on the environment, i.e. the location of the 'production' abroad, e.g. the fishing of tuna in foreign waters: can states 'regulate' foreign production activities, by conditioning market access on whether foreign producers comply with prescribed rules? Secondly, extraterritoriality related to the location of the concern that a measure aims to protect, e.g. dolphins or migratory sea turtles, clean air or biodiversity: can states use trade measures to protect transboundary environmental concerns or concerns located outside the territory of the regulating state? The previous chapters have analysed the application of extraterritoriality in different fields of international law, such as public international law, competition law and international human rights law. Due to the lack of guidance on jurisdictional issues and extraterritoriality in the WTO agreements and in case law, and because the WTO agreements should not be interpreted in clinical isolation of public international law,[1] the lessons learned from the analysis of those other fields will now be applied to a WTO context.

Public international law is relevant to the first question. As was demonstrated in chapter 4, npr-PPMs should not be seen as extraterritorial measures *stricto sensu*. 'Extraterritorial' trade measures *affect* or *incentivize* conduct abroad, rather than *regulating* that conduct. The measure is only activated once access to the market is sought. Npr-PPMs should instead be qualified as measures with an extraterritorial effect or measures of territorial extension.[2] Enforcement of trade measures is territorial as it occurs within the territory of the imposing member, likely at the border. In contrast to the fields of law examined in the previous chapters, the extraterritorial nature of npr-PPMs does not trigger a jurisdictional question, but is assessed as a merits question under WTO law. Nonetheless, a substantive assessment of extraterritorial effects can still build upon the practice developed on the tenet of extraterritoriality elsewhere. Despite the more limited form of extraterritoriality, extraterritorial effects

1 AB Report *US-Gasoline* 1996, 17.
2 Scott (2014), 90. See also Zleptnig(2010), 308; Vranes(2009), 174.

similarly raise controversy and would need to be justified in some way. Even when not unlawful from a general international law perspective, npr-PPMs still raise questions concerning their legality and acceptability under WTO law, due to their potential impact on foreign producers and/or policy makers.

This leads to the second question: whether WTO law, and in particular the GATT, allows states to use trade measures to address environmental concerns that may be located outside the territory of the regulating state or whether it acts as a stumbling block. WTO law is concerned with the observance of the multilaterally agreed trading rules. Where an inconsistency with the substantive rules is established, WTO Members can turn to the general exceptions in order to seek justification for a measure. As has been discussed in chapter 2, there has been much debate on whether PPMs should be addressed under Article III GATT or Article XI GATT. While that choice is of importance for the determination of infringements,[3] neither provision *de lege lata* takes into account the objective of a measure, nor do they contain any reference to a jurisdictional limitation. The possible extraterritorial nature of the objective that a npr-PPM aims to protect is thus not considered at this stage. In other words, even if npr-PPMs have the objective to protect 'extraterritorial' environmental concerns, as long as a npr-PPM is not inconsistent with substantive GATT or other WTO obligations, that extraterritorial element is not relevant for the WTO analysis.

However, a npr-PPM in violation with substantive obligations can be justified under Article XX GATT, at which point the objective of the measure will be assessed. Article XX has so far been the principal battlefield for PPM regulations, and will most likely remain so. Similar to the rest of the GATT, Article XX does not contain any reference to jurisdiction. In *US-Shrimp,* in answer to the question whether the US could only act to protect a concern within its jurisdiction, the AB referred to a 'sufficient nexus' between the migratory sea turtles and the US, without defining the required nexus. In *EC-Seal Products,* the AB emphasized the systemic importance of determining the jurisdictional limitations of Article XX GATT, but did not explore the issue further due to a lack of arguments made by the parties.[4] The question thus remains whether trade measures that aim to protect an environmental concern located outside the territory of the regulating state can be accepted.

This chapter proposes an extraterritoriality decision tree within the framework of Article XX GATT, offering a systematic approach to assess the 'extraterritorial' objectives of npr-PPMs. The model finds its legal basis in the paragraphs of Article XX GATT and functions as an extraterritoriality threshold question before the measure can further be examined under the paragraphs and *chapeau* of Article XX GATT. As a first step it is suggested to consider the location of the concern and to determine to what extent that concern has an environmental impact on the regulating state. The analogous application of

3 See chapter 2.
4 AB Report *EC-Seal Products* 2014, para.5.173.

the effects doctrine in competition law serves as a useful tool to analyse that environmental impact.[5] The second step of the decision tree refers to the international recognition and support for a norm. The analysis of extraterritoriality in the context of human rights law has shown that jurisdictional boundaries can be more elastic when common norms are concerned.[6] In addition to effects, the 'international characterization' of norms[7] serves to strengthen a claim of acceptable 'extraterritorial' objectives under Article XX GATT.

After the proposal of the tree which is embedded in the paragraphs of Article XX GATT, this chapter will address the relation between the environmental exceptions of Article XX(b) and (g) and the moral exception of Article XX(a) GATT. The justification analysis will be completed by briefly discussing the *chapeau* and its relevance for npr-PPMs with extraterritorial effects. Finally, some observations will be made that go beyond the legal framework and the purpose of this thesis, but are worth noting.

7.2 Assessing the extraterritorial effect of environmental npr-PPMs under Article XX GATT: A decision tree

7.2.1 The environmental exception grounds and necessity

7.2.1.1 Environmental concerns

As has been discussed in chapter 2, if a violation of a substantive GATT obligation has been established, justification can be sought under Article XX GATT. The analysis of the paragraphs of Article XX GATT consists of a two-tier test: firstly, the objective must be covered by one of the listed areas; and secondly, with regard to the relationship between the measure at issue and the societal value pursued, a degree of necessity – depending on the wording of the particular paragraph – must be shown.

Paragraphs (b) and (g) of Article XX GATT allow WTO Members to rely on environmental objectives to justify measures that are inconsistent with the

5 For a full analysis of competition law and the effects doctrine, see chapter 5.

6 A distinction between the human rights context (the extraterritorial application of regional and international human rights treaties) and the trade-environment context is that international human rights obligations will apply when states exercise 'effective control' over territory outside their borders. The actual territorial state is at that point unable to ensure sufficient human rights protection in its territory due to lack of control. In an environmental context, a PPM would apply to all imported goods, without distinguishing between states that are unable to ensure a sufficiently high level of environmental protection, and states that are unwilling to ensure that level of protection. For a full analysis of international human rights law, see chapter 6.

7 Scott (2014), 89.

substantive obligations of GATT. Article XX(b) refers to the protection of human, animal or plant life and health, while Article XX(g) refers to the conservation of exhaustible natural resources. Generally, the concerns at issue relate either to pollution or to resources.[8] Competitiveness concerns and economic motivations related to environmental concerns, such as measures to 'level the playing field' by insisting that foreign producers use the same production practices as domestic producers in order to offset regulatory costs differences, cannot be justified by virtue of Article XX. Mavroidis makes a distinction between the applicable rules in cases of commercial externalities, such as the competitive advantage of the exporter from a country with lax environmental policies; and the applicable rules in cases of physical and possibly (im)moral externalities, such as actual transboundary environmental harm, e.g. acid rain. He argues that the GATT/WTO is an agreement regulating commercial relations between WTO Members, and hence the Members should be assumed to have accepted the resulting commercial externalities from domestic environmental policies, to the extent that they do not violate the non-discrimination provisions.[9] Commercial externalities due to environmental policy differences cannot be accepted as a possible justification ground for PPMs with an extraterritorial effect. Lax environmental policies could, however, also lead to environmental harm, either within the territory of the importing state or transboundary harm or lead to damage to the global commons. These physical environmental externalities are likely to fall within the scope of paragraphs (b) and (g) of Article XX and the economic concerns can very well be intertwined with the environmental concerns. The primary motivation must be environmental, though.[10]

The question at issue is whether there is an implied jurisdictional limitation to Article XX: are paragraphs (b) and (g) limited to concerns within the territory or jurisdiction of the imposing member, or can members also rely on the exceptions to address environmental concerns outside their territory? Under Article 31(1) VCLT, a treaty is to be interpreted in good faith, starting with an examination of the ordinary meaning of the words, read in their context, and in the light of the object and purpose of the treaty involved. When the tools offered by Article 31 VCLT do not resolve a problem of interpretation, Article 32 VCLT allows for supplementary means of interpretation, including the *travaux préparatoires*.[11] Neither paragraph (b) nor (g) of Article XX GATT contain a reference to territory or jurisdiction. Looking beyond the wording, Article

8 OECD (1997), 27.
9 Petros C. Mavroidis, 'Reaching Out For Green Policies: National Environmental Policies in the WTO Legal Order' 2014, RSCAS 2014/21 EUI Working Papers, 9.
10 Howse and Regan (2000), 280.
11 While not all WTO Members are parties to the VCLT, the AB has recognized the VCLT's rules on treaty interpretation (Article 31 and 32) as customary international law and its relevance for the interpretation of the WTO Agreements, thereby making them binding on all States. See AB *Japan-Alcoholic Beverages II* 1996, p.10.

XX serves to balance WTO Members' rights to regulatory space and to invoke exceptions with other Members' rights to free trade.[12] WTO Members' trade relations should allow for 'the optimal use of the world's resources in accordance with the objective of sustainable development, seeking both to protect and preserve the environment'.[13] There are no subsequent agreements between the parties on the jurisdictional scope of Article XX, nor do the *travaux* reveal the intent of the parties with respect to the appropriate limitation of Article XX.[14]

Given this lack of direction on a territorial or jurisdictional scope, there is no ground to assume that Members can only protect concerns that are strictly within their territory. Especially in light of the non-territorial nature of environmental challenges, a broader interpretation of the listed environmental objectives, including concerns located outside the territory of the regulating state, seems appropriate. The increasing awareness of the global threats of environmental concerns such as climate change justifies a broad interpretation of Article XX, considering the AB's finding that the WTO agreements should be interpreted in light of contemporary concerns.[15]

Nonetheless, acceptance of environmental objectives without any jurisdictional limitation would also distort the appropriate balance between regulatory space and free trade. In *US-Shrimp*, the AB relied on a 'sufficient nexus' between the concern (sea turtles) and the regulating state (the US), implicitly requiring a territorial link by referring to the turtles swimming through US waters. The AB failed to give further guidance on the requirements of a nexus. In order to approach more systematically the assessment of concerns, the proposed extraterritoriality decision model relies on environmental effects within the territory of the regulating state and distinguishes as a first step between internal or inward-; external or outward-; and inward/outward-looking measures, based on the location of the concern.[16] This distinction will be elaborated on below when discussing the first step of the decision tree.

7.2.1.2 Necessity

The necessity test involves a process of weighing and balancing a series of factors, which results in an ad-hoc, contextual assessment of each measure,

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12 AB Report *US-Shrimp* 1998, para.128.

13 Marrakesh Agreement, 1994, preamble.

14 The GATT was drafted by governments at the UN Conference on Trade and Development between 1946-1948. The Conference negotiated a Charter for the International Trade Organization, and the GATT was viewed as an interim agreement pending the implementation of the ITO Charter. The preparatory work of the ITO Charter is thus considered the preparatory work of the GATT. No references are made to a territorial limitation. See also Charnovitz (1998), 700.

15 AB Report *US-Shrimp* 1998, paras.129.

16 Charnovitz introduced this distinction in Charnovitz (1998), 695.

such as the contribution of the measure to the end pursued, the restrictive effect of the measure, and whether a WTO-consistent alternative measure is reasonably available.[17] The necessity standard takes different forms in the different paragraphs of Article XX GATT. Article XX(b) demands that measures are *necessary* to protect the environment, whereas Article XX(g) does not refer to *necessary* but instead requires a measure to be *related to* the protection of an exhaustible resource. Being *related to* is a more lenient standard than *necessity*, where only a reasonably available least-restrictive measure will pass the test, and not merely a measure that indeed relates to the stated objective.

In *Korea-Various Measures on Beef* the AB found that with regard to 'necessary' in Article XX(d), one should

> 'take into account the relative importance of the common interests or values that the law or regulation to be enforced is intended to protect. The more vital or important those common interests or values are, the easier it would be to accept as 'necessary' a measure designed as an enforcement instrument.'[18]

In this light, the seriousness of the concern could be considered: measures taken in light of fairly grave and imminent environmental danger may be more necessary than measures taken in the light of less imminent, less serious types of environmental threats.[19] Necessity furthermore requires taking into account the level of contribution of the measure to the realization of the end pursued.[20] In *Brazil-Tyres,* the AB noted that the fact that the contribution of a law to the protection of an environmental concern is not immediately obvious, because it is part of a broader programme of which the impact can only be evaluated over time, should not prevent a finding of necessity.[21] The 'extent to which the compliance measure produces restrictive effects on international commerce' is another element that can determine the required level of necessity. The broader the impact, the higher the necessity threshold will be[22] so it must be examined whether less-trade restrictive measures could secure the same objective and level of protection.[23]

Article XX(g) does not refer to 'necessary' but requires that measures are 'related to' the conservation of exhaustible natural resources. In *US-Gasoline*, the AB noted that 'related to' does not mean that a measure must be 'primarily

17 See AB Report *Korea-Various Measures on Beef* 2000, para.161-164; AB Report *EC-Asbestos* 2001, para.170-172; AB Report *Brazil – Retreaded Tyres* 2007, para.141-144.
18 AB Report *Korea-Various Measures on Beef* 2000, para.162.
19 Richard B. Bilder, 'The Role of Unilateral State Action in Preventing International Environmental Injury' 1981, 14 Vanderbilt Journal of Transnational Law 51, 61.
20 AB Report *Korea-Various Measures on Beef* 2000, para.163.
21 AB Report *Brazil – Retreaded Tyres* 2007, para.151.
22 AB Report *Korea-Various Measures on Beef* 2000, para.163.
23 AB Report *Brazil – Retreaded Tyres* 2007, para.178.

aimed at'.[24] Rather the AB examined whether 'the means are, in principle, reasonably related to the ends'.[25] In *US-Shrimp*, the AB examined 'the relationship between the general structure and design of the measure here at stake, and the policy goal it purports to serve'.[26] The AB furthermore emphasized the wide support for the concern at issue when discussing whether the measure at stake was related to the legitimate policy concern.[27]

In view of a possible jurisdictional limitation of Article XX and the required balance between the WTO Members' rights, the necessity test allows to further qualify which concerns could be reasonably accepted. The more common and important the interest, the more easily a measure will be deemed necessary. Whereas it is important how to take into account how the regulating state values the concern at issue, an analysis should equally consider how a concern is of importance to the broader WTO membership, especially where the environmental concern is (partly) located outside the jurisdiction of the regulating state.[28] The threatened harm must be important enough to justify a violation of the substantive obligations of GATT.[29] Determining the degree of necessity then forms the basis for the second step of the extraterritoriality decision model, to be further elaborated below: assessing the international recognition and support for a norm. According to the AB, a treaty should be interpreted in light of contemporary concerns, which can be evidenced by international instruments of environmental law.[30] Taking into consideration international environmental law in order to assess necessity is also supported by the AB's finding that the WTO agreements are not to be read 'in clinical isolation' from public international law.[31] The more international support for an environ-

24 AB Report *US-Gasoline* 1996, 17.
25 Ibid 20.
26 AB Report *US-Shrimp* 1998, paras.156.
27 Ibid para.135.
28 The AB's statement in *US-Shrimp* can be read in this light: 'It is well to bear in mind that the policy of protecting and conserving the endangered sea turtles here involved is shared by all participants and third participants in this appeal, indeed, by the vast majority of the nations of the world.' (AB Report *US-Shrimp* 1998, para.135).
29 Robert E. Hudec, 'GATT Legal Restraints on the Use of Trade Measures Against Foreign Environmental Practices' in Jagdish Bhagwati and Robert E. Hudec (eds), *Fair Trade and Harmonization: Prerequisites for Free Trade?*, vol 2 (The MIT Press 1996) 127. However, international recognition of a norm and the importance of a norm does not necessarily equal the seriousness of possible environmental harm. I do not propose to include graduations of seriousness in the determination of an acceptable extraterritorial effect, as was suggested by Esty: major harm *v* narrower harm; rapid harm *v* less *v* least rapid harm; certain harm *v* less certain harm; irreversible harm *v* reversible harm. (*See* Esty(1994), 283.) It is likely that more serious harm will be a stronger incentive for states to cooperate internationally and seek agreement, however, lacking both textual support as well as support in practice of international law, the seriousness of harm is not an explicit factor to be taken into account in addition to the proposed elements of location and nature of the concern.
30 AB Report *US-Shrimp* 1998, paras.129ff.
31 AB Report *US-Gasoline* 1996, p.17.

mental concern, the easier a measure will be considered ‘necessary’ to that policy objective.[32] Where less international support exists for an objective or method to reach that objective, the threshold for proving there are no less trade restrictive alternatives (with less extraterritorial effects) will become higher. Equally, if a PPM is enforcing a treaty obligation, then that measure will most likely be considered appropriate and not more trade-restrictive than necessary. Broader acceptance of a norm also reduces potential trade barriers for producers: having to comply with a multilaterally supported norm or standard is less of a burden than having to comply with an infinite number of different norms or standards.

The structure and design of the measure will determine whether a npr-PPM based upon a unilateral concern is considered to be too trade restrictive: for instance, a full ban will be more difficult to justify than other less trade restrictive measures such as a tax or a label. The second step of the decision tree as outlined below will be of help to the weighing and balancing process of necessity.

7.2.2 Step 1 of the decision tree: Location of the concern

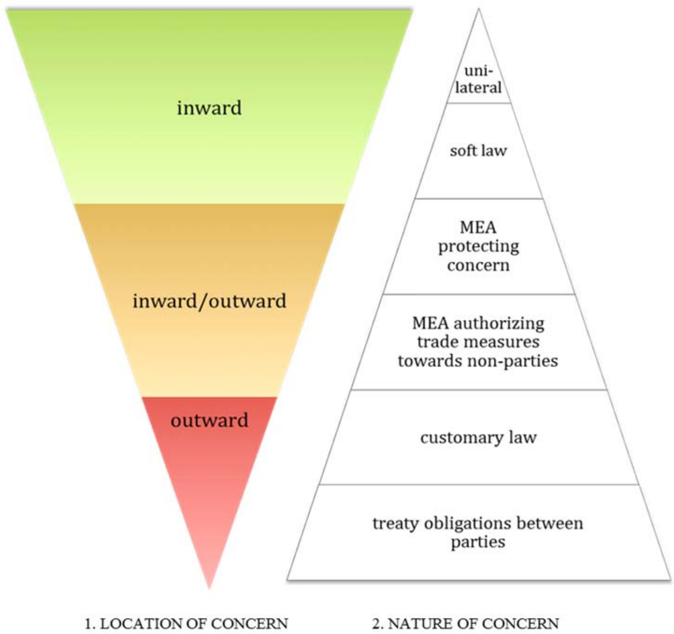

Figure 1. Step 1

32 AB Report *US-Shrimp* 1998, para.135.

The first step of the proposed extraterritoriality analysis refers to the location of the concern.[33] Are the measures aiming at protecting a domestic concern, a non-domestic concern or both, when regulating an extraterritorial activity?[34] Environmental PPMs can be imposed to protect an internal or *inward-looking* concern (e.g. the chemical composition of gasoline can influence pollution levels within the regulating country), or to protect an external or *outward-looking* concern (e.g. pollution of a lake in a foreign country), or both (e.g. climate change, air pollution, the global effects of a preserved rainforest, or sea turtles swimming within and outside territorial waters).[35] In other words, can the foreign production activities lead to environmental harm within or outside the territory of the regulating state? Is there a (physical) link still with the territory (protection of migratory turtles, protection of air) or not at all (protection of a threatened species or polluted lake elsewhere)? Often environmental concerns abroad might be linked to domestic moral concerns (e.g. consumers in country A are morally concerned about the pollution of a lake in country B, which could affect the local supply of drinking water) which could lead to the invocation of the public moral justification under Article XX(a) GATT.[36] The relation between the environmental exceptions and the public morals exception will be discussed in more detail below.[37]

Neither the AB nor any panel have made an explicit distinction between measures with an inward- or outward-looking purpose, but it is submitted that this would allow for a better assessment of the acceptability of npr-PPMs that target foreign production processes. Purely inward-looking measures will have a much stronger territorial connection with the regulating state than

33 The location of the production activity itself is not the determinant factor, as it is a common aspect of any trade measure to have an effect on activities abroad. There is furthermore no discussion that the production of imported products is taking place outside the importing country. Looking at the location of the concern allows to seek a connection with the regulating country of import that will allow that country to indeed exercise jurisdiction in this way. The distinction between inward- and outward-looking concerns is inspired by Charnovitz' distinction in Charnovitz (1998). Robert Hudec refers to the term 'externally-directed' in Hudec(1996).

34 See chapter 3.

35 Inspired by the distinction of inward- and outward-looking introduced by Charnovitz (1998). Robert Hudec refers to the term "externally-directed" in Hudec(1996), 116. Where a measure has separate inward and outward-looking objectives, arguably the domestic concern suffices to accept the full measure, including the extraterritorial aspect of it. For instance, in the *Tuna II* case on labeling of tuna, the domestic concern was related to consumer information, whereas the well-being of dolphins in foreign waters were the outward-looking concern. In *Seals* because of the public morals of EU citizens (inward) neither the Panel nor the AB paid much attention to the fact that many of the seals that the EU Regulation sought to protect did not live within the territory of the EU. Thus, even though there is still an outward-looking element, a separate inward-looking element can suffice to preliminarily accept the partly extraterritorial measure and continue with the analysis of Article XX.

36 See AB Report *EC-Seal Products* 2014.

37 See infra at 7.3. Environmental Concerns and Public Morals.

purely outward-looking measures: looking beyond WTO law, there is little doubt that states can take action to address environmental harm within their territory.[38] However, a territorial connection could still be demonstrated in case of partly outward-looking measures if the environment of the regulating state is substantially affected. Without environmental effects on the territory, it is submitted that fully outward-looking concerns will not pass the extraterritoriality threshold and cannot be justified under Artice XX GATT.

7.2.2.1 *Inward*

Inward-looking measures are measures that aim at protecting legitimate concerns within the domestic territory of the importing Member by regulating production activities abroad that have either an impact on the physical characteristics of the imported end product (product-related PPMs) such as a ban on products containing asbestos, a ban on hormones-injected beef or prescriptions for the chemical composition of gasoline;[39] or where the production activities have direct environmental effects on the territory, such as industry in a neighbouring country polluting a transboundary river.[40] In the disputes with inward-looking concerns that have been brought before a panel or the AB, no party has made a claim regarding jurisdiction, nor has the issue been addressed *ex officio* by a panel or the AB.[41] It follows that states can impose PPMs when the production activity that is being regulated can or will lead to environmental harm within the territory of the importing state. This position finds support under the jurisdictional principles of international law as well, as harm within the territory allows the state in question to exercise prescriptive

38 See Albert Lin, 'The Unifying Role of Harm in Environmental Law' 2006, Wisconsin Law Review; Horn and Mavroidis (2008), 1133; Jansen (2000), 312. See also International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts, 2001. Environmental damage can lead to state responsibility. During the drafting of the ARSIWA, there was some discussion to include massive environmental pollution among the provisions that would call for universal jurisdiction as violations of *jus cogens*. Such reference was nevertheless not included in the final draft.

39 AB Report *EC-Asbestos* 2001; WTO, *European Communities – Measures Concerning Meat and Meat Products (Hormones)* AB Report 1998, WT/DS26/AB/R; AB Report *US-Gasoline* 1996. In *US-Gasoline* the US Clean Air Act was adopted to improve air quality in the most polluted areas of the country by controlling toxic and other pollution caused by the combustion of gasoline manufactured in or imported into the US. See also AB Report *Brazil – Retreaded Tyres* 2007. Brazil imposed an import embargo on retreated tyres. They have a shorter lifespan than new tyres, and more import would lead to a faster accumulation of waste tyres, thereby providing breeding grounds for mosquito-borne diseases and causing difficult-to-control fires. Disposing of waste tyres furthermore had negative environmental consequences within Brazil's territory.

40 See chapter 3.

41 AB Report *Brazil – Retreaded Tyres* 2007; AB Report *EC-Asbestos* 2001; AB Report *EC-Hormones* 1998; AB Report *US-Gasoline* 1996. For a discussion of the cases, see chapter 3.

jurisdiction over the matter.[42] Jurisprudence has emphasized that states are free and sovereign to determine their own level of environmental protection within their territory.[43]

7.2.2.2 Inward/outward and effects

Most environmental npr-PPMs have both an inward- and outward-directed purpose. The objective they are aiming to protect is of a transboundary nature, such as air pollution, protection of biodiversity or animal species, like the migratory sea turtles in *US-Shrimp*. Transboundary concerns can even take the form of global concerns, where every state is affected by it, such as climate change. The classification of inward- and outward-looking concerns only refers to 'physical' environmental concerns, rather than moral concerns. A measure can address an outward-looking physical environmental concern, combined with an inward-looking moral concern, for instance, concerns by consumers in country A about a polluted lake in country B that local villagers depend on for drinking water, or moral concerns by European consumers about the threatened extinction of pandas. Environmental concerns should first be addressed under the environmental exceptions, before turning to Article XX(a), if environmental protection is the main objective. This relation between the environmental exceptions and moral exception will be further discussed in more detail in section 2.3 of this chapter.[44]

With regard to physical environmental inward-and-outward-looking concerns, the question is how the ratio of inward and outward effects can be determined. In *US-Shrimp*, the AB required a 'sufficient nexus' between the regulating country and the concern to be protected, without clarifying what that nexus could consist of: it sufficed for *some of the turtles* to traverse US waters *some of the time*.[45] A territorial connection was implied by the AB, but

42 Lin (2006). States should furthermore avoid through their actions or emissions the causation of environmental harm in other states. See e.g. *Institut de droit International* (IDI) in its 1987 Resolution on Transboundary Air Pollution (62 AIDI (1987-II), Article 2); Schoenbaum (1997), 300. The legal elements of this duty are unclear, however, and there is no real forum to adjudicate these questions. If environmental pollution is caused, states and/or private actors can incur *ex-post* environmental liability. From a legal procedural point of view, it could be argued that if there is transboundary pollution of a certain activity, this should be addressed through domestic public or private enforcement channels, rather than through trade measures. From a policy point of view on the other hand, it definitely makes sense to use trade measures as a tool to prevent or to limit further environmental damage by targeting the polluting or environmental-unfriendly activities themselves *ex-ante* (after negative effects have been noted within the territory of the importing state, or by relying on the precautionary principle for yet uncertain effects.

43 AB Report *EC-Asbestos* 2001, para.168; AB Report *EC-Hormones* 1998, para.77. See also John H. Knox, 'The Judicial Resolution of Conflicts Between Trade and the Environment' 2004, 28 Harvard Environmental Law Review 1, 54.

44 See infra at 7.3 on environmental concerns and public morals.

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

the question is how such connection must be established in light of the nature of environmental concerns where there is no immediate tangible territorial nexus, or where that nexus seems rather random, as with migratory sea turtles. In particular, global concerns such as air pollution, climate change or biodiversity disruption challenge the traditional understanding of a territorial connection: a clear causal link cannot easily be established, harm is likely to be caused by multiple actors, the harm is not immediately observable and can have different cross-border impacts. It is clear, though, that these environmental concerns can have widespread effects. For example, unsafe use of chemicals in an industrial plant in country A may cause groundwater pollution, leading to river pollution in country B, which could lead to toxic fish in country C.

In this context, the effects doctrine as relied on to justify the extraterritorial application of competition law can be of help.[46] For lack of relevant international competition law rules, national competition law is being applied extraterritorially by a growing number of states, addressing foreign anticompetitive behaviour that affects domestic economic interests.[47] The marketplace no longer has a territorial base and a global economy increases the level of international economic transactions, transnational firms operate in different countries. This line of reasoning can be transposed to environmental challenges and npr-PPMs.[48] Whereas competition law focuses on the effects that anticompetitive behaviour can have on the domestic market, environmental npr-PPMs focus on the effects that production processes can have on the (domestic) environment. Thus, do production activities abroad contribute to environmental harm internally? The open question is: when can the required nexus or these environmental effects be considered sufficient?

46 See chapter 5 on the effects doctrine and competition law.

47 The EU and the US are best known for their extraterritorial application of competition law. See e.g. EU: General Court *Gencor* 1999; Court of Justice of the European Union *Wood Pulp I* 1998; Court of Justice of the European Union *Dyestuffs* 1972.; US: Sherman Act (1890) 15 U.S.C. §§ 1-7; US v Aluminium Co of America, 148 F.2d 416 (2d Cir. 1945) ('Alcoa'); Hartford Fire Insurance v California, 509 US 764, 796 (1993). Apart from these examples other countries such as Japan, Brazil, Israel, China and India have adopted the effects doctrine in the context of competition law. The effects doctrine was also approved by the International Law Association as a principle of international law at its 55th Conference in 1972 where the effect is a constituent element of the act. L'Institut de Droit International stated during its session in 1977 that the effects doctrine could be applied extraterritorially to anticompetitive behaviour of multinationals where effects where intentional or foreseeable, substantial, direct and immediate.

48 Horn and Mavroidis (2008), 1133. See also Van Calster(2000), 214. See also in this regard a report by the OECD countries, agreeing in 1995 already that they should not use trade measures to pressure other countries to change their policies and practices with respect to environmental problems whose effects are limited to the jurisdiction of those countries (OECD, *Report on Trade and Environment to the OECD Council at Ministerial level* (1995) 6.)

The competition law effects doctrine requires effects to be direct, substantial and foreseeable.[49] It is not always clear what the thresholds for these criteria are, as they are not defined anywhere and often are assessed together without making a clear distinction between, for instance, what is 'direct' and what is 'substantial'.[50] Direct and substantial effects will likely be considered together in some environmental contexts as well, as it can be challenging to distinguish between direct and indirect effects, especially with regard to pollution concerns, threats to biodiversity or climate change.[51] Weiss suggested a 'proximity of interest to the subject matter being protected', whereby the greater the impact of the problem on the state applying the measure, the greater the proximity of interest.[52] While substantial effects might be easier to assess than the directness of environmental effects, a threshold would still need to be determined. Antitrust law often makes use of economic *de minimis* thresholds before domestic law will be applied to foreign anticompetitive conduct,[53] but establishing similar environmental *de minimis* thresholds is difficult, as it is almost impossible to estimate the effect of e.g. one ton of CO_2 emissions by a certain activity in a certain location on EU air quality. A requirement of substantial effects raises furthermore challenging questions related to the choice of scientific standards and measurement methods. By whom and how will such threshold be determined? Is a substantial effect an *appreciable* effect? Can *potential* effects be sufficient?[54] What about effects that are not yet observable, but likely to manifest themselves in the future? In *Brazil-Tyres*, the AB stated in the context of the necessity test that, even where the contribution of a law to protecting an environmental concern such as climate change is not immediately obvious because it is part of a broader programme of which the impact can only be evaluated over time, it should not prevent a finding that measure is necessary.[55] It is inherent to environmental harm that the effects will only materialize over time, and a requirement of observable effects in order to determine necessity would indeed be untenable.

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49 See 1986. See §402 on general principles for extraterritorial jurisdiction and §415 on antitrust law.

50 See chapter 5.

51 Note in this regard that environmental harm with a direct causal link can also be addressed through different means, such as national law procedures or through state responsibility.

52 Friedl Weiss, 'Extra-Territoriality in the Context of WTO Law' in Günther Handl, Joachim Zekoll and Peer Zumbansen (eds), *Beyond Territoriality: Transnational Legal Authority in an Age of Globalization* (Martinus Nijhoff 2012) 479.

53 See for Instance Commission *De Minimis* Notice (Notice on Agreements of Minor Importance), 25 June 2014.

54 In *Alcoa* (US v Aluminium Co of America, 148 F.2d 416 (2d Cir. 1945) ('Alcoa')) the potential effects were sufficient, as long as the absence of actual effect was not shown. The US Department of Justice/Federal Trade Commission Guidelines also considers that potential harm can qualify as substantial effects in an antitrust context (Antitrust Enforcement Guidelines for International Operations, April 1995, Section 3.121).

55 AB Report *Brazil – Retreaded Tyres* 2007, para.151.

Future harm and long-term effects pose a challenge to the requirement of the foreseeability of effects. Environmental risks can be very difficult to predict and can often not be specified by a few precisely determined variables, but may instead be driven by the interaction of changes taking place at very different temporal and/or spatial scales.[56] Slow changes that have been taking place over decades or centuries can accumulate with human influences and lead to abrupt changes for instance. Also ecological threats are influenced by natural and human factors, so any prediction requires a thorough understanding of the behaviour of a system including these factors.[57] Determining the existence of environmental effects will thus very much depend on the scientific knowledge and available data with regard to a particular concern. It may very well be the case that certain risks are still uncertain. Would it be possible in these cases to adopt a precautionary approach in light of uncertainty?

The precautionary approach refers to action that can be taken with respect to threats of serious or irreversible environmental damage, where there is no full scientific certainty.[58] GATT does not make any explicit reference to precaution. A limited recognition of the precautionary principle can be found in Article 5.7 of the SPS Agreement, where Members may act on the basis of available information and where they need to seek additional information for a more objective assessment of risk within a reasonable period of time. The AB in *EC-Hormones* and the panel in *EC-Biotech* referred to the unclear status of the precautionary principle in international law (and the different positions taken in literature) and left the question whether the principle had crystallized to become a general principle of law unsettled.[59] In addition to Article 5.7 SPS, the AB found the precautionary principle reflected in Article 3.3 SPS that explicitly recognizes the right of Members to establish their own level of protection, which may be more stringent than that required by existing international standards.[60] Furthermore, Members may also 'rely, in good faith, on scientific sources which, at that time, may represent a divergent, but qualified and respected, opinion' and are thus not obliged to follow the majority scientific opinion.[61] Based on international state practice, one could argue

56 Rosie Cooney and Andrew T.F. Lang, 'Taking Uncertainty Seriously: Adaptive Governance and International Trade' 2007, 18 European Journal of International Law 523.
57 Ibid 529. Adaptive management sets out an approach to manage ecological resources, recognizing and responding to the uncertainty, systemic unpredictability and complexity characteristics of large-scale ecosystems. Key characteristics are a focus on facilitating continuous learning (both in terms of acquiring information and developing new skills, and by redefining a particular problem and reconstructing policy views); policy interventions that can be provisional and reversible; strong monitoring mechanisms, the outcomes of which are fed back into the policy-making process; and open and transparent sharing of knowledge (see p.531-539).
58 Rio Declaration on Environment and Development, 31ILM 874, Principle 15 (June 14, 1992).
59 AB Report *EC-Hormones* 1998, paras.123; Panel report *EC-Biotech* 2006, paras.7.87.
60 AB Report *EC-Hormones* 1998, paras.123.
61 Ibid para.178.

that the precautionary principle has become a principle of environmental law.[62] In light thereof, it could be taken into account for the interpretation of relevant WTO provisions, such as Article XX GATT, even without explicit reference, pursuant to article 31(3)(c) of the Vienna Convention.[63]

In cases of inward-looking concerns, there should be little doubt that states may indeed rely upon the precautionary principle as only a state itself can consider its appropriate level of protection.[64] However, when a concern is partly outward-looking, a stricter balance must be struck between the domestic interests and the sovereignty of other states affected. As the territorial link (effects) becomes weaker, the interests of the exporting states will carry more weight.[65] Both general international law and competition law prescribe a reasonableness or comity test to avoid conflict between the interests of two or more sovereign states in the exercise of extraterritorial jurisdiction.[66] Are the effects felt in one state more direct than those felt in other states and are the effects felt in one state more substantial than those felt in other states?[67] The legitimate environmental concerns of the importing state and legitimate concerns of the exporting state must be considered. For instance, biofuels policy could clash with foreign interests, such as, food security or land grabbing.[68] Environmental concerns arising abroad may have an impact on indigenous peoples and other groups such as artisanal and subsistence fishers, forest

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62 Principle 15 of the Rio Declaration (1992) provides that 'in order to protect the environment, the precautionary principle shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.' See also among others Tim O'Riordan, James Cameron and Andrew Jordan (eds), *Reinterpreting The Precautionary Principle* (Cameron May 2001); Ilona Cheyne, 'The Use of the Precautionary Principle in WTO Law and EC Law' (European Union Studies Association Biennial Conference 2005); Mary Stevens, 'The Precautionary Principle in the International Arena' 2002, 2 Sustainable Development Law & Policy 13; Alan O. Sykes, 'Domestic Regulation, Sovereignty and Scientific Evidence Requirements: A Pessimistic View' 2002, 3 Chicago Journal of International Law 353.

63 Marceau and Trachtman (2002), 849.

64 AB Report *EC-Hormones* 1998, para.186.

65 See by analogy a reasonableness or comity test as applied in international law and competition law to avoid conflict between the interests of two or more sovereign states in the exercise of extraterritorial jurisdiction. This requires a careful balancing act, whereby the interests of other countries need to be taken into account as much as possible.

66 See chapter 4 for a discussion of comity and reasonableness and chapter 5 for a discussion of comity in the context of competition law.

67 Akehurst (1972-1973), 198.

68 Paolo Farah, ASIL/IEcLIG Conference paper, November 2014. See in that regard also the pending dispute between the EU and Argentina on bidodiesel (*European Union – Anti-Dumping Measures on Biodiesel from Argentina*, WT/DS473. The panel has been established in June 2014, but no report has yet been published at time of writing (March 2016)).

dwellers or Inuit seal hunters.[69] This requires a careful balancing act, whereby the interests of other countries need to be taken into account as much as possible. Determining which interest is 'more important' is a challenging exercise that must balance possible trade-offs. Also, when there is scientific uncertainty with regard to an environmental concern, measures that adopt a precautionary approach so as to address that specific concern will be subject to greater scrutiny than with respect to those concerns where the threat or harm can be fully evidenced. In these balancing acts, the body of international environmental law can be taken into account to determine the international support for a particular concern. In contrast to competition law, with no relevant international body rules to rely on, there is a wide body of (mostly soft) international environmental instruments that can be considered in order to support state action.[70] In addition to international support, another important consideration in this balancing of state interests is good faith, as implied in the *chapeau* of Article XX GATT: efforts such as dialogue with third countries or technical assistance in combination to the trade measure can go a long way in preventing or limiting these types of conflicts.

Concerns on conflicts of interests are particularly relevant where the global resources are concerned. With regard to protection of global resources, the strength of the territorial link or effects cannot apply as such: by its very nature, every state has an equal interest in protecting the global commons.[71] We all share our planet, and peoples and states have responsibilities to each

69 Margaret A. Young, 'Trade Measures to Address Environmental Concerns in Faraway Places: Jurisdictional Issues' 2014, 23 Review of European Community & International Environmental Law 302, 303. See for instance *EC-Seal Products*, where the protection of indigenous people had to be balanced with the welfare of seals.

70 This international body of law serves as the second step of the decision tree, to be discussed below in section 7.2.3, to furher justify a territoriality claim.

71 See in that regard the doctrine of obligations *erga omnes*, as recognized by the ICJ in the Barcelona Traction case. However, under the current status quo of environmental law, no such obligations have been clearly identified. State practice to date only supports the development of *erga omnes* obligations in the context of human rights and humanitarian norms. Christian Tams, *Enforcing Obligations Erga Omnes in International Law* (Cambridge University Press 2005). Nevertheless, the fundamental importance of protecting the environment was emphasized in the preamble of the Institut de Droit International, 2005 Krakow Resolution on Obligations and Rights *Erga Omnes* in International law, stating that 'a wide consensus exists to the effect that (…) obligations relating to the environment of common spaces are examples of obligations reflecting those fundamental values'. If environmental protection of the global commons were to get the status of an obligation *erga omnes*, acts of states breaching that obligation could then lead to state responsibility and the right of injured states to take countermeasures. Where obligations *erga omnes* are concerned, also non-injured states can invoke state responsibility. See Draft Articles on Responsibility of States for Internationally Wrongful Acts, Articles 48 and 54.

other and to future generations for preserving its environment.[72] The fact that some states experience less physical harm today than others (or vice-versa) should not be the sole ground to determine which state has an 'overriding interest'.[73] For example, even those states that are not yet suffering from e.g. extreme droughts, may still want to address climate change concerns. It is therefore suggested that in addition to environmental effects, the international characterization of a substantive norm is considered in an extraterritoriality analysis under Article XX: when the environment of numerous states is affected, international support for the norm that is imposed through a npr-PPM can strengthen a claim of justified extraterritorial effects. This additional criterion will be discussed below at 2.3 as the second step of the decision tree. International support for a substantive norm as imposed by a npr-PPM is also of importance to further justify the extraterritorial effects of a npr-PPM where the effects on the territory are weaker, more indirect or uncertain. In addition to a precautionary approach that states can adopt, a partly outward-looking concern will more easily pass the extraterritoriality threshold when it is protecting a norm that is recognized and/or protected by international legal instruments (hard law or soft law).[74]

7.2.2.3 Outward

A third category of measures relates to environmental concerns which are located entirely within the territory of a foreign state, such as a polluted lake in a foreign country, a foreign plant species or foreign animal threatened with extinction.[75] The distinction between foreign harm and transboundary harm depends on the determination of directness of harm: environmental concerns such as polluted or dried out lakes could indirectly lead to other transboundary harm, however, those effects can no longer be considered 'direct' and 'substantial'. Where the environmental effects caused by an activity are too indirect, or too insignificant, a npr-PPM regulating that activity should be considered outward-looking.

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72 See also preamble of the WTO Agreement and its reference to sustainable development: '*Recognizing* that their relations in the field of trade and economic endeavour should be conducted with a view to raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, and expanding the production of and trade in goods and services, while allowing for the optimal use of the world's resources in accordance with the objective of sustainable development, seeking both to protect and preserve the environment and to enhance the means for doing so in a manner consistent with their respective needs and concerns at different levels of economic development'.

73 See in this regard also the possible existence of environmental customary norms as discussed infra at 7.2.3.2.

74 See section 7.2.3.

75 Horn and Mavroidis (2008), 1166.

Trade barriers solely based on outward-looking concerns, without any territorial link, nexus or effects, cannot be accepted under Article XX GATT, as there is no support for such practice under international law. It is then up to the affected states or the international community as a whole to act. It would be possible to adopt less-trade restrictive measures, such as labelling requirements that provide information on the production process (market incentives rather than market bans) that could be accepted under the TBT Agreement.[76] Alternatively, a Member may seek justification under the moral exception of Article XX(a).[77] In the absence of moral concerns or environmental effects on the territory, it is very unlikely that a PPM addressing a fully demarcated foreign environmental harm with no or only an indirect environmental impact on the regulating state would be accepted under Article XX GATT.

7.2.3 Step 2 of the decision tree: Nature of the Concern and Norm Recognition

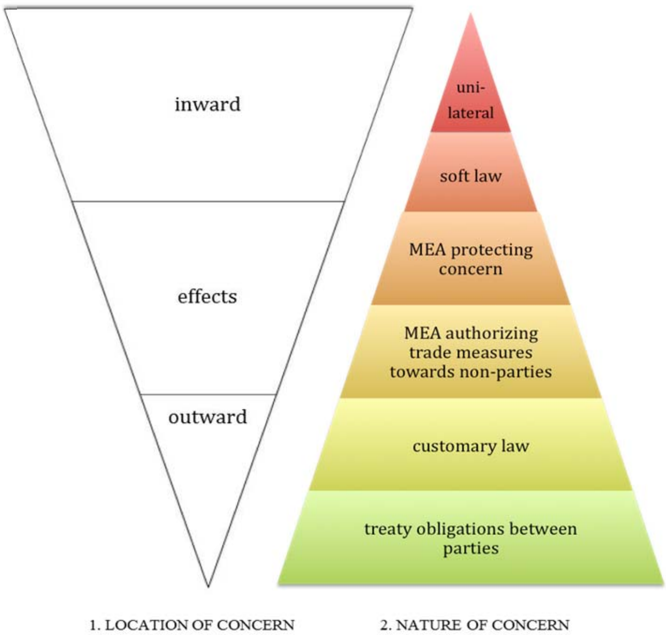

Figure 2. Step 2

76 The second sentence of Annex 1.1 TBT, referring to among others labelling requirements, only refers to PPMs in general, without distinguishing between related and non-related PPMs. It can thus be accepted that it is then irrelevant to what extent the production process impacts on the final product in order to fall within the scope of the TBT Agreement. See e.g. AB Report *US-Tuna II* 2012. See also Marceau (2014), 327.

77 See infra at 7.3 on environmental concerns and public morals.

The analysis above has shown that npr-PPMs can be more easily accepted when they are inward-looking; or have a connection or nexus through effects and thus inward/outward-looking. The weaker this territorial connection, however, the more additional support a state will need in order to justify imposing npr-PPMs. In those cases, the level of international recognition and support of a particular norm or concern to be protected is important to determine whether the 'end can justify the means'.[78] As argued above, the necessity test of the paragraphs of Article XX can be interpreted to give added value to international support. Furthermore, the analysis of extraterritoriality in the context of international human rights law has shown that jurisdictional boundaries can be more elastic when common norms are concerned.[79] If this observation is applied to a trade and environment context, it seems that the more a certain environmental norm is recognized and supported internationally, the more acceptable a npr-PPM protecting that norm through regulating an activity outside its borders will be;[80] and the likelihood of the PPM having a protectionist objective will decrease. Scott has referred in this regard to the 'international characterization' of norms.[81] The importance of international support is also recognized in Principle 12 of the Rio Declaration on Environment and Development, stating that 'environmental measures addressing transboundary and global environmental problems should, as far as possible, be based on international consensus'. The identical phrase is found in paragraph 2.22(i) of Agenda 21.

A requirement of international support is not explicitly included in the text of either Article XX(b) or article XX(g). In *US-Shrimp*, the AB emphasized the wide support for the concern at issue when discussing whether the measure at stake was related to the legitimate policy concern.[82] In combination with

78 According to the AB, Article 3.2 DSU supports that WTO law must be understood within the context of the broader body of international law, including multilateral environmental agreements. AB Report *US-Gasoline* 1996, p.30.

79 See chapter 6. A distinction between the human rights context and the trade-environment is that international human rights obligations will apply when states exercise 'effective control' over territory outside their borders. The actual territorial state is at that point unable to ensure sufficient human rights protection in its territory due to lack of control. In an environmental context, a PPM would apply to all imported goods, without distinguishing between states that are unable to ensure a sufficiently high level of environmental protection, and states that are unwilling to ensure that level of protection.

80 Under international human rights law, the obligations at issue are laid down in regional and universal human rights treaties, which leads to strong international recognition of these norms by a high number of states (almost universal membership of the UN treaties). As a large number of states have expressed support for the same norms, extraterritorial jurisdiction is definitely easier to accept and the risk of conflicting regulation is dramatically diminished. The main difference in this regard between human rights law and current environmental law is that the former consists mainly of binding treaties and declarations, whereas the latter includes many non-binding declarations and other soft law instruments.

81 Scott (2014), 89.

82 AB Report *US-Shrimp* 1998, para.135.

the previous step of the decision tree, assessing the location of the concern, a compelling and widely supported international norm could give additional support to npr-PPMs addressing inward/outward-looking concerns, even when the effects would be weaker. Vice vera, the less 'back-up' for the norm, the stronger the evidence of effects must be in order to pass the extraterritoriality threshold.

Assessing international support for a norm goes beyond the distinction between multilateral versus unilateral action, as reality is more complex. Treaties can for instance mandate the use of PPMs, authorize PPMs, or authorize trade measures in response to actions that undermine the treaty.[83] Even when there is no international agreement prescribing the use of trade measures, the environmental cause may find support in a multilateral environmental agreement (MEA) or in soft law. When the concern at issue does not yet find any support in soft of hard law, because the concern is newly arising or yet unknown, this will be referred to as unilateral in substance, or a 'unilateral norm'. The extraterritoriality decision tree distinguishes between different degrees of multi-and unilateralism. The focus is on the degree of multilateral approval of the norm or concern to be protected, or in other words, the degree of norm recognition, rather than on the form of the measure: a PPM is inherently unilaterally imposed. The following subsections will elaborate on how international support can be assessed or measured.

Panels and the AB cannot make findings on violations of other (non-WTO) agreements.[84] This is closely related to, but not the same as, the applicable law to a dispute, which refers to which rules and principles can be invoked as a relevant legal basis for the resolution of a dispute.[85] Whether the applicable law is limited to WTO law or whether and to what extent 'external' international law can be invoked in WTO law is a topic of wide scholarly debate, absent a clear statement on the matter by panels or the AB.[86] External rules can shed light on the interpretation of the terms of a treaty per Article 31(1) VCLT.[87] Arguably, external rules could also be relied upon to interpret a WTO obligation per Article 31(3) VCLT, referring to 'subsequent agreement between the parties', 'subsequent practice in the application of a treaty', or 'relevant rules of international law' – allowing panels and the AB to look at non-trade

83 Charnovitz (2002), 105; Bartels (2002), 391.

84 WTO, *Mexico-Tax Measures on Soft Drinks and Other Beverages* AB Report 2006, WT/DS308/AB/R, para.56. Articles 7 and 11 DSU.

85 Zleptnig(2010), 59; Emily Reid, *Balancing Human Rights, Environmental Protection and International Trade* (Hart Publishing 2015) 207.

86 For a discussion of the different views held, see Joost Pauwelyn, *Conflict of Norms in Public International Law: How WTO Law Relates to Other Rules of International Law* (Cambridge University Press 2009); Ronnie R.F. Yearwood, *The Interaction Between World Trade Organisation (WTO) Law and External International Law: The Constrained Openness of WTO Law (A Prologue to a Theory)* (Routledge 2012); Marceau (1999).

87 AB Report *US-Shrimp* 1998, paras.130-132.

agreements to inform the interpretation of the WTO agreements.[88] It is unclear whether Article 31(3)(c) VCLT, referring to the 'relevant rules of international law applicable in the relations between the parties', should be interpreted in a WTO context as the parties to a dispute, or rather as the parties to the WTO as a whole.[89] In *EC-Biotech,* the panel adopted the latter interpretation, stating that only those rules 'applicable in the relations between all parties to the treaty which is being interpreted' can be taken into account.[90] The panel then observed, however, that 'the mere fact that one or more disputing parties are not parties to a convention does not necessarily mean that a convention cannot shed light on the meaning and scope of a treaty term to be interpreted'.[91] The AB has adopted a subtle middle way by stating that 'the purpose of treaty interpretation is to establish the common intention of the parties'[92] According to the AB, 'one must exercise caution in drawing from an international agreement to which not all WTO Members are party', but also recognize that Article 31(3)(c) is

> 'considered an expression of the "principle of systemic integration", which (…) seeks to ensure that international obligations are interpreted by reference to their normative environment in a manner that gives coherence and meaningfulness to the process of legal interpretation.'[93]

This means that a delicate balance must be struck between the international obligations of individual WTO Members and ensuring a consistent interpretation of WTO law for all WTO Members.[94] It could thus be said that under Article 31(3)(c) VCLT the intentions of the broader WTO membership must be taken

88 Knox (2004), 65.

89 Article 2(1)(g) VCLT defines ' party' as a 'State which has consented to be bound by the treaty and for which the treaty is in force'. When interpreting obligations under a treaty in light of subsequent agreements or subsequent practice, it only makes sense if the entire Membership has agreed to those. See Pauwelyn (2001), 575; WTO, *European Communities - Customs Classification of Certain Computer Equipment* AB Report 1998, WTO/DS62/AB/R, para.84. The requirement of all parties has a broad scope though, for instance in *US-Cloves* a Doha Ministerial Decision was accepted as representing the 'common understanding' of the membership and in *US-Tuna II* the AB accepted a TBT Committee Decision as a subsequent agreement. It thus seems that all decisions made by consensus by organs and bodies comprising 'all WTO Members' can take decisions that qualify as subsequent agreements. Vidigal (2013), 1034; Reid(2015), 204. See also for a discussion on Article 31(3)(c) VCLT, McLachlan (2005); Marceau (1999), 124; Philippe Sands, 'Treaty, Custom and the Cross-Fertilization of International Law' 1998, 1 Yale Human Rights & Development Law Journal 85.

90 Panel report *EC-Biotech* 2006, para.7.71. See also Reid(2015), 204.

91 Panel report *EC-Biotech* 2006, para.7.94.

92 AB Report, *EC-Computer Equipment* 1998, para.93

93 AB Report *EC-Aircraft* 2011, para.845.

94 Ibid.

into account, and a rule must be 'at least implicitly accepted or tolerated by all WTO Members'.[95]

It is submitted that when assessing a generally applicable trade measure, a panel must when interpreting treaty obligations indeed assess the broader interests of the WTO Membership and not only those of the parties to a dispute. The decision tree as proposed here does not suggest any interpretation of WTO provisions by relying on external treaties. Rather, what is proposed here is that external rules are taken into account when determining the nature of the norm as imposed through a PPM, in order to determine whether that PPM can be considered necessary in light of the common interests of the WTO Members.

7.2.3.1 Treaty obligations between parties

The first category in the second pyramid of the decision model relates to measures that are mandated or authorized by a treaty to which both all affected states (i.e. all states with an interest in production and/or export of the good subject to the PPM in question) are a party, and include both mandated PPMs as well as trade sanctions in response to non-observance of the treaty in question.[96] Panels and AB cannot make findings on violations of other agreements, and thus any panel's findings must be limited to WTO rules.[97] The treaty between the affected parties could, however, be considered when determining whether the necessity of a npr-PPM.[98] Thus, within the scope of WTO disputes, regulating WTO members could refer to bi- or plurilateral treaties to substantiate the requirement of necessity of a disputed trade measure, and measures executing obligations under or complying with such treaty will easily pass the extraterritoriality test.[99] However, this reasoning is only valid where the npr-PPM in question only affects those states that are a party to the modifying treaty.

95 Vidigal (2013), 1030; Pauwelyn (2001), 576.

96 Charnovitz (2002), 105; Bartels (2002), 391. For an overview of multilateral environmental treaties prescribing trade measures see Duncan Brack and Kevin Gray, *Multilateral Environmental Agreements and the WTO* (2003); Peter Van den Bossche, Nico Schrijver and Gerrit Faber, *Unilateral Measures Addressing Non-Trade Concerns: A Study on WTO Consistency, Relevance of other International Agreements, Economic Effectiveness and Impact on Developing Countries of Measures concerning Non-Product-Related Processes and Production Methods* (2007) 165.

97 AB Report *Mexico-Soft Drinks* 2006, para.56; WTO, *European Communities – Measures Affecting Importation of Certain Poultry Products* AB Report 1998, WT/DS69/AB/R.whereby the bilateral oilseeds agreement was not applicable law and could not be enforced by the WTO DSB. If there is a conflict between the GATT/WTO and the other treaty in question, as a general rule the later treaty will prevail according to Article 30 VCLT.

98 Article 31 VCLT.

99 Please note that the measure will still need to comply with the conditions of the chapeau of Article XX, as any other trade measure seeking justification under Article XX GATT.

Examples include sustainability clauses in FTA's[100] (the EU for instance has an extensive network of bilateral preferential agreements, in which market access is often used as a bargaining chip to obtain changes in e.g. environmental policy of the EU's trading partner);[101] international resource conservation agreements that authorize trade measures to enforce the agreements among the parties;[102] or agreements that foresee in trade sanctions when their standards are not respected.

7.2.3.2 Customary international law

A second category with broad international support, but more debated than treaty obligations between affected parties, is customary international law. In order to determine whether a rule has the status of customary international law, there must be consistent and uniform state practice, and a belief that such practice is required by law (*opinio juris*).[103] Once a rule is recognized as custom, it is binding on all states, except for persistent objector-states who have expressly shown that their practice has always differed.[104] In the area of environmental law, very few rules have gained the status of customary law.[105] While there might be consensus on the broader need to protect the environment, or at least a clear prohibition on causing transboundary pollution, there are no rules of customary international law that determine how to address certain concerns or how environmental harm can be punished. References to common concerns of humankind or the global commons should not

100 See for instance EU-South Korea FTA Article 1.1(g); Article 13(6); Ludo Cuyvers, 'The Sustainable Development Clauses in Free Trade Agreements: An EU Perspective for ASEAN?' 2013, W-2013/10 UNU-CRIS Working Papers.

101 Sophie Meunier and Kalypso Nicolaidis, 'The European Union as a Conflicted Trade Power' 2006, 13 Journal of European Public Policy 906, 913. For some examples of such agreements, see Article 20 Cotonou Convention, signed 23 June 2000; Article 52 EU-Ukraine Partnership and Cooperation Agreement [1998] OJ L51/3; Article 9 1988 Cooperation Agreement with the Gulf Cooperation Council [1989] OJ L54/3.

102 E.g. Convention on International Trade in Endangered Species 1973. The International Commission for the Conservation of Atlantic Tunas recommended that parties take non-discriminatory trade restrictive measures on specified fishery products from listed countries that are adjudged to be violating the Convention. See Resolution by ICCAT Concerning an Action Plan to Ensure Effectiveness of the Conservation Program for Atlantic Bluefin Tuna, Jan 23, 1995, www.iccat.org.

103 Shaw(2008), 72.

104 See e.g. Jonathan Charney, 'The Persistent Objector Rule and the Development of Customary International Law' 1985, 56 British Yearbook of International Law 1; Joel P. Trachtman, 'Persistent Objectors, Cooperation, and the Utility of Customary International Law' 2010, 21 Duke Journal of Comparative & International Law 221.

105 One example could the 1982 United Nations Convention on the Law of the Sea (UNCLOS) which in part already codified existing customary law, and of which many norms now have the status of customary law as well, as non-parties to the treaty also follow many of the UNCLOS norms.

be considered under the category of customary law as long as there is no consistent practice and *opinio juris* on the matter.[106]

7.2.3.3 Multilateral treaty authorizing trade measures towards non-parties

A third layer of the decision tree refers to environmental trade measures authorized and supported by MEAs towards states that are not a party to that treaty. The regulating Member (party to the MEA) cannot legally rely on its treaty obligations towards the Member that is not a party to the MEA. However, that MEA can still offer support for npr-PPMs in the contextual analysis of determining the common nature of the concern to the international community as a whole. If the treaty has a substantial membership (including a large number of WTO Members for instance), establishing wide international support for the norm to be protected, but the exporting country has not signed the agreement, a balance of the interests at stake might tip to the advantage of the state imposing the measure.[107] From an environmental perspective, this approach makes most sense, as this does not allow states to escape their (moral/ethical) responsibilities and to free-ride on the environmental efforts of other states.[108]

If the MEA has a more limited membership, relying on the MEA becomes more complicated and sensitive, as one needs to balance individual interests of states, which might all find support in international practice. This balancing of interests will need to be determined on a case-by-case basis, as there is no conclusive general answer. Elements that can be taken into account are the composition of the membership and the affected states (e.g. can an MEA consisting only of developed countries be relied on as support for a measure that mostly affects developing countries?). It could also be considered whether the non-signatory party has clearly opted for not being involved in negotiations or not signing the treaty (fundamental disagreement, for example), or whether there is another reason why it has not become a party to the MEA yet (closed membership, delay in negotiations, or other priorities, for instance).

Examples of treaties authorizing trade measures towards non-parties include the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal which requires parties to prohibit

106 See infra in categories 7.2.3.4-2.3.6.

107 Hudec(1996), 124. See by analogy the reasoning of the AB with regard to recognized international standards under the TBT Agreement. The obligations and privileges associated with international standards pursuant to the TBT Agreement apply with respect to *all* WTO Members, not merely those who participated in the development of the respective standard. Still, the AB found that the larger the number of countries that participate in the development of a standard, the more likely it can be said that the respective body's activities in standardization are recognized. See AB Report *US-Tuna II* 2012, para.390.

108 Hudec(1996), 131.

imports of hazardous waste from non-parties;[109] CITES which does not permit trade of threatened species with non-parties unless with documentation equivalent to CITES permits;[110] the Wellington Convention on Driftnets which states that a Party may take measures *consistent with international law* to prohibit the importation of fish caught using a driftnet;[111] the Anadromous Stocks Convention which directs parties to prevent trafficking in illegally caught anadromous fish;[112] and the Montreal Protocol on Substances that Deplete the Ozon Layer which bans the import of controlled substances from any non-party.[113]

7.2.3.4 Multilateral treaty aiming at the protection of particular environmental concern

This category of the decision tree refers to trade measures that are protecting an environmental cause that is supported by a treaty, whereby the treaty does not refer to the use of PPMs or any other trade measures.[114] The environmental measure is taken in furtherance of the MEA's objectives. If the agreement at issue is an MEA to which the importing and the exporting state are parties, there should be little disagreement on the environmental objective in case of a dispute. Any discussion will most likely focus on the measure's design and application (including the preferred method to reach an environmental objective). If only the importing member is a party to the MEA, the size of the MEA's membership should be considered in order to assess the degree of international recognition for the environmental objective, as discussed above.[115] Whether the npr-PPM is aiming to protect a regional concern, or a global concern (protection of the global commons or common concerns of humankind) should be taken into account in the assessment of the MEA's membership. In case of a regional concern, a sizeable membership from the affected region could suffice.

109 *Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal*, March 22, 1989, 28 ILM 649), art 4.5.
110 CITES, 1973.
111 *Convention for the Prohibition of Fishing with Long Driftnets in the South Pacific*, Nov 24, 1989, 29 ILM 1454, Art 3(2). Note that it is not clear what is meant with 'consistent with international law' as no reference is made to jurisdictional rules or extraterritoriality.
112 *Convention for the Conservation of Anadromous Stocks in the North Pacific Ocean*, Feb 11, 1992, US Senate Treaty Doc 102-30, art III:3 (www.npafc.org).
113 *Montreal Protocol on Substances that Deplete the Ozon Layer*, 1987, arts 4.1, 4.9. The Parties also examined the feasibility of banning or restricting from countries not party to the protocol the import of products *produced with* but not containing controlled substances, however, found that it was not feasible to impose such a ban or restriction on imports. See OECD (1997), 20.
114 The majority of MEAs do not contain trade measures. Neumayer(2002), 141.
115 See *supra* at 7.2.3.3.

The Kyoto Protocol is an example of an agreement aiming at protecting an environmental concern, without imposing binding commitments on all treaty parties: if a measure is taken with the objective of tackling climate change, the Kyoto Protocol can be relied upon to demonstrate the wide recognition of the need for emission reduction. The targets are binding, even though the Protocol does not prescribe how states should facilitate the necessary reductions.[116] This reference to the Kyoto protocol raises the question how specific the international agreement should be. Is it sufficient to share the concern (for instance, global warming) or should also the prescribed standards (for instance, emission limits, specific technologies, measurements techniques) be agreed on internationally? A binding international agreement that regulates the appropriate methods to reach an objective definitely increases the likelihood that a measure will be considered necessary or related to the objective. If the MEA only recognizes the need for protecting the particular concern, panels would need to scrutinize the available (scientific) evidence in order to determine whether the specific measure is not more trade restrictive than necessary. The question is thus whether the measure at issue seeks to enforce internationally recognized standards, or whether the npr-PPMs is aiming at protection levels considerably stricter than the corresponding international standards. In the latter case, the stricter part of the npr-PPM could possibly be considered a unilaterally recognized concern,[117] making it more difficult for WTO Members to justify its extraterritorial effect.[118]

7.2.3.5 Soft law

This layer of the decision tree relates to trade measures protecting an environmental concern that is only addressed in non-binding or soft law, such as UN Declarations.[119] A widely recognized soft law norm could also strengthen a claim for justiciation of partly outward-looking measures. The recognition of the norm of non-binding agreement must be considered: have a large number of states expressed support to the norm? In other words, can the norm be considered as largely consensual within the international community of states, rather than solely between certain states or within a specific regime?[120] The smaller the support, the stronger the environmental effects on the regulating state must be in order to justify a measure with extraterritorial effects. While the lack of binding agreements could imply a lack of international consensus or of sense of urgency at the international level, the choice for a soft law instrument could also be a conscious choice in order to avoid concerns

116 Kyoto Protocol, 1997.
117 See infra at 7.2.3.6.
118 Scott (2014), 62.
119 E.g. Rio Declaration on Environment and Development, 1992.
120 Vidigal (2013), 1038.

about legal compliance and resulting shallow commitments – in particular in areas of high uncertainty.[121] Despite the weaker incentives for compliance, soft law agreements do demonstrate states' policy concerns and can even entail more clearly drafted and ambitious commitments.[122]

An example of where trade measures are based on soft law is the EU Timber Regulation,[123] which prohibits placing illegally harvested timber on the market, to combat illegal logging, a cause supported in several soft law norms, such as the Rio Forest Principles or the 2001 Bali Declaration.[124]

7.2.3.6 Unilateral norms

Concerns that find no support under international law, not even under soft law, are classified in this decision tree as unilateral norms.[125] The absence of international (soft or hard) law does not necessarily mean that there is no state practice by states other than the imposing state, but that there is no concerted formal instrument yet, which increases the level of scrutiny. An element that should be considered here is whether states have started bi- or multilateral negotiations. In *US-Shrimp*, the AB addressed this point under the chapeau of Article XX GATT as an aspect of the good faith test implied in the prohibition on arbitrary and unjustifiable discrimination.[126] However, it is submit that it is more appropriate to consider at this stage of the decision tree whether states have started negotiations, and why they might have failed. In the words of Nollkaemper, 'the preference for multilateralism does not affect the legality of unilateralism when agreements are only hypothetically available'.[127] In case of failed negotiations, it is important to take a closer look at the reason for failure: is there a lack of consensus on the concern to be

121 Kal Raustiala, 'Form and Substance in International Agreements' 2005, 99 American Journal of International Law 581, 611. Raustiala provides a very interesting discussion on why and how states opt for soft or hard law (pledges or contracts).
122 Ibid 612.
123 Regulation EU/995/2010. For a discussion of the EU Timber Regulation, see chapter 7.
124 Report of the United Nations on Environment and Development, Non-legally Binding Authoritative Statement of Principles for a Global Consensus on the Management, Conservation and Sustainable Development of all Types of Forests, A/CONF.151/26 (Vol. III), Annex III, 14 August 1992; Ministerial Declaration, Forest Law Enforcement and Governance East Asia Ministerial Conference, Bali September 2001, p. 2. The EU Timber Regulation is particular in that it is not only based on international soft law norms, but also relies explicitly on the national law of the producing country to determine the legality of timber. As the producing country is not necessarily the exporting country to the target market, the soft law support is still relevant.
125 I do not refer to *unilaterally described* policies, as that might be a common aspect of all measures seeking justification under Article XX. (AB Report *US-Shrimp* 1998, para.121.) Unilaterally described policies can still find broader support in international law as the previously discussed categories demonstrate.
126 Ibid para.166.
127 Nollkaemper (1996), 251.

protected, or on the ways on how to protect it?[128] As the AB has noted, 'it is one to thing to *prefer* a multilateral approach … it is another to require the *conclusion* of a multilateral agreement'.[129] Environmental concerns that are deemed in need of protection by a large group of states, although no agreement has so far been reached in terms of specific commitments or compliance mechanisms, differ from concerns that find very little approval internationally. If there is wide(r) consensus on the urgency and need to protect an environmental threat, which could for instance be evidenced by scientific reports or environmental NGO activities, all actors involved should aim at formal cooperation with respect to the particular threat.[130] Such formal cooperation, either through hard or soft law, could then legitimaze further unilateral action through e.g. npr-PPMs.

In the absence of multilateral solutions or international recognition of a need due to uncertainty about harm, its seriousness, or its causes, could states rely upon the precautionary principle to protect an environmental concern?[131] As has been stated above when discussing the foreseeability of environmental effects, the precautionary principle is recognized as a principle of environmental law.[132] If there is insufficient evidence available on a certain risk, the precautionary principle could be relied upon by states to protect against that risk, especially in the light of the slow pace of the international law-making process.[133] Due to the emergence of new or previously unknown risks, the slow manifestation of environmental effects, and the complexity of contributing factors and causality, scientific uncertainty is common. A lack of action due to a strict requirement of positive scientific evidence, especially where risks are complex and poorly understood, could lead to significant damage.[134]

128 In *US-Shrimp* the measure was originally regarded as discriminatory because a multilateral approach was not pursued in the implementation of the measures. After the first AB report the US reached agreements with a number of countries, including three out of the four complainants (not Malaysia). The AB had not found the measure discriminatory because of the lack of consent, but because of the lack of pursuing a multilateral approach. In the compliance case, the AB concluded that this time the US had provided shrimp-exporting countries with 'similar opportunities to negotiate' an international agreement. As a number of countries consented to the US proposal, it is likely that the US proposal could be considered a serious negotiating offer. It is then interesting to examine why other countries did not enter into negotiations or accepted the offer. (AB Report *US-Shrimp (Article 21.5 Malaysia)* 2001, paras.131.)

129 Ibid para.124.

130 NGO's can be very active participants in treatymaking, in particular in the field of environmental law. After conclusion, they may also monitor implementation, chastise the non-compliant, and encourage reform and renegotiation. See Kal Raustiala, 'NGOs in International Treatymaking' in Duncan B. Hollis (ed), *The Oxford Guide to Treaties* (Oxford University Press 2012).

131 Boisson de Chazournes (2000), 325.

132 See *supra* at 7.2.2.2.

133 Boisson de Chazournes (2000), 325.

134 Cooney and Lang (2007), 527.

As has been argued above, states can rely on the precautionary principle when addressing inward-looking concerns.[135] When a concern is partly outward-looking, a much stricter balance must be struck between the interests of the regulating state and the sovereignty of other states and the risk for international conflict. It is submitted that where a measure is partly outward-looking, and the concern to be protected is not yet recognized internationally (i.e. unilateral norm), states cannot rely on the precautionary principle to adopt npr-PPMs with an extraterritorial effect. While it is important to protect emerging but yet uncertain environmental concerns in the absence of international action, the multilateral character of the WTO must be respected. While environmental trade leverage tools may be very useful to 'force' regime formation, in a multilateral setting states should first raise awareness and convene support for an environmental concern,[136]

Where state interests (unilateral, or more widely supported) conflict with interests of other states, a comity or reasonableness test can be applied.[137] The legitimate interests of the importing country must be balanced against the legitimate interests of the exporting country. This requires a difficult balancing act, in which the context and impact of the measure need to be carefully assessed and in which the regulating country will need to prove that the imposed npr-PPM is the least trade restrictive to obtain the same level of protection.

Unless the npr-PPM is inward-looking, it is submitted that states cannot impose npr-PPMs that find no support in any formal instrument of law, whether soft of hard law. In case of unilateral norms, states should raise further international awareness and focus on international negotiations and other means of action, before imposing npr-PPMs that address these yet-unknown concerns.

135 See *supra* at 7.2.2.2.

136 Richard W. Parker, 'The Use and Abuse of Trade Leverage to Protect the Global Commons: What We Can Learn From the Tuna-Dolphin Conflict' 1999, 12 Georgetown International Environmental Law Review 1, 116; Schoenbaum (1997), 299.

137 See *supra* at 7.2.2.2. In the context of competition law, 'true conflict' has been used when conduct complying with one state's regulation is in violation with another state's regulation. When one can comply with both without necessarily violating one set of regulations, there would be no true conflict. [Hartford Fire Ins. Co. v California, 509 US 764 (1993) (Scalia J., dissenting)] According to Regan and Howse, such true conflict is not very likely, as 'not many countries require that shrimpers use turtle-unfriendly nets, or that cosmetics be tested on animals'. See Howse and Regan (2000), 286.

7.2.4 The decision tree: the model

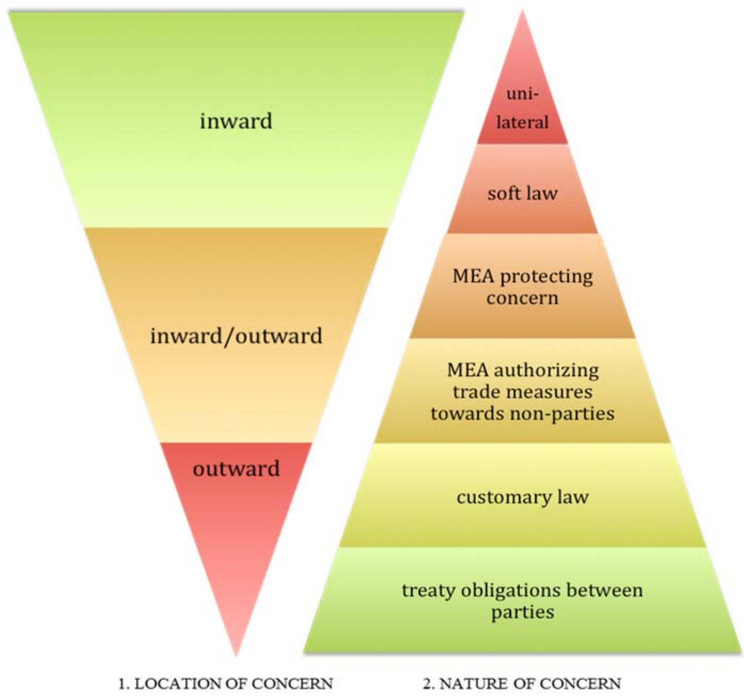

Figure 3. WTO extraterritoriality decision tree

7.3 Environmental Concerns and Public Morals

Seal pups being inhumanly clubbed to death, pandas threatened with extinction, pollution by industry of a lake that is the local supply of drinking water: these examples raise concerns related to human and animal welfare and environmental protection. Even though the environmental concern is located entirely within the territory of another state, and there may be no transboundary environmental externality (no effects), domestic consumers can have strong moral objections or concerns about the foreign activity and the resulting environmental harm.[138] As Howse and Regan argue,

138 Note that if consumer preferences are very strong that this could already influence the finding of likeness of products under Article III GATT (if npr-PPMs would be taken into account under said article). If products would be deemed unlike based on consumer preferences, there would be no inconsistency with Article III and no need for any further

> 'even if the physical effects of the disfavoured processing method occur entirely outside the importing country, the importing country may be concerned to avoid the moral discredit … of … encouraging harm or wickedness – and the moral discredit occurs within the importing country, regardless of where the physical harm occurs.'[139]

It can be difficult to distinguish moral from environmental concerns: for instance, the fact that an animal species is threatened with extinction can have a direct environmental impact on country A, but can be a moral concern to the not-directly-affected country B. In the recent *EC-Seal Products* case, the public morals exception under Article XX(a) GATT was invoked by the EU to justify an import ban on seal products, while Article XX(b) was invoked as back-up argument.[140] The panel and the AB accepted the reliance on Article XX(a) without questioning the relationship with the environmental exception grounds of Article XX(b).

Thus, when could states invoke the public morals exception to address environmental concerns? Two questions must be answered: firstly, is there a jurisdictional limitation to the public morals exception, or in other words, to what extent can states invoke the public morals exception to address concerns outside the regulating state? Secondly, can the public morals exception be relied on to address environmental concerns? This is of particular relevance if there is no jurisdictional limitation to Article XX(a).

As has been pointed out on several occasions throughout this chapter, there can be substantive overlap between moral and environmental concerns, and hence also between the different exception grounds. This section will take a closer look at the relationship between the environmental exceptions and the public morals exception. First the territorial scope of Article XX(a) will be examined. As it is argued that there is no territorial limitation to the public morals exception, criteria will be proposed to determine the acceptability of a public morals defence.

7.3.1 Territorial scope of Article XX(a) GATT

It is important to first consider the territorial scope of Article XX(a) and address the question whether there might be a jurisdictional limitation to the exception, before moving on to defining what could be covered by 'public morals'. In the recent *Seals* dispute, the EU invoked the public morals exception to justify

analysis of the extraterritorial effect.

139 Howse and Regan (2000), 279.

140 WTO, Panel Report, *European Communities – Measures Prohibiting the Importation and Marketing of Seal Products*, WT/DS401/R, 2013; WTO, AB Report, *EC-Seal Products*, 2014.

its seals regime. Unfortunately, neither the panel nor the AB addressed the question of jurisdictional limitation. The AB did mention the systemic importance of determining the of Article XX(a), however, it could not examine the issue further as no arguments were made by the parties in this regard.[141] The jurisdictional limitation of public morals refers to the question of whose morals can be protected. Can Article XX(a) only be relied on in order to protect the public morals of people within the regulating state's territory (for instance, an import ban on alcohol or pornography), or could it also serve to protect public morals of people outside that territory (for instance, an import ban aiming at the protection of children subject to child labour or an export ban on pornography to protect the morals of foreign citizens)?[142] It seems to be most likely that the protection of public morals must be interpreted as referring to the morals of the people within the territory who can be concerned about actions occurring both within and/or outside the territory, which could relate to the environment, human rights, religion or even politics both within and outside the territory. This protection of public morals within the territory can also lead to protection of public morals outside the territory, but the exception cannot be used if it solely aimed at protecting the latter. For instance, country A has an avowed policy of protecting a particular moral standpoint, but it exports goods that contradict this standpoint. If country B then restricts imports of these goods because of its own public morals, then the measure by country B might protect both the public morals in its own country and in country A. If country B does not adhere to the particular moral standpoint, and only imposes restrictions in order to support the moral view point in country A, then country B could not rely on the public morals exception as it would not be protecting its *own* public morals. In the example of child labour: if country

141 AB Report *EC-Seal Products* 2014, para.5.173.

142 Charnovitz used the distinction between inward- and outward-looking measures, whereby inward-directed measures are used to protect the morals of persons in one's own country, and outward-directed measures are used to protect the morals of foreigners residing outside one's own country. He indicates himself that the terms are somewhat arbitrary, because a ban on goods made by children might be 'haracterized as inwardly-directed to prevent domestic consumers from suffering a moral taint from serving as a market for such products'. (Charnovitz (1998), 695.) As I would submit that most, if not all, moral concerns could be rephrased as inward-looking concerns, I will not refer to this distinction (used elsewhere in this thesis) when it comes to moral concerns. One could think of a test where one would need to look at the primary aim of the measure (for instance is the measure more aimed at protecting the children abroad, or is the measure more aimed at protecting the domestic consumers). However, evidencing such claims would be difficult and remain subjective, and thus would be of little help to help distinguishing between genuine inward-looking or outward-looking concerns. As Wu puts it, all types of restrictions arise out of the importing state's moral concern, the difference is that the 'outwardly-directed' concerns may also be seeking to protect certain individuals beyond the restricting state's own borders. (Mark Wu, 'Free Trade and the Protection of Public Morals: An Analysis of the Newly Emerging Public Morals Clause Doctrine' 2008, 33 Yale Journal of International Law 215, 236.)

A is morally concerned about rights of children, both in country A and B, an import ban aiming on goods produced by child labour would be considered a domestic moral concern, even if the concerns related to an activity occurring abroad. An export ban on pornography would not be considered an issue of domestic moral concern, if pornographic materials are allowed within the domestic market. It is then not up to country A to determine what is morally accepted for country B. This interpretation allows for an unlimited territorial scope, on one condition: citizens, consumers and/or government in the regulating state must be morally concerned. Where a state decides that it wants to protect public morals elsewhere, the exception cannot hold if those concerns are not shared by the public in the regulating state.

As already noted, this does not mean that those public morals cannot relate to concerns occurring abroad. The public morals exception would make little sense if the moral concerns in question could only relate to domestic activities: as it is inherent that trade measures have an effect on activities occurring abroad, cases where moral harm results from those activities should be covered by the public morals exception. There cannot be any requirement that the subject of concern should be linked to the territory: if a jurisdictional link is required, as was implied by the AB in *US-Shrimp* in the context of Article XX(g), then domestic consumers and their concerns *are* that jurisdictional link.[143] Any other more restrictive reading seems to be unaccounted for in the wording of Article XX(a) GATT.

As it has been submitted that the extraterritorial scope of moral concerns is no impediment to justification under Article XX GATT, the assessment of acceptability will thus need to focus on the definition of public morals. A WTO Member invoking the public morals exception will need to demonstrate that firstly, its citizens and consumers are indeed concerned about the activity to be regulated[144] (show the existence of a moral concern), and secondly, that the measure is necessary to attain the objective, which includes a process of weighing and balancing factors such as the importance of the objective, the contribution to the objective, the trade-restrictiveness of the measure, and the existence of less-trade restrictive alternatives.[145] Lastly, the good faith conditions of the chapeau must have been complied with, as for any measure seeking justification under Article XX. The following sections will take a closer look at how panels can assess the legitimacy of public morals, by addressing the validity of public morals as well as the evidence question of public morals.

143 Robert Howse, Joanna Langille and Katie Sykes, 'Pluralism in Practice: Moral Legislation and the Law of the WTO after *Seal Products*' 2015, New York University Public Law and Legal Theory Working Papers, 46.

144 AB Report *EC-Seal Products* 2014, paras.5.136.

145 Ibid para.5.169.

7.3.2 Validity of public morals

If there is no territorial limitation to the public morals exception, except that the exception must aim at protecting public morals within the regulating country – irrespective of whether these moral concerns relate to activities occurring within or outside the territory of that state – the content of 'public morals' needs to be defined. What can be considered as a public moral? Could any type of 'worry' or value judgment by people, consumers, and/or governments be considered a public moral? The scope of the public morals exception is not revealed by looking at the text of Article XX(a), nor do the *travaux préparatoires* offer much help.[146] After having examined moral exceptions in other trade treaties, Charnovitz found that these exceptions were initially a response to a broadly-felt need to be able to impose trade restrictions relating to narcotics, alcohol, slaves, pornography as well as animal cruelty among others.[147] However, nowhere in the WTO Agreements are 'public morals' as such defined, and these historic examples cannot be considered exhaustive. As the AB noted in *US-Shrimp,* generic terms are by definition evolutionary rather than static, and should thus be interpreted in light of current concerns.[148]

The panel in *US-Gambling* held that the term public morals 'denotes standards of right and wrong conduct maintained by or on behalf of a community or nation'.[149] The panel recognized that the content of public morals can 'vary in time and space, depending upon a range of factors, including prevailing social, cultural, ethical and religious values'.[150] Members have the right to determine the level of protection they consider appropriate.[151] For all these reasons, I submit that WTO adjudicators in determining the validity of public morals should adopt a deferential approach and should not exercise a normative power that they do not hold.[152]

146 Charnovitz (1998), 704.
147 Ibid 713.
148 AB Report *US-Shrimp* 1998, para.130.
149 Panel Report *US-Gambling* 2004, para.6.465. In this case the US imposed a ban on cross border gambling and betting services. Antigua, a small country but a big player in the internet-based offshore gaming industry, brought a complaint against the ban. The US raised the public morals defense, asserting that the service posed a threat for organized crime, money laundering, fraud, public health (pathological gambling), and underage gambling.
150 Ibid para.6.461. This reading of the public morals exception under GATS was reiterated by the panel in *China-Audiovisuals* when dealing with the public morals exception under GATT. Panel Report *China-Publications and Audiovisual Products* 2009, para.7.759.
151 AB Report *EC-Asbestos* 2001, para.172.
152 This does not mean that public morals in the WTO should not be read in conjunction with other sources of international law. Howse et al give the example of an import ban based in racist hatred towards individuals of third countries, based on the countries 'moral' values. Such a ban would likely violate the *jus cogens* norm against racial discrimination. See Howse, Langille and Sykes (2015), 23; 1970. See also Bal (2001), 93.

Nevertheless, it has been suggested that additional 'checks' should be taken into account when determining the scope of valid 'public morals'. For instance, in *EC-Seal Products*, Canada argued that WTO Members must be consistent in their protection of public morals, and that the lack of (philosophical) consistency could lead to a finding that a concern is not a genuine moral belief. Canada claimed that the EU invoked public morals on animal welfare with regard to seals, but was inconsistent in its approach with regard to for instance slaughterhouses within the EU.[153] The argument was rejected by the AB, stating that states have the right to set the level of protection they desire, and thus 'may set different levels of protection even when responding to similar interests of moral concern'.[154] States can thus not be required to assess similar public morals in the same way, which allows for a gradual evolution of law.[155] Members should be able to distinguish, as long as this distinction can be explained by legitimate reasons.[156]

Another proposed check is that public morals must be shared widely or even universally. So, must a Member's definition of public morals find support in an international interpretation?[157] On the one hand, international consensus on values can support the argument that a measure can indeed relate to a shared value or public moral;[158] however, imposing an internationally uniform definition of morals would take away the whole point that Members are free in determining their own level of protection.[159] Moral concerns and values can vary greatly between countries, and depend not only on cultural or religious preferences, but also on employment and income opportunities and priorities of the population.[160] Even if one were to accept that the absence of international consensus or support for a certain value would not lead to

153 Canada's appellant's submission, para. 395. Canada argued that the EU claimed its main objective was animal welfare and prevent suffering for animals, but in the meantime included a tolerance for other types of suffering, as for instance for slaughterhouses and wildlife hunts.

154 AB Report *EC-Seal Products* 2014, para.5.200. See also on the argument that a measure should be coherent and consistent with other domestic regulation, Tamara Perisin, 'Is the EU Seal Products Regulation A Sealed Deal? EU and WTO Challenges' 2013, 62 International and Comparative Law Quarterly 373, 373.

155 Howse, Langille and Sykes (2015), 35.

156 See in that regard also Article 5.5 SPS, stating that Members shall avoid arbitrary and unjustifiable distinctions in the levels it considers to be appropriate in different situations.

157 Wu (2008), 231.

158 The Panel in *EC-Seal Products* took into account the growing global tendency towards taking animal welfare seriously in concluding that it could be a component of the public morals exception. See Panel Report *EC-Seal Products* 2013, para.7.420.)

159 Nicolas Diebold, 'The Morals and Order Exceptions in WTO Law: Balancing the Toothless Tiger and the Undermining mole' 2008, 11 Journal of International Economic Law 43, 12. He gives the example of Israel who would be unable to prohibit the importation of non-kosher meat products unless the kosher requirement was considered as part of the internationally uniform public morals.

160 OECD (1997), 28.

the failure of the justification, there would be an implied assumption that any value that is shared internationally would more easily qualify as 'valid'. If public morals and values are indeed individual to each Member, international practice should not be taken into account.[161] Moreover, practically speaking, when a norm is widely shared, states will have less need to impose import or export restrictions to protect those morals.[162] Wu adds an additional element with regard to shared values: he argues that the country at which the restriction is directed, must also have embraced the norm and a restriction could not be imposed against a country for violating a norm that it has never endorsed.[163] However, domestic concerns should not (and cannot) be conditional on the moral policy of another state. Furthermore, in order to be consistent with the chapeau of Article XX, a measure cannot discriminate arbitrarily or unjustifiably and a Member can thus not distinguish between countries in imposing trade-restrictive measures. The argument that states would abuse the public morals exception if public morals can be determined unilaterally, needs to be rebutted by a stringent assessment of the evidentiary proof of the existence of actual public morals, as well as the necessity test.[164] The AB has furthermore stated in *US-Shrimp*, in the context of environmental exceptions but equally applicable to morals, that conditioning market access to a Member's domestic market on whether exporting Members comply with, or adopt, a policy or policies *unilaterally described* by the importing Member may, to some degree, be a common aspect of measures falling within the scope of the exceptions (a) to (j) of Article XX.[165]

7.3.3 Evidence of public morals

In light of the proposed deferential approach to accepting public morals as valid, it is important to constrain the scope of the public morals exception by focusing on a factual evidence analysis. I propose that a clear distinction be made between the validity of the moral concern as discussed above (for instance, animal welfare) and the existence of actual public moral concerns (for instance, the specific welfare of seals). The panel in *EC-Seal Products* can

161 This could be different in the context of the TBT Agreement and the SPS Agreement, where explicit references are made to existing international standards. If for instance a trade measure would refer to animal welfare standards (assuming that these measures would fall within the scope of the agreements), which were based upon relevant international standards of animal welfare, then at that point international practice and consensus would of course offer support. However, in those examples, one would not discuss public morals as a justification for a (discriminatory) trade-restrictive measure, rather the argument would come up when discussing the validity of the standards in question.

162 Wu (2008), 232.

163 Ibid 246.

164 See *infra* at 7.3.3 and 7.3.4.

165 AB Report *US-Shrimp* 1998, para.121.

be criticized for not making such distinction, and for accepting too easily that the EU's concerns could be considered as a matter of Article XX(a).[166]

The burden of proof is on the respondent to prove that the policy objective pursued by the challenged measure really does relate to matters of domestic public morals[167] and that, if the state were not to act, it would be 'harming' public morals.[168] The fundamental question is whose moral concerns are at issue: can the government determine the content of morals, or must there be a clearly expressed concern by the public, and if so, in their capacity as citizen (voter) or as consumer? Must the concerns be shared by a significant number of people; a majority of the people; or would a sizable minority suffice as well? Diebold argues that based on the principles of a democratic society, the majority of a Member's population should endorse the moral value in order for it to qualify under Article XX(a) GATT.[169] However, requiring a majority preference does not seem to be the right threshold to measure moral concerns, as it raises questions related to the reliability measuring methods as well as the feasibility in federal or quasi-federal systems such as the UK or Belgium. Lamy referred in this regard to 'collective preferences', whereby 'collective choices are binding on a society as a whole and transcend individual preferences'.[170]

What would be legitimate evidence that the public is indeed morally concerned?[171] Would this be an opinion poll, a referendum, regulation?[172] Legislative acts could support the existence of a public moral concern and public morals could be assessed in light of their legislative history, the hierarchy of law (e.g. constitutional law) and the nature of legislative acts (e.g. criminal law, administrative law).[173] If one were to focus on legislative acts, would the WTO implicitly be endorsing a theory of democratic legitimacy? As political structures of WTO Members vary radically, what should be the proper standard to determine whether a belief really is an expression of the morality of a particular society?[174] With regard to authoritarian, non-democratic systems, evidence of a democratic legislative process could not be used.

166 Panel Report *EC-Seal Products* 2013, para.7.631.
167 AB Report *EC-Seal Products* 2014, paras.5.136.
168 If the objective of the measure was not to harm animals (rather than public morals), the relevant exception ground would be Article XX(b) GATT.
169 Diebold (2008), 19.
170 Speech by Pascal Lamy as European Commissioner, 'The Emergence of Collective Preferences in International Trade: Implications for Regulating Globalisation", 15 September 2004, at http://ec.europa.eu/archives/commission_1999_2004/lamy/speeches_articles/spla242_en.htm.
171 Wu (2008), 233.
172 In *EC-Seal Products* the EU submitted a series of opinion polls to evidence that seal welfare was indeed a moral concern by the EU population. (First written submission by the European Union (21 December 2012), para.194. See for a critical analysis of the EU opinion polls, Paola Conconi and Tania Voon, '*EC-Seal Products*: The Tension Between Public Morals and International Trade Agreements' 2016, 15 World Trade Review 211, 231.
173 Diebold (2008), 23.
174 Howse, Langille and Sykes (2015), 6.

Could this 'discrimination' of non-democracies be nonetheless supported in light of 'enhancing democracy'?[175] In *China-Audiovisuals,* the AB condoned in principle China's appeal to the right of censorship under Article XX(a) GATT. The Chinese government had imposed import restrictions on written publications and audiovisual products in order to prevent the dissemination of cultural goods with a content that could have a negative impact on public morals in China.[176] Following the panel and the AB, I do not believe that requirement of 'democratic legitimacy' can be read in Article XX(a). Governments can decide what is 'good' or 'bad' for their citizens, and while a legislative support may be acceptable evidence to a public morals claim, such support cannot be required. WTO panels or the AB should adopt a deferential approach to the specific methods of decision-making in the regulating country.

Next to 'publicly' determined morals by citizens and governments, it is worth taking a closer look at the role of consumers, especially where 'ethical' moral concerns are at issue.[177] If consumers value highly certain morals, in principle the market principle of demand should already lead to decreased imports. Why then still rely on trade restrictive measures? It has been argued that people hold and express different preferences in their consumer role and in their citizen role. Some morals may be highly valued by political participants, but as consumers on the market they are not willing to back up that valuation. Sunstein offers a number of explanations for this disjunction: markets reflect individual choice more reliably than politics; voters can be confused as they do not realize that they must ultimately bear the costs of the programs they favour; voting patterns reveal a free-rider problem; or voters may often uninformed about public policy issues. People may also be aware of their own selfishness and might commit themselves in democratic processes to a course of action that they consider to be in the general interest. The collective character of politics furthermore grants some legal assurance that others will have to participate in the same system, and you are not contributing alone (a sort of prisoners' dilemma).[178] Lewinsohn-Zamir argues that a perceived sense of 'hopelessness' may play a crucial role in the behaviour of

175 See e.g.Thomas Frank, 'The Emerging Right to Democratic Governance' 1992, 86 American Journal of International Law 46; Robert Keohane, Stephen Macedo and Andrew Moravcsik, 'Democracy-Enhancing Multilateralism' 2009, 63 International Organization 1.

176 Panel Report *China-Publications and Audiovisual Products* 2009, para.7.752; WTO, *China-Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment* AB Report 2009, WT/DS363/AB/R, para.233.

177 It might be relevant to distinguish between 'order-disturbing' public morals and 'ethical' public morals. In the former category, a stronger role should be given to governments, rather than consumer preferences (consumers might for instance be very much interested in the 'immoral' goods such as pornography). As to the latter category, more weight could be given to consumer preferences and behaviour to determine the existence of a genuine moral concerns.

178 Sunstein (1993), 242.

consumers, which is absent in political settings.[179] If citizens/voters express strong values, beliefs and preferences, which they do not implement as individual consumers, which action is then the more realistic reflection of those preferences?[180] Can the alleged moral concerns of citizens/voters then be considered genuine? If citizens are willing to take a strong moral stand in theory, but not in practice (when it comes to the choice of 'good' products over 'bad' products), how fair is it then to pass on the bill to foreign producers who might need to adjust production processes or suffer the economic consequences as a result of trade restrictions based on ambiguous public morals?[181]

The crucial question seems to be: should trade measures address public morals as reflected by consumer preferences, voters' opinions, or both?[182] I submit that both must be taken into account when examining the evidence of a genuine public moral, especially in light of information asymmetries and information manipulation. The available information for consumers must be taken into account, such as for instance the comprehensiveness and clarity of labels: labels could be misleading, and patterns of consumer preferences could be influenced by governments through prescribing the amount of information that must or may be disclosed to consumers.[183] Public opinion can be manipulated both by governments but also by the corporate sector that has its own specific interests.[184] Furthermore, consumers might be led by the price of products primarily, and might decide to buy the cheaper product and 'free ride'. In addition, also those consumers who do not plan on consuming a particular product might be morally concerned (e.g. even without buying seal products, one can care about animal welfare of seals and vegetarians can still be concerned about sustainable production of meat).[185] If market behaviour were to be the only indicator of genuine moral concerns, more

179 Lewinsohn-Zamir (1998), 379. As Deborah Lynn Guber has also argued, "a critical component of an individual's willingness to engage in activity designed to support environmental causes or other public goods hinges upon the perceived efficacy of that activity." See Deborah Guber, *The Grassroots of a Green Revolution: Polling America on the Environment* (MIT Press 2002) 155.

180 Note in that regard the interesting wording in *EC-Seal Products* of the objective of the measure: 'addressing public moral concerns relating to the EU public's participation as consumers in the market for products derived from inhumanely killed seals'. AB Report *EC-Seal Products* 2014, para.5.223.

181 Note that citizens in the regulating country might pay a price for imposing trade-restrictive measures. If the market is more limited, prices are likely to increase. In other words, the bill is not merely passed on the foreign producers, part of the bill will also be on domestic consumers.

182 Lewinsohn-Zamir (1998), 378. See also Gregory Shaffer and Joel P. Trachtman, 'Interpretation and Institutional Choice at the WTO' 2011, 52 Virginia Journal of International Law 103, 146.

183 Kysar (2004), 579.

184 This is for instance made all too clear in Naomi Oreskes and Erik M. Conway, *Merchants of Doubt* (Bloomsbury Press 2010).

185 Shaffer and Trachtman (2011), 146.

socially protective regulation might no longer pass the evidence threshold. This is also relevant in relation to new issues or new risks on which the public has not had the time yet to form an opinion, or about which insufficient information is available. Where the emerging risk would impose a risk for human/animal/plant health or the environment, trade restrictions would need to be justified under the environmental exceptions; *idem* for security threats under the security exception. Any other risk that is merely of a moral nature would need to be evidenced by consumer preferences and clearly expressed public concerns, e.g. through civil society initiatives, before a government can rely on the public morals exception.

Assessing these concerns and this type of evidence is a complex task to undertake for panels and it could be argued that the exception might be easily abused. However, assessing the credibility of evidence and complex fact-finding is not new to WTO panels.[186] Panels have the authority to seek information from any relevant source,[187] which could include civil society organizations, public opinion firms, local government officials and citizens.[188]

7.3.4 Necessity

Once the validity of public morals has been accepted and its factual existence has been established, the respondent must demonstrate that the measure is necessary to attain the objective. Refusing justification for lack of necessity will be less infringing on the regulatory autonomy of the regulating state than rejecting the validity of certain public morals.[189]

The necessity test involves a process of weighing and balancing a series of factors, such as the interests at stake, the importance of the objective, the contribution of the measure to that objective, the negative trade impact, and possible less-trade restrictive alternatives that could secure the same objective and level of protection.[190] This balancing act results in an ad-hoc, contextual assessment of each measure.[191] A measure seeking justification based on public morals does not necessarily need to make a material contribution[192] or seek to further concrete effects, but can also be issued merely to express

186 Jeremy Marwell, 'Trade and Morality: The WTO Public Morals Exception After *Gambling*' 2006, 81 New York University Law Review 802, 825.

187 Article 13 DSU.

188 Marwell (2006), 825.

189 Diebold (2008), 25.

190 Panel Report *US-Gambling* 2004, para.6.492; AB Report *Brazil – Retreaded Tyres* 2007, para.178; AB Report *EC-Seal Products* 2014, para.5.169.

191 See WTO, AB Report, *Korea-Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, WT/DS161/AB/R, 2000; WTO, AB Report, *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*, WT/DS135/AB/R, 2001; AB Report *Brazil – Retreaded Tyres* 2007.

192 AB Report *EC-Seal Products* 2014, para.5.216.

moral convictions.[193] The question is then to what extent a regular necessity test – whereby the extent to which a measure contributes to the end pursued is considered – can be applied in the context of public morals. As the notion of risk, as can be applied in a context of environmental damage, might be difficult to reconcile with the subject of protection being public morals[194] (i.e. what is the 'risk' to public morals, what would be the 'extent of the damage'), how can the level of protection set by the regulating Member then be assessed? I submit that the stronger the evidence of a genuine public concern (depending on the nature, quantity and quality of the evidence),[195] the more autonomy states should have with regard to the appropriate level of protection.

Nevertheless, less-trade restrictive alternatives have to be examined, even where WTO Members can set their own level of protection. A genuine alternative should allow the regulating Member to still achieve its desired level of protection.[196] For instance, with regard to less-trade restrictive alternatives, one could wonder whether the use of an outright ban on products may be essential to express the moral sentiment underlying a measure, compared to a labelling scheme for instance?[197] If consumers indeed do care about a moral concern, especially when related to PPMs, the provision of information should be sufficient: once the consumers know the origin and production method of a product for instance, they can make an individual value judgment and decide whether they want to buy a certain product.[198] Part of the necessity test could thus also require the state to demonstrate that consumers are indeed misinformed,[199] that they would not be able to make the 'right choice',[200]

193 Howse, Langille and Sykes (2015), 2. According to the authors, the EU ban on seal products for instance was introduced to make a statement about the problematic nature of cruelty to animals and the impermissibility of consumptive behaviours that tolerate and encourage such cruelty. An important aspect of the ban's meaning and purpose was the expression of a deontological belief that seals ought not to be treated in the manner permitted by the hunts in Canada and other sealing nations. The ban was a statement of fundamental European moral and ethical beliefs about the proper treatment of non-human animals.

194 AB Report *EC-Seal Products* 2014, para.5.198.

195 Ibid para.5.215.

196 WTO, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services* AB Report 2005, WT/DS285/AB/R, para.308.

197 Howse and Langille (2012), 430.

198 Kysar (2004), 579.

199 See for instance literature on consumers and incomplete information (e.g. Ran Kivetz and Itamar Simonson, 'The Effects of Incomplete Information on Consumer Choice' 2000, 37 Journal of Marketing Research 427; Shih-Chieh Chuang and others, 'The Effect of Incomplete Information on the Compromise Effect' 2012, 7 Judgment and Decision Making 196.).

200 See in this regard the literature on behavourial economics, consumer choice and consumer bias, e.g. Diane DiClemente and Donald Hantula, 'Applied Behavorial Economics and Consumer Choice' 2003, 24 Journal of Economic Psychology 589; Daniel Kahneman and Amos Tversky, 'Choices, Values, and Frames' 1984, 39 American Psychologist 341; Tim Jackson, *Motivating Sustainable Consumption: A Review of Evidence on Consumer Behaviour and Behavioural Change* (2005); Steffen Huck, Jidong Zhou and Charlotte Duke, *Consumer*

that market mechanisms might fail in the supply of public goods,[201] and that more restrictive state action is thus required in order to make the choice that aligns best with public morals. Demonstrating the need for such patronizing behaviour by the state might be difficult, and serve as a safeguard for a too lenient approach towards the public morals exception.

7.3.5 Morals in relation to the environmental exceptions

Without any territorial limitation Article XX(a) might invite attempts to circumvent territorial limitations in other exceptions, where states need to comply with a higher threshold to demonstrate a sufficient nexus and/or international support for the environmental concern they aim to protect. A too lenient assessment of Article XX(a) could in that regard deprive the other exceptions of their *effet utile*. Public morals should not be read in a way to deny the other paragraphs of Article XX independent meaning.[202] Whereas there might be some overlap in different clauses, justification for a measure should be sought on the most applicable ground or in other words the main objective of the measure. If a state relies on the public morals exception, a panel must check whether the rule in question is genuinely concerned with standards of right and wrong within a society[203] and is thus actually aimed at the protection of public morals. The emphasis on evidence and necessity as discussed above must serve to avoid abuse of the exception.

The proposed extraterritoriality decision tree has little relevance in a context of public morals: if we indeed consider the existence of a moral concern within the territory of the regulating state sufficient a nexus, public morals fall by definition within the inward-looking concerns then, which establishes a jurisdictional nexus and there would be no need to go further to the second step of the tree. Even if one were to consider the second step (international support), it would be of no value, as it is intrinsic to the concept of public morals that these can be local, and cannot be determined based on the existence or lack of international support. Hence I submit that the risk to an 'uncontainable' Article XX(a) or the slippery slope is not its extraterritorial reach, but an overly broad acceptance of public morals, as described above.

Behavioural Biases in Competition: A Survey (2011); Europe Economics, *An Analysis of the Issue of Consumer Detriment and The Most Appropriate Methodologies to Estimate It.* (2007).

201 Public goods are characterized by their non-excludability, meaning that it is impossible or impractical to prevent those who do not pay for a good from enjoying its mechanisms. Because of this, state intervention in the market might be necessary in providing and protecting public goods, such as guarding against air pollution or the extinction of endangered species. See Lewinsohn-Zamir (1998), 377.

202 Marwell (2006), 823.

203 Howse, Langille and Sykes (2015), 25.

This does not diminish the decision tree's value for the environmental exceptions: it is precisely because of this different territorial scope (and the more careful consideration that can be given to sovereignty concerns under the environmental exceptions) that it is important that the relation between the different exceptions as well as their scope is clearly delineated.

Thus, in conclusion, WTO adjudicators should adopt a deferential approach to what beliefs *may constitute* public morals. It is not the WTO's task to take a normative stand when it comes to morals, which are intrinsically linked to cultural values, time and place. However, in order to 'cap' the possible overreach and abuse of the public morals exception, adjudicators should focus on the *actual existence* of a public moral, as well as strictly scrutinize the *necessity* of any measure with regard to the claimed objective of public morals. A clear distinction must thus be made between the validity of the concern as such – where I propose a deferential approach – and the actual existence of the concern – which is a factual evidence question of the public's actual preferences and values. Without such strict scrutiny, trade-restrictive measures might be presented as addressing moral concerns, even when they might not be. Additionally, any measure needs to be necessary to attain the objective, and must comply with the chapeau of Article XX GATT.[204]

7.4 The chapeau of Article XX GATT

Once a measure falls under of one of the exceptions of Article XX, and has thus passed the 'extraterritoriality threshold', the analysis turns to the *chapeau* of Article XX. In assessing the application of the measure, the *chapeau*'s purpose is to prevent abuse or misuse of the specific exemptions provided for in Article XX.[205] The analysis of the *chapeau* is not specific to npr-PPMs with an extraterritorial objective, but can offer additional safeguards against a possible overreach.

In assessing the application of the measure, one must examine the manner in which the measure is implemented in practice, and how other elements extraneous to the measure could affect the measure's ability to perform its function.[206] According to the AB, the *chapeau* is an expression of the principle of good faith as a general principle of law.[207] Good faith in this context can be reflected in a duty to cooperate, and to show systematic respect for multi-

204 In order to comply with the conditions of the chapeau, measures must have been taken in good faith and cannot lead to arbitrary and unjustifiable discrimination. This will be discussed in greater detail below at 7.4. See also chapter 2.

205 AB Report *US-Shrimp* 1998, para.119; 156; AB Report *US-Gasoline* 1996, 25.

206 AB Report *Brazil – Retreaded Tyres* 2007, para.7.107.

207 AB Report *US-Shrimp* 1998, para.158.

lateralism and the international community's interests.[208] Basically, the integrity of the measure should be key.[209]

The text of the chapeau establishes three standards regarding the application of measures: first, there must be no arbitrary discrimination between countries where the same conditions prevail; second, there must be no unjustifiable discrimination between countries where the same conditions prevail; and third, there must be no disguised restriction on international trade. These concepts may be read side-by-side and impart meaning to one another. It is argued that firstly, determining whether the prevailing conditions are the same is a consideration of whether the main objective of the measure can justify a disparate impact; secondly, if the conditions are the same, a finding of arbitrary and unjustifiable discrimination should assess objectives distinct from the main objectives as a measure is likely to have multiple objectives; and thirdly, even if a measure does not discriminate, it should be examined whether it also has protectionist purposes. This section will highlight some key elements that can be of particular relevance to environmental npr-PPMs.

7.4.1 Countries where the same conditions prevail

A measure imposed by a WTO Member may not arbitrarily or unjustifiably discriminate between countries where the same conditions prevail. This latter condition is sometimes underemphasized. Any discrimination must relate to the objective of the measure, as found under the respective paragraph of Article XX GATT. In the case of environmental PPMs, this means that any discrimination must be rationally related to the environmental objective. In other words, a PPM cannot discriminate between countries where the same environmental conditions prevail (those conditions that are relevant to the main objective), such as for instance all countries with tropical woods in relation to PPMs on the logging of timber. A PPM that imposes different requirements to countries with similar environmental contexts would then constitute unjustifiable discrimination.[210]

Purely economic conditions should not play a role under the *chapeau* when seeking justification for environmental npr-PPMs. However, economic conditions can be related to the environmental context of a country, and can in particular lead to a distinction between resourceful, developed countries and less developed countries without the necessary resources or technologies to attain high environmental standards. A PPM that targets all producers in a neutral way

208 Elisa Morgera, 'The EU and Environmental Multilateralism: The Case of Access and Benefit-Sharing and the Need for a Good-Faith Test' 2013-2014, 16 Cambridge Yearbook of European Legal Studies 109, 119.
209 Gaines (2002), 431.
210 Ibid 429.

is likely to have a greater impact on producers in developing countries that might have less economic resources and technical knowledge. Thus, even though similar natural resources may be available in developed and developing countries, or equally polluting activities might take place in developed and developing countries, the technical know-how, capacity and economic means to protect environmental concerns differ. Arguably, to the extent that economic conditions of a country relate to its environmental conditions, these could or even should be taken into account for finding that countries are not similar, if the PPM in question were to distinguish between developed and developing countries.[211] In *US-Shrimp*, the AB found that discrimination also results 'when the application of the measure at issue does not allow for any inquiry into the appropriateness of the regulatory program for the conditions prevailing in exporting countries'.[212] Considering development factors in order to determine whether 'the same conditions prevail' could find support in the GATT Enabling Clause that allows for differential and more favourable treatment for developing countries.[213] Different contextual factors related to the 'development, financial and trade needs' allow Members to differentiate between developing countries as well, as long as the distinguishing criteria are objective generally applicable.[214] This distinction is also reflected in the principle of common but differentiated responsibility (CBDR), a principle justifying the design of different international obligations on the basis of differences in the current socio-economic situations of countries and their historical contribution to a specific environmental problem.[215]

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211 This would most likely be a violation of the MFN obligation under Article I GATT, which would then need to be justified under Article XX GATT. See also by analogy AB Report *EC-Tariff Preferences* 2004.in which the AB contended that different developing countries were not 'similarly situated' when they had 'different needs' and thus could be subject to 'performance requirements' as long as these were objective, transparent and indeed non-discriminatory in the broad sense. For a hypothetical analysis of differential treatment for Kyoto-signatories and non-signatories with reference to *EC-Tariff Preferences*, see Jagdish Bhagwati and Petros C. Mavroidis, 'Is Action Against US Exports for Failure to Sign Kyoto Protocol WTO-legal?' 2007, 6 World Trade Review 299.

212 AB Report *US-Shrimp* 1998, para.165.

213 GATT Contracting Parties, Decision of 28 November 1979 (L/4903) on Differential and more favourable treatment reciprocity and fuller participation of developing countries. The Enabling Clause has been applied with regard to tariff preferences, but also allows for special and differential treatment with regard to non-tariff measures (paragraph 2(b)). See also Alexander Keck and Patrick Low, 'Special and Differential Treatment in the WTO: Why, When and How?' 2004, ERSD-2004-03 WTO Staff Working Paper.

214 GATT Contracting Parties, Differential and More Favourable Treatment Reciprocity and Fuller Participation of Developing Countries (Enabling Clause), L/4903, 28 November of 1979, para.3(c). WTO, *European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries* AB Report 2004, WTO/DS246/AB/R, paras.156.

215 UNFCCC, 1992, preamble; Article 4; Martin Khor, 'The Climate and Trade Relation: Some Issues' 2009, South Centre Research Paper, 22; Morgera (2013-2014), 117; Pieter Pauw and others, 'Different Perspectives on Differentiated Responsibilities: A State-of-the-Art Review of the Notion of Common but Differentiated Responsibilities in International Negotiations'

Even if countries were to be found in a similar situation, and a measure would produce disparate effects, those effects are only prohibited under the chapeau where the discrimination is 'arbitrary and unjustifiable'. The question is whether *any* reason can be invoked to justify discrimination, or whether the reason must relate to the main objective as found under the paragraphs under Article XX. In *Brazil-Retreaded Tyres,* the AB found that discrimination would be arbitrary or unjustifiable if the reasons given 'bear no rational connection to the objective falling within the purview of a paragraph of Article XX, or would go against that objective'.[216] This statement can be problematic. While the rationale for the discrimination may relate to the main objective, it is also very well possible that it will contradict it.[217] For instance, in *EC-Seal Products* the EU's main concern was the protection of seals and animal welfare, but the Seals Regulation allowed for exception grounds related to among others the protection of indigenous communities and marine resources management. Which grounds could be accepted as legitimate objectives at this stage of the analysis remains an open question, even though it can be noted that the panel and the AB did not question the EU's objective to protect indigenous interests for instance. Howse et al suggested that in any case multiple objectives of a measure would need to be reconciled in good faith, which could be interpreted as requiring 'one objective to be applied so as to minimize or reduce to what is necessary the sacrifice of the main objective to the other competing objective(s)'.[218] Furthermore, if indeed different objectives are accepted under the *chapeau*, a new necessity test would be invoked, where no other less discriminatory measure must be reasonably available to achieve the same protection.[219] It is in that light that the following subsections on the *chapeau* can be read.

7.4.2 Coercive effect

In *US-Shrimp*, the AB noted in its analysis of unjustifiable discrimination that

> 'the most conspicuous flaw in the measure's application related to its intended and actual coercive effect on the specific policy decisions made by foreign governments. [The measure at issue…] requires *all other exporting Members* … to adopt *essentially the same* policy….'[220]

2014, 6/2014 Deutsches Institut für Entwicklungspolitik Discussion Paper, 36. For a discussion of CBDRRC in the context of climate change, see chapter 7.

216 AB Report *Brazil – Retreaded Tyres* 2007, 227.

217 Bartels (2015), 116.

218 Howse, Langille and Sykes (2015), 44.

219 Julia Qin, 'Defining Nondiscrimination under the Law of the World Trade Organization' 2005, 23 Boston University International Law Journal 215, 267.

220 AB Report *US-Shrimp* 1998, paras.161.

Shrimp harvesting methods comparable in effectiveness to those required by the US were not accepted. This was proof to the AB that the measure in its application was more concerned with effectively influencing other WTO Members to adopt the same policy, rather than inquiring into the appropriateness of different comparable programs to protect the concern at issue. The AB considered this 'rigidity and inflexibility' to also constitute arbitrary discrimination within the meaning of the *chapeau*.[221] A measure must thus allow for other, comparably effective means to reach the objective pursued. An environmental npr-PPM should not prescribe the precise method on how results should be achieved or require the adoption of a rigid norm, but must pursue a clear objective, allowing other states to determine the most suitable way to reach certain standards.[222]

One way of attaining the required flexibility, and recognizing measures comparable in effectiveness, is through mutual recognition.[223] This can either be in a negotiated and reciprocal context, whereby several parties pledge to mutually recognize each other's practices if common minimum standards are respected,[224] but recognition can also be a unilateral inclusion, whereby the regulating state affirms that practices abroad that reach the required standards, will be accepted and recognized.[225] The idea is basically that when a product can be sold lawfully in one jurisdiction, it can be sold in any other participating jurisdiction. As Schaffer and Nicolaidis argue,

> 'mutual recognition regimes can promote greater tolerance for difference, and, as a result, greater resilience of domestic polities when interacting with each other,

221 Ibid para.177.

222 Grewal (2006), 97.

223 Marceau and Trachtman (2002), 844. Mutual recognition provisions can be found in the SPS Agreement Articles 3 and 4, as well as in article 6 and annex 3(D) of the TBT Agreement. Next to the mutual recognition rules within the internal market (implemented in secondary law), the EU has concluded a number of (sectoral) mutual recognition agreements with Australia, Canada, Israel, Japan, New Zealand, Switzerland and the USA. For an overview see http://ec.europa.eu/growth/single-market/goods/international-aspects/mutual-recognition-agreements/index_en.htm. Mutual recognition agreements are often sectoral. For an interesting assessment of mutual recognition in EU-US relations and the current TTIP negotiations, see Jacques Pelkmans and Anabela Correia de Brito, *Transatlantic MRAs: Lessons for TTIP?* (CEPS Special Report, 2015).

224 Kalypso Nicolaidis and Gregory Shaffer, 'Transnational Mutual Recognition Regimes: Governance Without Global Government' 2005, 68 Law and Contemporary Problems 263, 275. States could choose to effectively recognize the other state's standard as equivalent, but they could for instance also agree that each regulatory system will recognize only its own standards, but agree that a conformity assessment of the importing state's standards will be carried out in the exporting state.

225 Joel P. Trachtman, 'Regulatory Jurisdiction and the WTO' 2007, 10 Journal of International Economic Law 631, 639. Recognition by the importing Member of the exporting Member's regulation could also be an element in a necessity analysis under the paragraphs of Article XX GATT. Sometimes, the least trade restrictive alternative will be simple recognition of the effectiveness of the home country regulation.

lessening the potential for conflict. Tolerance is indeed a defining feature of mutual recognition. Mutual recognition represents the acceptance of other systems and approaches as valid … promotes the acceptance of difference.'[226]

Coerciveness can furthermore relate to the 'target' of the measure. A distinction can be made between process-based measures and country-based measures, whereby the former are to be preferred as they target the individual producer and the odious production practice, rather than force a government to adopt a certain policy.[227] Process measures are more intrusive than product standards, and npr-PPMs based on a foreign government policy are even more intrusive than npr-PPMs targeting a production practice.[228] A measure should thus focus on the origin-neutral production process that can have an environmental impact, rather than focus on whether the government has adopted a specific policy regulating the concern at issue. Country-based discrimination may be considered too trade-restrictive: a producer within a country who could comply with the prescribed production requirements would still not be able to trade freely. While process-based measures may be less effective and unsatisfactory for environmentalists, as Charnovitz rightly observed, it is one thing for country A to specify a PPM for the fish that it imports from country B; it is quite another for country A to say that it will not import *any* fish from country B unless *all* of B's fish catch are caught in the prescribed way.[229] Country-measures may be seen as arbitrary and unjustifiable discrimination if the measures ban products that can be freely marketed within the importing country.[230] The panel in *US-Shrimp* also held this view, while it noted that 'it would be impossible for exporting Members to comply at the same time with multiple conflicting policy requirements'.[231] The difficulty of process-based measures, on the other hand, relates to the development and enforcement of an effective system to keep those products produced in a 'good' way, separate from those produced in a 'bad' way.[232]

226 Nicolaidis and Shaffer (2005), 317.
227 See Howse and Regan (2000), 269. Charnovitz uses a similar distinction between 'government-policy' and 'how-produced' restrictions. Charnovitz (2002), 107. Government-policy-standards or country-based measures may be more efficient in inducing the participation of other countries in multilateral environmental agreements though. For an interesting discussing on the efficiency of these measures, see Howard Chang, 'An Economic Analysis of Trade Measures to Protect the Global Environment' 1995, 83 Georgetown Law Journal 2131.
228 Charnovitz (1993), 40.
229 Charnovitz (2002), 69.
230 Nollkaemper (1996), 253.
231 Panel report *US-Shrimp* 1998, para.7.45.
232 Nollkaemper (1996), 254.

The effectiveness of any PPM in terms of better environmental protection will furthermore depend on (amongst others) the market power of the importing country, an aspect that will be discussed in greater detail below.[233]

7.4.3 Good faith and international contingency

Good faith in the context of the *chapeau* of Article XX can be seen as a general principle reflected in a duty to cooperate and to negotiate, or in a broader sense showing respect to the international legal order.[234] Good faith serves to balance domestic interests and values against jurisdictional overreach and international tensions.[235]

According to Morgera,

> 'demonstrating good faith necessitates systematic respect for multilateral norms as well as reliance on multilateral institutions that are essential to the effective, objective and even-handed promotion and protection of the international community's interests.'[236]

Respect for multilateralism can manifest itself in various ways. In *US-Shrimp*, the AB found the failure of the US 'to engage the appellees, as well as other Members exporting shrimp to the US, in serious, across-the-board negotiations with the objective of concluding bilateral or multilateral agreements for the protection and conservation of sea turtles' to be another aspect leading to unjustifiable discrimination.[237] This aspect was particularly important, as the very policy objective of the measure, the protection of highly migratory species of sea turtles, demanded 'concerted and cooperative efforts on the part of the many countries whose waters are traversed in the course of sea turtle migrations'.[238] With regard to a preference for multilateral solutions, including failed or ongoing attempts to find such solutions, I submit that these should be considered under the necessity test when assessing the international recognition of a norm rather than under the *chapeau*.[239] What could be considered under the *chapeau* though, is whether there is arbitrariness with regard to partner countries. For example, if a country has negotiated an agreement with country A but not with country B, even though both countries would be equally affected by the imposed measure. If no attempts have been made to

233 See *infra* at 7.6.1.
234 Morgera (2013-2014), 119.
235 Robert Howse, 'From Politics to Technocracy – and Back Again: The Fate of the Multilateral Trading Regime' 2002, 96 American Journal of International Law 94, 106; Scott (2014), 4.
236 Morgera (2013-2014), 119.
237 AB Report *US-Shrimp* 1998, 166.
238 Ibid 168.
239 See *supra* at 7.2.1.2.

open negotiations with country B as well, that discrimination can be considered arbitrary or unjustifiable.

The legitimacy of environmental trade restrictions will furthermore be strengthened if the measure is 'conditional' on international developments, and sufficiently flexible in light of those, for instance by including review clauses that can be triggered expressly by developments at the multilateral level and inputs from third countries at the bilateral level.[240] The 2009 EU Climate and Energy Package, for instance, contains review clauses linked to the outcome of ongoing international negotiations.[241] Responsiveness to international action is thus related to multilateral negotiations. Legitimate unilateral action does not oppose multilateral action: unilateral acts would be imposed because of the absence of effective multilateral alternatives, especially in light of grave and urgent environmental threats.[242] Unilateral PPMs should then be seen as a sort of interim measure, pending further international action.

Morgera has defined this openness as a requirement of continued 'responsiveness' to international developments.[243] Referred to by Scott and Rajamani as 'contingency upon international action',[244] it implies that while the EU is increasingly willing to insist upon the application of its legislation to conduct that takes place abroad, it should also be willing to consider 'disapplying' its legislation when the foreign conduct in question has been satisfactorily regulated by another state or by an international body.[245] If a state refuses to join in a multilateral arrangement, and instead continues to act unilaterally, the credibility of its case for unilateral action will erode.[246] It is thus important that a PPM is drafted in such a way that there is room for adaptation and flexibility, which should also be monitored strictly and revised where necessary.

240 Morgera (2013-2014), 121.
241 See for instance Directive 2009/29/EC amending Directive 2003/87/EC so as to improve and extend the greenhouse gas emission allowance trading scheme of the Community, arts 10b(1) and 11a.
242 Bilder (1981), 91.
243 Morgera (2013-2014), 121.
244 Joanne Scott and Lavanya Rajamani, 'EU Climate Change Unilateralism' 2012, 23 The European Journal of International Law 469.
245 Scott (2014), 24. Scott gives the EU's Derivatives Regulation (EMIR; Reg. 648/2012) as an example of 'contingency' whereby the EU is taking into account regulation by other countries. As she states, 'the Commission is empowered to adopt decisions declaring that the legal, supervisory and enforcement arrangements of a third country are equivalent to those laid down in EMIR and that these third country arrangements are being effectively applied and enforced in an equitable and non-distortive manner so as to ensure effective supervision and enforcement in that third country. Where at least one counterparty to a derivatives contract is established in a third country that benefits form an equivalence decision of this kind, all of the counterparties to the contract will be deemed to have fulfilled the specified obligations under EU law' (Art. 13(3)).
246 Bilder (1981), 92.

Responsiveness does not only relate to developments at a multilateral level, but also includes genuine dialogue and the exchange of views with third countries and stakeholders. This does not necessarily have to relate to law-making initiatives, but can relate to capacity building, research, monitoring efforts, joint activities etc.[247] That dialogue may involve relevant bodies under multilateral environmental agreements or relevant international organizations. In the absence of binding international agreement, these efforts can then be taken into account in a contextual analysis to demonstrate genuine attempts for multilateral solutions and respect for both the sovereignty of other countries and the multilateral system.

7.5 The decision tree outside of Article XX GATT

7.5.1 The TBT Agreement

The TBT Agreement has formed the ground of debate with regard to PPMs. In particular, it is still unresolved whether npr-PPMs could fall within the scope of the Agreement, or whether it is limited to pr-PPMs.[248] The TBT applies to 'technical regulations', a term defined in Annex 1.1, referring to

> '[A document] which lays down product characteristics or their related processes and production methods… It may also include or deal exclusively with terminology, symbols, packaging, marking or labelling requirements as they apply to a product, process or production method.'

In *EC-Seal Products*, the AB first examined the meaning of 'product characteristics' and found that characteristics include objectively definable 'features', 'qualities', 'attributes' or other 'distinguishing marks' of a product.[249] The AB then found 'related' in the first sentence of Annex 1.1 to refer to these characteristics: the process or production method must be related to the product characteristics, or must, in other words, have a sufficient nexus to the characteristics of the product.[250] It is unclear what is meant with a 'sufficient nexus' in this context.

If one were to argue that 'related' means that the measure must have an impact on 'objectively definable product characteristics', then npr-PPMs that do not affect the physical characteristics of a product, might not be considered 'related' and could thus not fall within the scope of the TBT Agreement. If a sufficient nexus could on the other hand be understood as any link apart from

247 Morgera (2013-2014), 123.
248 See chapter 2.
249 AB Report *EC-Seal Products* 2014, para.5.11.
250 Ibid para.5.12.

a physical link, then certain npr-PPMs could be considered related. For instance, the fact that shrimp was harvested in a turtle-friendly way, could be 'related' to the end product. It remains somewhat of a mystery what the AB could have had in mind: any production process has an automatic 'nexus' to the product, but when is this sufficient? If assessing that nexus would imply a consideration of the objective of the PPM (e.g. an environmental objective, ethical characteristics), then how to distinguish the test from regulatory purpose or a necessity test?

In *Seals,* the AB found that the ban on seals products imposed a characteristic on products 'by providing that they may not contain seal',[251] however, the exceptions to the EU seal regime (the indigenous communities exception, the marine resources management exception and the travellers exception) did not. According to the AB, there is no basis in the text of Annex 1.1 to 'suggest that the identity of the hunter, the type of hunt, or the purpose of the hunt could be viewed as product characteristics'.[252] As a measure must be examined as a whole, including prohibitive and permissive elements, and the exceptions to the EU seal regime were considered to be the main feature of the measure, rather than the criteria relating to the *manner* in which seals are killed, the AB considered the EU seal regime to not lay down product characteristics and thus not to constitute a technical regulation.[253] Whether these exceptions could be considered PPMs *related to* product characteristics was unfortunately left open by the AB. As the panel had not examined the issue in its report, nor was it examined in previous cases, and as the parties had not submitted sufficient argumentation on this point, the AB did not rule on this point. The AB did note that 'the line between PPMs that fall, and those that do not fall, within the scope of the TBT Agreement raises important systemic issues'.[254] The contours of npr-PPMs within the TBT have thus not yet been determined.

The second sentence of Annex 1.1, referring to among others labelling requirements, only refers to PPMs in general, without distinguishing between related and non-related PPMs. It can thus be accepted that it is irrelevant to what extent the production process has an impact on the final product in order to fall within the scope of the TBT Agreement.[255] Labelling requirements could be seen as a special regime, exceptionally bringing npr-PPMs within the scope of the TBT. As suggested by Marceau, the regime of labelling requirements can be more flexible as such measures do not completely restrict trade but essentially provide information.[256] Whether or not the measure in question

251 Ibid para.5.39.
252 Ibid para.5.45.
253 Ibid para.5.58.
254 Ibid para.5.69.
255 See for instance *US-Tuna II* on dolphin-safe labels for tuna products. AB Report *US-Tuna II* 2012; Levy and Regan (2015), 350.
256 Marceau (2014), 327.

is inconsistent with the agreement then needs to be determined through an analysis of the substantive TBT obligations.

If one were to argue that a npr-PPM were to have a sufficient nexus with the product (characteristics) – without any physical impact – and the measure could thus be considered a technical regulation and fall within the scope of the TBT, then with regard to the non-discrimination obligations under Article 2.1 TBT a similar logic as under Articles I and III GATT must be followed. Firstly, are the relevant products like, i.e. in a sufficiently strong competitive relationship?[257] If so, are imported products treated less favourably compared to domestic products, and does that impact stem exclusively from a 'legitimate regulatory distinction'?[258] At this point we are confronted with the extraterritoriality question again: could such legitimate regulatory distinction also be based on concerns located outside the territory of the regulating state? Is there a territorial limitation to the legitimate regulatory distinctions under Article 2.1 TBT? Or should this question not be considered under Article 2.1 TBT?

I submit that the reasoning of the decision tree as proposed under Article XX GATT can be applied to a TBT context as well. The main question whether states can use trade measures to protect 'extraterritorial' concerns remains the same. Article 2.1 TBT entails the MFN and national treatment obligations. The context of Article 2.1 TBT, among which Article 2.2 TBT and the preamble of the TBT Agreement, supports a finding that technical regulations may pursue legitimate objectives when they are not applied in a manner that would constitute a means of arbitrary or unjustifiable discrimination.[259] When ascertaining whether a technical regulation modifies the conditions of competition to demonstrate less favourable treatment with regard to the national treatment obligation under Article 2.1 TBT, a panel must analyse whether the detrimental impact on the imported products stems exclusively from a legitimate regulatory distinction.[260] Article 2.2 TBT establishes an additional obligation that technical regulations shall not be more trade-restrictive than necessary to fulfil a legitimate objective. Article 2.2 TBT resembles the sub-paragraphs of Article XX GATT, with a (non-exhaustive in case of Article 2.2) list of objectives, as well as a necessity test.[261] Technical regulations have to conform to the requirements of Article 2.2 though, irrespective of whether a measure was found to be inconsistent with Article 2.1 TBT: Article 2.2 is thus not a justification provision for inconsistencies found with other substantive obligations. This distinction between Article XX GATT and Article 2.2 TBT may have important consequences for the burden of proof: the respondent bears the burden under Article XX GATT

257 AB Report *US-Clove Cigarettes* 2012, para.120.
258 Ibid para.271.
259 AB Report *US-Tuna II* 2012, para.213; AB Report *US-Clove Cigarettes* 2012, para.182; AB Report *US-COOL* 2012, para.240.
260 AB Report *US-Clove Cigarettes* 2012, para.182.
261 AB Report *US-Tuna II* 2012, para.322. As under Article XX GATT, environmental concerns are explicitly mentioned in Article 2.2 TBT.

to justify its measures, whereas the complainant likely bears the burden under Article 2.2 TBT.[262]

I submit that, *if* npr-PPMs would fall within the scope of the TBT Agreement, the decision tree should be applied within the analysis of Article 2.2 TBT, similar to its application under the paragraphs of Article XX GATT. Thus, with regard to 'legitimate objective', a panel would first need to look at the location of the concern to determine whether the production process that is targeted through the technical regulation leads to environmental effects within/upon the territory of the regulating state or whether the impact is discernible solely outside the territory of the regulating state. Secondly, with regard to necessity, a panel would need to scrutinize the level of international support for the measure. The more common and important the interest, the more easily a measure will be deemed necessary. Broader acceptance of a norm also reduces the potential trade restrictive effect of measures incorporating such norm and potential trade barriers for producers: having to comply with a multilaterally supported norm or standard is less of a burden than having to comply with an infinite number of different norms or standards.

7.5.2 Article III GATT

The extraterritoriality decision tree purports to answer the question whether countries can impose npr-PPMs in order to protect environmental concerns partly or fully outside of their territory. As has been discussed in chapter 2, under GATT environmental concerns that are not related to the physical characteristics of the end product, only become relevant when a violation with the substantive obligations of GATT has been established (among which Article III or Article XI).[263] If a npr-PPM were to be considered a restrictive border measure under Article XI GATT, the analysis will turn to Article XX. If a npr-PPM were to be considered an internal regulation under Article III, it has been the subject of much debate whether legitimate reasons to impose differential treatment between imported and domestic products can play a role in the analysis of Article III GATT.[264] That debate has revived after the 2012 TBT cases, where the AB interpreted Article 2.1 TBT to include a consideration of regulatory objectives when determining treatment less favourable, in the absence of a provision equivalent to Article XX GATT.[265] The AB stated that a panel must

262 Green (2005), 174.

263 Even though these concerns may be relevant for consumer preferences and could arguably (though unlikely) lead to a finding of unlikeness of the domestic and imported products, the extraterritorial character is not an issue at that stage. See chapter 2.

264 See chapter 2.

265 AB Report *US-Clove Cigarettes* 2012, paras.93; AB Report *US-COOL* 2012, para.271. A provision similar to Article XX GATT can be found in the Preamble of the TBT though (recital 2, recital 5 and recital 6).

analyse whether the detrimental impact on imports stems exclusively from a legitimate regulatory distinction rather than reflecting discrimination against the group of imported products.[266] Following this reasoning, it has been proposed to include national regulatory autonomy in the analysis of Article III as well, rather than limit it to Article XX. This argument has been discussed earlier and will not be repeated.[267] However, if such approach were accepted – which is unlikely in view of the AB's rejection in *EC-Seal Products*[268] –, this could have consequences for the extraterritoriality assessment. Answering whether a disparate impact stems from a legitimate regulatory distinction requires the respondent to demonstrate the non-protectionist purpose of the measure and a genuine link between the purpose and the measure. Similar to Article XX, the question of jurisdictional limitation to acceptable, *legitimate*, regulatory purposes would arise under Article III as well: can a regulatory distinction be considered legitimate when this is based on a concern that is located outside the territory of the regulating state?

I submit that *if* an interpretation of Article III including the regulatory purpose of a measure were to be accepted, the decision tree as proposed under Article XX GATT can be applied to Article III as well. The text of Article III does not offer any textual support for the tree, but the reasoning is built by analogy: the AB's interpretation of Article 2.1 TBT and Article 2.2 TBT relies heavily on its interpretation of Article XX GATT.[269] As discussed above, Article 2.1 TBT entails the non-discrimination obligations, in combination with the 'legitimate regulatory distinction'-test bearing resemblance to the chapeau of Article XX GATT. Under the TBT, however, whether an inconsistency with Article 2.1 TBT is found or not, Article 2.2 imposes an additional obligation of legitimacy and necessity. Article 2.2 TBT resembles the paragraphs of Article XX GATT, with the difference that Article 2.2 does not serve as a justification to Article 2.1 TBT (or any other TBT obligation for that matter). Any finding under Article 2.1 TBT is thus independent from a finding under Article 2.2 TBT. In that light, I have argued above that *if* npr-PPMs would fall within the scope of the TBT Agreement, the decision tree should be applied within the analysis of Article 2.2 TBT, similar to its application under the paragraphs of Article XX GATT. However, this reasoning cannot be transposed to Article III GATT because of

266 AB Report *US-Clove Cigarettes* 2012, para.271.

267 See chapter 2.

268 AB Report *EC-Seal Products* 2014, para.5.117. According to the AB, 'a panel is not required to examine whether the detrimental impact of a measure on competitive opportunities for like imported products stems exclusively from a legitimate regulatory distinction'. Note the AB's particular wording of 'not required to' rather than 'should not' or 'cannot'. Further clarification on the issue is needed.

269 The AB stated in *US-Clove Cigarettes* that 'in the GATT 1994 this balance is expressed by the national treatment rule in Article III:4 as qualified by the exceptions in Article XX, while, in the TBT Agreement, this balance is to be found in Article 2.1 itself, read in the light of its context and of its object and purpose'. (AB Report *US-Clove Cigarettes* 2012, para.109.)

the different legal relationship between Article III and Article XX GATT. Only when a violation is found with a substantive obligation under the GATT, will a respondent have to turn to Article XX GATT. If a legitimate regulatory distinction would be read into the assessment for less favourable treatment, and that would lead to a finding of consistency with Article III GATT, there is no longer any need to turn to Article XX, and the jurisdictional scope or limitation of regulatory autonomy will not be considered. Intuitively, transposing the reasoning of Article 2.1 TBT to Article III GATT can only make sense when this includes both the consideration of regulatory purpose as well as the related safeguards to maintain a balance between the right of Members to invoke exceptions (or regulatory distinctions) and the substantive rights of the other WTO Members. Thus, I thereby submit that if regulatory space can be taken into account in a determination of treatment less favourable under Article III, any assessment of a legitimate regulatory distinction should include looking at the location of the concern that a measure purports to protect (jurisdictional limitation to legitimate objectives), as well as international support for the concern at issue (necessity). *De lege lata* the tree is only applicable under Article XX GATT though.

7.6 The dilemmas of trade leverage for environmental protection

This chapter has proposed an extraterritoriality decision tree, building upon positive law from other fields of law, with the purpose of coming to a more systematic assessment of extraterritoriality claims under Article XX GATT. However the use of npr-PPMs to further environmental protection also raises certain dilemmas. For instance, there is an inherent inequity to trade leverage as large, powerful markets will be more able to make use of PPMs than smaller markets. Also, little known or newly emerging environmental concerns could not be addressed through npr-PPMs under the current legal framework, even though these threats might be in most need for alternative solutions for lack of multilateral recognition. The following section will expound these dilemmas and make suggestions where relevant.

7.6.1 Market power and the unfairness of PPMs

Is the proposed legal framework of the decision tree able to guarantee fair and equal opportunities for WTO members to indeed make use of npr-PPMs to attain environmental objectives? In principle, every WTO Member can make use of PPMs and these will be subjected to the same legal assessment in order to test their WTO-consistency. The impact of PPMs, however, will depend on a number of factors, such as market power of the imposing country relative to that of the exporting country, trade dependence of the specific industry, the volume and direction of trade in the affected product, supply and demand, the type and combination of instruments used, and the appropriateness and feasibility of the requirement imposed.[270] The most crucial factor seems to be the market power: can the exporter divert exports to another market? Foreign producers that are forced to comply with higher standards in order to gain market access, can either choose voluntarily to converge to the required standard; try to compel the market power change its rules through for instance diplomacy, WTO complaints or sanctions; seek a cooperative solution; or choose not to export to that market.[271] If exporters have no alternative strategy that is economically viable, they will need to adapt to the PPM-prescibed standards, which may instigate a positive change with regard to the allegedly harmful activity. The size and attractiveness of the market will thus be important factors for a PPMs' success.[272]

Grewal has argued in his theory on network power that in order to enjoy the benefits of globalization one sometimes has no choice but to accept a specific set of dominant standards. These standards are not in the traditional way determined by one actor, nor are they 'forced' upon others, but they become more valuable when more actors use them. In a way, the free choice over alternatives decreases if one wants to take part in the network (the 'unfreedom of globalization'). While participation is a choice, and acceptance of standards is driven by consent, some form of 'informal power' or unequal dependence can be discerned.[273] Acceptance of standards can then serve as the criteria by which a group governs access to an activity.[274] If standards become more valuable the more actors use it, then large trading blocks, such as the EU, have a valuable asset for which actors would be 'willing' to adopt standards, namely access to the EU market (also named the Brussels effect).[275] The purpose of unilaterally imposed PPMs in the absence of international agreements is precisely to serve as an incentive for enhanced international cooperation.[276] Seeking access to a market is a choice made by exporters. However, in the case of the EU, for example, one can wonder whether there really is a choice still, or whether that choice is constrained? For instance, in the EU's attempt to include foreign airlines into the EU emission trading system, could one argue that there was a choice for foreign airlines to no longer service

270 OECD (1997), 32.
271 Bradford (2012), 50.
272 This question differs from the question whether the environmental policy prescribed by a PPM is effective from an environmental perspective, as that will depend on the substance of the measure.
273 See Grewal(2008).; Grewal (2006).
274 Grewal (2006), 91.
275 Bradford (2012); Meunier and Nicolaidis (2006), 907.
276 See also *infra* at 7.6.2.

European airports?[277] This reveals the inherent economic inequity of PPMs: only those states with substantial market power will reasonably be able to take advantage of PPMs.[278] In light of this equity concern one can understand the opposition by developing countries to PPM-based measures and other analogous 'product' requirements such as environmental packaging and eco-labelling.[279] While the power of markets is an unavoidable reality, the decision tree's emphasis on international support and multilateral solutions with regard to the concern to be protected is one contributing element to strenghten a rules-based approach to trade relations.[280]

However, a powerful market could also entail a responsibility, or even a duty,[281] of the larger states: protection of the commons, of a public good, might require leadership. States who can might have a moral duty to act when others cannot.[282] States might be morally obliged to for instance impose trade restrictions aiming at environmental protection. Caney identifies two types of responsibilities: first-order responsibilities, the obligation for an agent to do its fair share; and second-order responsibilities, responsibilities that seek to induce agents that fail to comply with their first-order responsibilities to step into line.[283] Second-order responsibilities would operate on the principle that 'with power comes responsibility', whereby power can be defined as 'A has power over B to the extent that he can get B to do something that B would not otherwise do'.[284] A strong market can thus become a powerful tool to incentivize conduct through market access, because of a moral responsibility to exploit that power. However, the concept of second-order responsibilities should not be abused by free-riders who want to evade their own first-order responsibilities.

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277 Grewal makes the distinction between 'freedom to choose'- the freedom of choice without an acceptable alternative- from the 'freedom to choose freely'- the freedom of choice over viable alternatives. One could then argue that choice in the absence of acceptable alternatives is equivalent to coerced choice. In the case of aviation, it is very unlikely that cancelling all flights to and from Europe would be a viable alternative for most airlines. Looking at a trade in goods context, the situation is different. While Europe is definitely still one of the major trading blocks, it would really depend on the good in question whether the EU is still the most dominant market.

278 Gaines (2002), 427.

279 Ibid 623; Shaffer (2000).

280 Jonathan Skinner, 'A Green Road to Development: Environmental Regulations and Developing Countries in the WTO' 2010, 20 Duke Environmental Law & Policy Forum 245, 265.

281 Francesco Francioni, 'Extraterritorial Application of Environmental Law' in Karl M. Meessen (ed), *Extraterritorial Jurisdiction in Theory and Practice* (Kluwer 1996) 132.

282 Anne Schwenkenbecher, 'Bridging the Emissions Gap: A Plea for Taking Up The Slack' 2013, 3 Philisophy and Public Issues (New Series) 271.

283 Simon Caney, 'Two Kinds of Climate Justice: Avoiding Harm and Sharing Burdens' 2014, 22 Journal of Political Philosophy 125, 134. See also Joanne Scott, 'The Geographical Scope of the EU's First-Order and Second-Order Climate Responsibilities: An Exploration' 2015, 17 Cambridge Yearbook of European Legal Studies 92.

284 Caney (2014), 141.

The responsibility of the regulating states to 'use' their market for better environmental protection would need to be closely linked with an obligation to ensure that the imposed regime provides the necessary management elements for success for producers that are not able to comply with higher standards, such as technical and possibly financial assistance.[285] Such assistance of developed countries helping developing countries implement environmental policy could be seen as an implementation of the common but differentiated responsibilities principle, recognizing the different responsibilities of developed and developing states in light of common responsibilities.[286] This is not only relevant for the foreign producers, but also an element that can impact the effectiveness of PPMs in contributing to better environmental protection: effective environmental protection strategies need to take into account the availability of resources and ecological conditions, which will vary by country.[287] The current Article XX GATT does not include such a duty for positive obligations, even though positive action in combination with negative action (trade restrictions) can be taken into account in a good faith assessment.[288] Any legal enforceable duty (as opposed to a mere moral duty) would need to agreed upon by the international community of states.

7.6.2 The necessity of environmental trade leverage

An important question in addition to the legal assessment of extraterritorial npr-PPMs is whether the environment can indeed be adequately protected through the use of unilateral trade leverage. Whether PPMs will be effective in addressing environmental concerns, i.e. whether they will indeed lead to better/more protection of the environment, depends on firstly, whether trade leverage is an appropriate tool for environmental protection; and secondly, the specific design, content and feasibility of the measure.[289] As the latter element requires a substantive analysis and scientific expertise that would go beyond my capabilities, the former element deserves closer attention.

In a study on the use and abuse of trade leverage, Parker identifies situations in which outside enforcement is more, or less, needed. He argues that when natural resources are used by a limited group, that are equally dependent on the resource, these users are often able to manage themselves the shared

285 Thomas Cottier, *Renewable Energy and Process and Production Methods* (The E15 Initiative: Strengthening the Global Trade and Investment System for Sustainable Development, 2015) 5; Parker (1999), 119; Charnovitz (2002), 74.

286 Elisa Morgera, 'Ambition, Complexity and Legitimacy of Pursuing Mutual Supportiveness through the EU's External Environmental Action' 2012, 2012/02 Edinburgh School of Law Research Papers, 7. See also for a further discussion of the principle, chapter 7.

287 OECD (1997), 32.

288 Shaffer (2000), 626.

289 OECD (1997), 30; Gaines (2002), 405.

resources, what can be seen in, for instance, regional agreements for managing regional seas. For the (relatively small group of) states involved, there is reciprocity of advantage in seeing that conservation works, and no pressing need for use or threat of leverage.[290] On the other hand, there are the truly global challenges, an example of which can be found in high-seas, distant-water fisheries. Global horizons, changing players, not being dependent on one type of fisheries, high competition: under these circumstances distant water fleets can be expected to devalue long-term, systemic conservation benefits. There is a risk of free-riding: if others make conservation efforts, free-riders can reap the gains without enduring the costs. This applies equally to other global challenges, such as climate change and ozone depletion.[291] In these examples trade leverage (especially by powerful trading partners) can then offer a useful incentive to comply with environmental norms (see for instance the trade measures foreseen in the Montreal Protocol or CITES). However, trade leverage without management regimes does not work. Rather the effectiveness of trade leverage is the degree to which it supports, and is supported by, effective management approaches.[292] Equally, global commons management regimes without trade leverage have been less successful, as illustrated by the ineffectiveness of most high seas fisheries management regimes,[293] or climate treaties.[294] Parker lists a number of global commons management options such as issue linkage (dense interrelationships between countries that permit making tit-for-tat deals); capacity building through technical and financial assistance (especially from developed to developing states);[295] compensation for those who must make most efforts (which can have adverse effects leading to over-production of harm-causing products or producers lining up for incentive payments); high quality regime design (finding the right point of technique and regulation, which will be determinant for the outcome and effectiveness of the policy);[296] or monitoring, reporting and verification of compliance by an international secretariat.[297] Trade leverage and global management of environmental concerns must thus go hand in hand, and trade leverage can be a tool to enforce existing commitments under international (binding or non-binding) regimes.

This thesis has started from the premise that in certain areas international agreement is lacking or has insufficient tools to ensure better environmental protection. Can npr-PPMs be a tool to stimulate better global management? Can PPMs serve as regime generators or norm creators? Can they be a step

290 Parker (1999), 100.
291 Ibid 101.
292 Ibid 107.
293 According to the FAO, approximately 70% of the world's fish stocks are overfished.
294 Parker (1999), 104.
295 See also Cottier (2015), 5.
296 See also OECD (1997), 35.
297 Parker (1999), 104.

towards more international cooperation in preserving environmental concerns? Greater awareness, triggering national and international discourse on the issue, deterring harmful production practices, encouraging international cooperation and participation in increased monitoring of risks and developing environmental risk reduction programs: these elements as recognized in the extraterritoriality decision tree can give a boost to collective decision-making, lead to regime-building and environmental progress.[298] According to Hakimi, trade leverage can help to 'develop new norms, prevent existing norms from eroding, reconcile competing objectives, and strengthen or recalibrate regimes'.[299] The practice and experience of trade leverage measures can also furnish experience upon which other states (and the international community) can usefully draw,[300] and can help to clarify 'gray areas' in international law.[301] Unilateral trade measures are alternatives to an ineffective or non-existent global regime can be very useful and effective to incentivise states to get involved in the development of an international regime to govern the environmental problem concerned. Such involvement would allow states a say in the decision-making (rather than being subject to unilateral measures), and economic disadvantages for producers and exporters can be avoided if the country of export has legislation similar to the country of import. Where legislation between countries of import and export differs, an incentive can be created to discuss and share practices, and increase cooperation. Hakimi has termed this behaviour 'unfriendly unilateralism',[302] which can help to overcome inaction and give a boost to collective decision-making. Depending on the existing international legal framework, trade leverage could be adopted with the objective of enforcing an existing international norm, furthering and strengthening an existing norm, or could serve to create a norm.

However, even if PPMs can be a tool to develop new norms, the current tree might not allow the promotion of little known or newly emerging environmental needs (if there is no international support yet). Even though arguably PPMs are most needed in cases of these 'new' yet unsupported concerns, states should commit to multilateralism, and involve other states before imposing trade measures that will affect other countries and their producers. If states and/or their consumers are genuinely concerned about a concern that does not find international support, a measure could seek justification under the public morals exception of Article XX(a).[303] Notwithstanding its benefits, unilateral action in the form of PPMs can only be a second-best alternative, in the absence of strong international action. Apart from the positive effects that PPMs

298 Ibid 110.
299 Hakimi (2014), 107.
300 Bilder (1981), 80.
301 Schoenbaum (1997), 299.
302 Hakimi (2014), 107.
303 See *supra* at 7.3.

may have on the development of international norms, unilateral environmental action is inherently limited in its efficiency and effectiveness: concerted action is required to achieve a more effective solution.[304] This is particularly true in light of global environmental challenges: in order to protect resources in the global commons, a multilateral solution is optimal.[305]

7.7 Conclusion

The main question of this thesis is whether states can make use of npr-PPMs to address transboundary environmental challenges, or whether WTO law forms a stumbling block for this type of measures with an extraterritorial effect. This chapter has proposed an extraterritoriality decision tree building on lessons learned from other fields of law that can serve as a systematic step-by-step plan to assess extraterritoriality claims within the scope of Article XX GATT.

The following points are worth noting. First, as the basic economic rationale of the WTO is free trade, accepting that countries can have a competitive advantage over others is 'part of the deal'. If states want to address environmental concerns through trade measures, they need to ensure that the measures are based upon legitimate environmental objectives as laid down in the general exceptions. Second, in addition to a territorial link through market access, in order to justify the extraterritorial reach of npr-PPMs, states must demonstrate that their environment is affected by the activities abroad (inward or inward/outward-looking). Based upon the effects doctrine, such environmental effects must be direct, substantial and foreseeable. In contrast to competition law, where there is no relevant body of international competition rules, determining effects in an environmental context can be more lenient: international (soft and hard) environmental law can be taken into account to support state action through trade measures, where the effects are weaker or uncertain in light of environmental complexity. When a measure is fully outward-looking, or a state is only very indirectly affected, the extraterritorial reach of the trade measure cannot be permitted, irrespective of the international support for the norm at issue. Third, when a measure is partly outward-looking but addressing a concern that finds no support yet in any international instrument (soft of hard law), the extraterritorial effect cannot be permitted either so as to respect the multilateral character of the WTO. The only option remaining would then to seek justification under the public morals exception of Article XX(a), of which it has been argued that there is no jurisdictional limitation, but where a thorough assessment of the actual existence (evidence) of the public moral is required. Fourth, the *chapeau* plays an important role, even if the *chapeau* analysis does not form part of the extraterritoriality assessment and is common

304 Bilder (1981), 85.
305 Skinner (2010), 265.

to all trade measures seeking justification. It is under the *chapeau* that the legitimacy of the measure will be determined, taking into account the flexibility of the measure, responsiveness to international actions and good faith. Measures accompanying the PPM such as management tools and technical assistance can be crucial for the success of a PPM. Lastly, despite the structured legal framework, there is no one-size-fits-all model. Due to the nature of environmental concerns, as well as the particularities of the international legal framework, a contextual case-by-case analysis, with respect for the interests of importing and exporting countries, as well as producers and public, is key when assessing the different criteria. Such a contextual analysis can be seen as a continuing duty of reasoned justification on the regulating state in order to demonstrate that the imposed npr-PPMs do meet the set standards.[306]

In conclusion, the WTO does allow for states to impose environmental npr-PPMs where these PPMs either do not violate any of the substantive obligations of the GATT or the other WTO Agreements; or if they do, where they comply with the conditions of the decision tree and the further conditions of the paragraphs and the *chapeau* of Article XX. In other words, extraterritorial environmental trade measures are not automatically inconsistent with WTO law. The WTO rules allow for sufficient regulatory space for states to address their environmental concerns, even when these are located outside the territory of the regulating state, where these concerns lead to environmental effects in the regulating country and where multilateral efforts support the (unilateral) protection of the environmental concern in question.

In the following chapter the decision tree will first be applied to the facts of *US-Shrimp*, in order to determine whether the decision tree could be of added value to the AB's reliance of a 'sufficient nexus'. The tree will furthermore be applied to different examples of EU environmental law. Where relevant, suggestions to further clarify the decision model and/or WTO law will be made.

306 Scott (2014), 26.

8 The application of the extraterritoriality decision tree: Case studies of environmental trade measures

8.1 INTRODUCTION

The previous chapter has proposed an extraterritoriality decision tree, developing a systematic approach to assess environmental npr-PPMs with an extraterritorial effect under Article XX GATT. The tree raises a number of challenges and dilemmas, both on a practical and on a more conceptual level. Practically, the functioning of the tree is dependent on choices made with regard to scientific measurement methods and benchmarks, to determine the existence of environmental effects and of international support.[307] Conceptually, one is faced with certain questions, such as: what to do with little known concerns? Could npr-PPMs play a role in regime formation and norm creation?[308] How to operationalize the principle of common but differentiated responsibilities?[309] How to incorporate the precautionary principle?[310]

This chapter will illustrate the application of the proposed decision tree in concrete cases. The tree will first be applied to the *US-Shrimp* case, discussed at multiple stages throughout this thesis and to date still the landmark judgment with regard to npr-PPMs and extraterritoriality. Faced with the opportunity to shed light on the jurisdictional limitation of Article XX GATT, the AB in *US-Shrimp* only very briefly addressed whether the US could exercise jurisdiction over threatened sea turtles within and outside US waters. The AB referred to some sea turtle species traversing, at one time or another, waters subject to US jurisdiction and found that this led to a 'sufficient nexus' between the turtles and the US, without further defining such nexus.[311] This decision has received its share of criticism over the years, mainly because of the *ad hoc* reasoning with regard to swimming turtles and the vagueness of what could qualify as a 'sufficient nexus'. Applying the extraterritoriality decision tree to the *US-shrimp* case will test whether this model can systematize and substantiate the AB's nexus test to assess measures protecting environmental concerns (partly) outside the territory of the regulating state.

307 See chapter 7.2.2.2; 7.2.3.
308 See chapter 7.6.3.6.
309 Ibid.
310 See chapter 7.2.2.2; 7.2.3.6.
311 AB Report *US-Shrimp* 1998, para.133.

Following the case study of *US-Shrimp*, the decision tree will be applied to three examples of EU environmental law: first, the Illegal, Unreported and Unregulated Fishing (IUU Fishing) Regulation; second, the aviation measures in light of the European Emission Trading System (EU ETS); and third, the Timber Regulation as part of the EU's Forest Law Enforcement, Governance and Trade (FLEGT) Action Plan.[312] Pursuant to Article 11 TFEU, 'environmental protection requirements must be integrated into the definition and implementation of the Union policies and activities, in particular with a view to promoting sustainable development'. Due to this integration requirement, environmental protection forms an important element in the EU's trade policy and vice versa.[313] The examples discussed in this chapter aim to further detect the challenges posed by the interplay between trade and environment, and develop possible amendments to the extraterritoriality model. The purpose of the chapter is not to offer a comprehensive analysis or a normative view of the environmental policies at issue, but rather to focus on how trade law interacts with environmental policy, and how extraterritorial effects of measures addressing transboundary environmental concerns could be assessed in practice.

8.2 *US-SHRIMP* REVISITED

8.2.1 Measure and Context

The *US-Shrimp* case has been extensively discussed throughout this thesis, mainly focusing on the AB's reasoning of a sufficient nexus between the regulat-

312 This list is not exhaustive. More examples of environmental measures with an extraterritorial element can for instance be found in the sustainability criteria for biofuels (see e.g. Emily Barrett Lydgate, 'Biofuels, Sustainability, and Trade-related Regulatory Chill' 2012, 15 Journal of International Economic Law 157; Mairon G. Bastos Lima and Joyeeta Gupta, 'The Extraterritorial Dimensions of Biofuels Policies and the Politics of Scale: Live and Let Die?'35:3 (2014) Third World Quarterly 391; Allan Swinbank and Carsten Daugbjerg, 'Improving EU Biofuels Policy? Greenhouse Gas Emissions, Policy Efficiency, and WTO Compatibility' 2013, 47 Journal of World Trade 813.), animal welfare standards (Howse and Langille (2012); AB Report *EC-Seal Products* 2014; CJEU, *Zuchtvieh-Export GmbH v Stadt Kempten* Fifth Chamber 23 April 2015, C-424/13.) or border carbon adjustments (see e.g. Quick(2011); de Cendra (2006); Sarah Davidson Ladly, 'Border Carbon Adjustments, WTO-Law and the Principle of Common but Differentiated Responsibilities' 2012, 12 International Environmental Agreements 63.) For an interesting overview of policy with a 'territorial extension', see Scott (2014).

313 See also Article 207 TFEU, reiterating the need for the EU's common commercial policy to be conducted 'in the context of the principles and objectives of the Union's external action' and requiring that trade agreements be 'compatible with the internal Union policies and rules'. See also for an interesting overview of policy coherence between EU environmental policy and other policy areas, Marisa Cremona, 'Coherence and EU Environmental Policy' in Elisa Morgera (ed), *The External Environmental Policy of the European Union* (Cambridge University Press 2012) 25; Marin Duran and Morgera(2012).

ing state and the concern addressed by a trade measure. Revisiting the case, this section will take a closer look at the specific measure and its context before applying the extraterritoriality decision tree. This exercise purports to determine whether the decision tree, if it had been available to the AB at the time, would have been of any use in substantiating the AB's decision. Where relevant, the decision tree will be applied to the state of affairs of 1996 (i.e. the existing legal framework at the time of the dispute).

Sea turtles are vulnerable animals, whose existence is being threatened by a number of human causes, such as the destruction of nesting and feeding habitats through coastal development, ocean pollution, entanglement in marine debris, or incidental capture in commercial fisheries, also called bycatch.[314] Shrimp fishers often use a process called bottom trawling, whereby a large net is dragged across the ocean floor.[315] Many sea turtles are accidentally caught in these shrimp trawl nets, and as sea turtles need to reach the surface to breathe, they often drown once caught in the nets.[316] Sea turtles are a fundamental link in marine ecosystems. They help maintain the health of sea grass beds and coral reefs that benefit commercially valuable species such as shrimp, lobster and tuna,[317] and facilitate nutrient cycling from water to land.[318] In addition to their intrinsic value as contributors to biodiversity, sea turtles thus play an important role in marine and terrestrial ecosystems.[319] There are seven recognized sea turtle species, all of which are included in Appendix I of the CITES Convention, and listed on the International Union for Conservation of Nature (IUCN) Red List as vulnerable, endangered or critically endangered.[320] Sea turtles are migratory species and can be found

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314 See among others Rebecca L. Lewison and others, 'Understanding Impact of Fisheries Bycatch on Marine Megafauna' 2004, 19 Trends in Ecology & Evolution 598. (identifying fisheries bycatch as a primary driver of population declines); Bryan P. Wallace and others, 'Impacts of Fisheries Bycatch on Marine Turtle Populations Worldwide: Toward Conservation and Research Priorities' 2013, 4 Ecosphere 40; Bryan P. Wallace and others, 'Global Patterns of Marine Turtle Bycatch' 2010, 3 Conservation Letters 131. (providing a comprehensive overview of reported data on sea turtle bycatch in fisheries worldwide from 1990 to 2008. The total reported turtle bycatch was appr. 85000 turtles, with less than 1% of total fishing fleets observed and reported, so very the true total is very likely to be much higher).

315 The Humane Society, Fact sheet on sea turtle excluder devices, at http://www.humanesociety.org/issues/fisheries/facts/turtle_excluder_device_ted.html.

316 World Wildlife Fund (WWF) on sea turtles, at http://www.worldwildlife.org/species/sea-turtle.

317 Ibid.

318 See e.g. E.G. Wilson and others, *Why Healthy Oceans Need Sea Turtles: The Importance of Sea Turtles to Marine Ecosystems* (2010) 5.at http://oceana.org/sites/default/files/reports/Why_Healthy_Oceans_Need_Sea_Turtles.pdf.

319 US Department of State on sea turtles, at http://www.state.gov/e/oes/ocns/fish/bycatch/turtles/.

320 International Union for Conservation of Nature and Natural Resources, at www.IUCNredlist.org. Looking at regional subpopulations of particular species, a more accurate picture of threats and conservation priorities can be formed, see WWF and Zoo-logical Society of London, *Living Blue Planet Report: Species, Habitats and Human Well-Being* (2015) 11.

throughout the world; five species have been known to nest on US coasts or traverse through US waters.[321] The fact that turtle species are found throughout the world does not mean that all turtles actually migrate worldwide. While some species can travel from Japan to Mexico or from Asia to the US West Coast, other species migrate rather regionally.[322]

The US Endangered Species Act of 1973 (ESA) lists the sea turtle species that occur in US waters as endangered or threatened species, thereby prohibiting their taking within the US, within US territorial waters and the high seas.[323] Research subsequently conducted by the United States National Oceanic and Atmospheric Administration (NOAA) National Marine Fisheries Service (NMFS) during the 1970s and 1980s led to the conclusion that drowning of sea turtles in mechanical shrimp trawls was a major factor in the decline of sea turtle populations worldwide[324] and shrimp trawling operations had been shown to have the greatest impact on sea turtle populations in the Gulf of Mexico.[325] Driven by these findings, NOAA developed fishing gear technology called Turtle Excluder Devices (TEDs) aimed at reducing the catch of sea turtles. TEDs both allow turtles to escape shrimp trawls, and shrimpers to retain their catch.[326] The TED is a metal grid of bars that attaches to a shrimp trawling net. It has an opening at either the top or the bottom, which creates a hatch to allow larger animals such as sea turtles, sharks, and larger fish to escape while keeping shrimp inside. When a heavy object hits the device, the hatch opens, providing an escape route.[327] In 1983, a formal NOAA programme was introduced to encourage shrimp fishermen to use TEDs voluntarily. However, the programme was not successful on a voluntary basis, resulting in the 1987 ESA regulations, requiring all shrimp trawlers to use TEDs in specified areas with high sea turtle mortality.[328]

In 1989, Section 609 of Public Law 101-162 was enacted, providing that shrimp harvested with fishing technology that may adversely affect sea turtles

321 Sea Turtle Conservancy, at http://www.conserveturtles.org/seaturtleinformation.php?page=species_world.

322 SEE Turtles Org., at http://www.seeturtles.org/sea-turtle-migration/. For an example of a sea turtle tracking program, see http://www.conserveturtles.org/satellitetracking.php.

323 ESA 1973 Section 4 (the listed species to be found at http://www.nmfs.noaa.gov/pr/species/esa/listed.htm#turtles); Panel report *US-Shrimp* 1998, para.14.

324 US Department of State on sea turtles, at http://www.state.gov/e/oes/ocns/fish/bycatch/turtles/.

325 Southeast Fisheries Science Centre of the US National Marine Fisheries Service (National Oceanic and Athmospheric Administration – US Department of Commerce), at http://www.sefsc.noaa.gov/labs/mississippi/ted/history.htm.

326 US Department of State, Under Secretary for Economic Growth, Energy and the Environment, at http://www.state.gov/e/oes/ocns/fish/bycatch/turtles/; Panel report *US-Shrimp* 1998, para.15.

327 NGO Humane Society, at http://www.humanesociety.org/issues/fisheries/facts/turtle_excluder_device_ted.html.

328 52 Fed Reg 24244 (29 June 1987).

could not be imported into the US.[329] The import ban did not apply if the US President certified on an annual basis that the harvesting nation had a regulatory programme and an incidental take rate comparable to that of the US.[330] In order for a foreign regulatory programme to be considered comparable to the US programme, it needed to be required for foreign shrimp trawlers to use TEDs at all times.[331] The import ban did thus not apply to shrimp harvested by fishermen using TEDs, nor did the ban apply to shrimp harvested in countries that by policy or law required the use of TEDs. The US Court of International Trade ruled in October 1996 that the US had to apply the import ban as long as the country concerned had not been certified, even when the shrimp had been harvested by TED-equipped trawlers.[332] In other words, according to the ruling, the US had to ban the import of shrimp from any country not meeting US-determined policy conditions.

8.2.2 Extraterritorial Effect

The US measure aims to protect five sea turtles species that are are known to occurr in US waters. However, these species equally live beyond US waters, and might never even cross them. The US measure is equally targeting those turtles that are not found in US waters, by prohibiting the import of shrimp that were not harvested using TEDs in shrimp trawls. By not only looking at the fishing method of the individual fisherman, but also requiring policy changes by the exporting countries, the US measure has an impact on third countries.

329 Fish and Fishing, Maritime Affairs, 16USC 1537, Public Law 101-162 Section 609(b)(1).
330 Section 609 (b)(2).
331 1991 Guidelines, 56 Federal Register 1051 (10 January 1991), and subsequently 1993 Guidelines, 58 Federal Register 9015 (18 February 1993). The scope of Section 609 was originally limited by the 1991 and 1993 Guidelines to specific countries in the wider Caribbean/western Atlantic region, however, in 1995 the US Court of International Trade found this limitation of geographical scope illegal. The 1996 Guidelines extended the scope of Section 609 to shrimp harvested in all countries.
332 The court later clarified that shrimp harvested by manual methods which do not harm sea turtles, by aquaculture and in cold water, could continue to be imported from non-certified countries. (*Earth Island Institute v Warren Christopher*, 948 Fed. Supp. 1062 (CIT 1996)).

8.2.3 The decision tree applied

8.2.3.1 Inconsistency with substantive obligations under GATT

In *US-Shrimp,* a violation of Article XI GATT was not disputed by the US,[333] and the case thus focused on the analysis of Article XX GATT. Article XI GATT provides for the general elimination of quantitative restrictions on import and export restrictions. Quotas or restrictions through import licenses are prohibited and as Section 609 prohibits the import of shrimp and shrimp products from countries that are not certified, the US did not contest that the import ban was inconsistent with Article XI GATT. The required certification of countries could be considered a type of import license. Once a measure infringes upon Article XI, the analysis will turn to the general exceptions under Article XX GATT.

While not argued by the parties, the US measure could also be inconsistent with Article III GATT. It has been discussed previously that the idea that npr-PPMs fall outside the scope of Article III GATT stems from the first non-adopted *Tuna-Dolphin* GATT panel Report.[334] Even if they could be considered under Article III, the second *Tuna-Dolphin* GATT panel found that 'likeness' of products should be determined based on the physical characteristics of a product and not on the manner in which they are processed or produced.[335] The relationship between Article III GATT and Article XI GATT is partly addressed in the Interpretative Note ad Article III. The Ad Note to Article III appears to exclude a simultaneous application of both provisions.[336] Different aspects of a measure may be scrutinized under both articles, however.[337] According to the Ad Note, two conditions must be met for a measure to fall under Article III: firstly, the measure must apply to imported and like domestic products; and secondly, the measure must be enforced at the time or point of importation of the imported product. Domestic measures, even if applicable at the border, remain covered by Article III.[338] If a measure is applied exclusively to imported products and is solely a border measure, then the relevant provision is Article XI.

In the case at hand, the US has domestic laws in place requiring the use of TEDs for shrimp trawlers,[339] and Section 609 extends the domestic rule to foreign fisheries. The import ban on shrimp harvested without the use of TEDs could thus also be considered under Article III GATT. In order to establish a violation under Article III GATT, the products at issue must be like, and less favourable treatment must be accorded to imported products compared to

333 Panel report *US-Shrimp* 1998, para.169.
334 See chapter 2.4. See GATT Panel *US-Tuna (Mexico)* 1991, para.5.14.
335 GATT panel *US-Tuna (EEC)* 1994, para.5.8.
336 See also Panel Report *EC-Asbestos* 2001, paras.8.91.
337 Panel Report *India-Autos* 2001, para.7.224.
338 Mavroidis(2012), 66.
339 16 USC 1531; 50 CFR 223.205.

domestic products. Treatment less favourable entails a modification of the conditions of competition to the detriment of the imported products. Determining likeness can be a crucial point for environmental measures: is shrimp harvested in a turtle-friendly manner like or unlike shrimp harvested in a turtle-unfriendly manner?[340] If likeness is determined through a competitive relationship, it may well be that physically identical products are nevertheless not considered 'like' when consumer preferences point to the contrary.[341] Are turtle-unfriendly shrimp an alternative for turtle-friendly shrimp? This seems very difficult to prove, as identical products are usually in a competitive relationship because they, at least potentially, compete with each other as substitutable products.[342] If turtle-friendly and turtle-unfriendly shrimp are considered like products, treatment no less favourable requires effective equality of opportunities for imported products to compete with like domestic products.[343] Such distinction in treatment can be formal or factual. Arguably, a *de facto* distortion exists due to the more developed US regulations on TEDs, including the voluntary programme on TEDs and the familiarity of US fishermen with the device; in contrast to fishermen in other countries that have no experience with TEDs, nor the financial capacities to develop them.[344] Such distortion would be sufficient to find an inconsistency with Article III, requiring justification under Article XX GATT.

8.2.3.2 Environmental objective and location of the concern

If a violation of substantive GATT obligations is established, justification can be sought under Article XX GATT. The analysis of the paragraphs of Article XX GATT consists of a two-tier test: firstly, the objective must be listed; and secondly, with regard to the relationship between the measure at issue and the societal value pursued, a degree of necessity – depending on the wording of the particular paragraph – must be shown. As explained in chapter 7, the proposed extraterritoriality decision tree finds its legal basis in these criteria. Firstly, when looking at the environmental objective, the question is whether the environmental exception grounds under paragraphs (b) and (g) of Article XX GATT are limited to concerns within the territory of the imposing Member, or whether Members can also rely on the exceptions to address environmental concerns outside their territory. As there is no explicit jurisdictional restriction in Article XX GATT, it has been submitted that it should first be determined whether a measure is inward-looking (environmental harm fully within the territory of the regulating state), outward-looking (environmental harm fully

340 See chapter 2.4.1.2.1.
341 Quick and Lau (2003), 431.; Bronckers and McNelis(2000).
342 Quick and Lau (2003), 432. See also chapter 6.3. on consumer behaviour.
343 Panel Report *US-Gasoline* 1996, para.6.10.
344 Panel report *US-Shrimp* 1998, para.107. See also expert opinions at paras. 5.142-5.168.

outside the territory of the regulating state) or a combination of both.[345] Purely inward-looking measures will have a strong territorial connection and there is little doubt that states can take action to address environmental harm within their territory.[346] Measures addressing a concern outside their territory could still be based on a territorial connection when the environment of the regulating state is substantially affected (inward/outward-looking or environmental effects both within and outside the territory). Without environmental effects on the territory, measures exclusively addressing outward-looking concerns will not pass the threshold for accepted extraterritoriality.

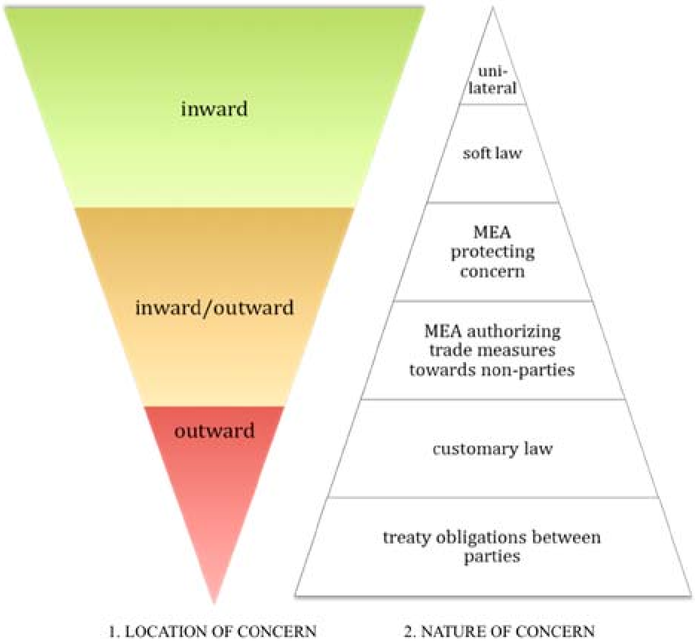

Figure 4. Step 1

Sea turtles are migratory species. Five (out of seven recognized) species of sea turtles are considered as possibly living in US waters and fall under the US regulation. However, even though those species are known to traverse US

345 See chapter 7.2.2.
346 See Lin (2006); Horn and Mavroidis (2008), 1133; Jansen (2000), 312. See also 2001. Environmental damage can lead to state responsibility. During the drafting of the ARSIWA, there was some discussion to include massive environmental pollution among the provisions that would call for universal jurisdiction as violations of *jus cogens*. Such reference was nevertheless not included in the final draft.

waters, not all sea turtles traverse the world, and migration is often regional.[347] While some of the sea turtles in foreign waters as protected by the US measure might traverse US waters, the measure equally covers sea turtles that might not ever do so.[348] The US measure can thus be classified as a partly inward/partly outward looking measure. The AB found a 'sufficient nexus' between the US and the sea turtles – 'some of the turtles swim in US waters some of the time' –, but it failed to further define that requirement (when is a nexus 'sufficient' and why would turtles sometimes swimming in US waters be sufficient). The AB did not require an explicit or strong territorial link as per general international law principles, but applied a less stringent test – without expounding its reasoning. With regard to a required nexus it is submitted that considering the environmental effects of a decreased sea turtle population on the US's territory and/or biodiversity allows for a more systematic and substantiated analysis – an approach particularly relevant when addressing environmental concerns that are less tangible, such as climate change. Furthermore, in line with the AB's implicit acceptance of a weaker link than normally required under public international law,[349] it has been advanced that the requirements of environmental effects to justify environmental trade measures are less stringent than under public international law and competition law.[350]

When simply transposed from those areas of law, the effects doctrine would require environmental effects on the territory to be direct, substantial and foreseeable (in order for an importing country to appeal for a justification under Article XX GATT). However, these requiremens can be more flexible, i.e. less present, in an environmental context due to the international support a concern may find through international environmental law.[351] In contrast to effects under competition law, where national rules are applied extraterritorially in the absence of relevant international rules, there is a body of international (largely soft) environmental law that can support a justification of extraterritoriality for npr-PPMs, in addition to environmental effects on the territory of the regulating state.[352] Thus, even when environmental effects are weaker or more indirect, the additional international recognition of a substantive environmental norm could still lead to a permissible extraterritoriality claim under WTO law. This international characterization is assessed

347 NGO See Turtles, at http://www.seeturtles.org/sea-turtle-migration/; For an example of a sea turtle tracking program, see http://www.conserveturtles.org/satellitetracking.php.
348 See for instance the examples given by the appellees of green turtles in Pakistani waters or olive ridley turtles in Thai waters: Panel report *US-Shrimp* 1998, paras.64. See also the expert opinions, paras. 5.255-5.276.
349 see chapter 4.
350 See chapter 7.2.2. See also chapters 4 and 5 on public international law and competition law.
351 See chapter 7.2.2.2.
352 Ibid.

in the second step of the decision tree.[353] Any justification of an extraterritorial npr-PPM needs a combination of both elements, which can be seen as communicating vessels: stronger effects need less international support, whereas strong international support can make up for weaker effects. In any event, no matter how strongly a state would feel about diversity in the marine ecosystem worldwide, these concerns could not justify restrictions on shrimp imports caught with turtle-unfriendly methods if that state's environment is not affected by a decrease in sea turtle populations. Npr-PPMs addressing environmental concerns located outside the territory of the regulating state without effects on its territory cannot be justified under Article XX GATT, irrespective of the existing international support.

To what extent would a decrease in population or even extinction of sea turtles species affect biodiversity within the US? Scientific expertise is required to answer that question. Sea turtles are said to play an important role in ocean ecosystems by maintaining healthy sea grass beds and facilitating nutrient cycling from water to land.[354] Nevertheless, according to sea turtle experts, our understanding of the ecological functions and impacts of sea turtles is a long way from providing clear answers to the question of their precise effects on biodiversity. There are many differing opinions, but there is little actual evidence to measure the environmental effects of a decline in sea turtle population, both globally and in the US.[355] While it can be assumed that a threat to those sea turtle species that are known to traverse US waters (and might nest on US shores[356]) would lead to more direct and substantial effects to the US ecosystem than to the ecosystems of countries whose waters are not crossed, this cannot be said with certainty. The impact of a decline in sea turtle population can only be considered in the long term. Confirming possible findings on environmental effects by demonstrating a reversal of effects after an increase of sea turtle populations requires even more time: it has been estimated that with consistent use of TEDs, it would take approximately 70 years for threatened sea turtle populations in the southeastern US to increase with an order of magnitude.[357] Where it is unclear how exactly and to what extent ecological damage will materialize, states could rely on a precautionary approach as recognized in international environmental law to act even in cases

353 See below at 8.2.3.3.
354 See e.g. Wilson and others (2010), 5.at http://oceana.org/sites/default/files/reports/Why_Healthy_Oceans_Need_Sea_Turtles.pdf.
355 Interview with Dr. Jack Frazier, Smithsonian Institute, National Zoological Park, Conservation and Research Center, October 2015. For an interesting study on the environmental effects of a decline in sea animals on the earth's nutrient cycle, see Christopher E. Doughty and others, 'Global Nutrient Transport in a World of Giants' 2015, 112 Proceedings of the National Academy of Sciences of the United States (PNAS).
356 See for an overview of nesting sites, http://www.conserveturtles.org/seaturtleinformation.php?page=nestingmap.
357 Larry B. Crowder and others, 'Predicting the Impact of Turtle Excluder Devices on Loggerhead Sea Turtle Populations' 1994, 4 Ecological Applications 437.

of uncertainty.[358] Environmental risks can be very difficult to predict and can often not be specified by a few precisely determined variables, but may instead be driven by the interaction of changes taking place at very different temporal and/or spatial scales.[359] Even though the precise magnitude of the impact of sea turtle extinction is yet unknown, it is clear that sea turtles do play an important role in the marine ecosystem, and not protecting these species will disrupt that natural system. It is likely that a decreased sea turtle population indeed affects the US marine (and possible terrestrial) ecosystem; however, uncertainty remains on how direct or substantial such effects are.[360]

In conclusion, the US TED measure is an inward/outward-looking measure. Sea turtles are migratory species, playing an important role in ocean ecosystems. Whereas there is insufficient evidence today to determine the actual effects of declines in sea turtle populations on the US ocean or terrestrial ecosystem, it is plausible that the US is affected by declines of those turtle species that are known to occur in US waters and may nest on US shores. In case of weaker – i.e. less present – effects, a npr-PPM may find further support in international environmental law in order to be justified under Article XX GATT, as will be discussed in the following section. Should doubts remain about the requisite level of effects, in light of the complexity and long-term materialization of environmental effects, an additional appeal to the precautionary principle could reinforce the justification of the contested measure under Article XX.

358 See chapter 7.2.2.2. The precautionary principle has not yet been recognized by panels or AB as customary international law. Due to the differing views on the matter by scholars, the AB has left the matter unsettled. The AB did recognize the principle as a principle of international environmental law. See AB Report *EC-Asbestos* 2001, paras.123; Panel report *EC-Biotech* 2006, paras.7.87.

359 Cooney and Lang (2007).

360 Interview with Dr. Jack Frazier, Smithsonian Institute, National Zoological Park, Conservation and Research Center, October 2015.

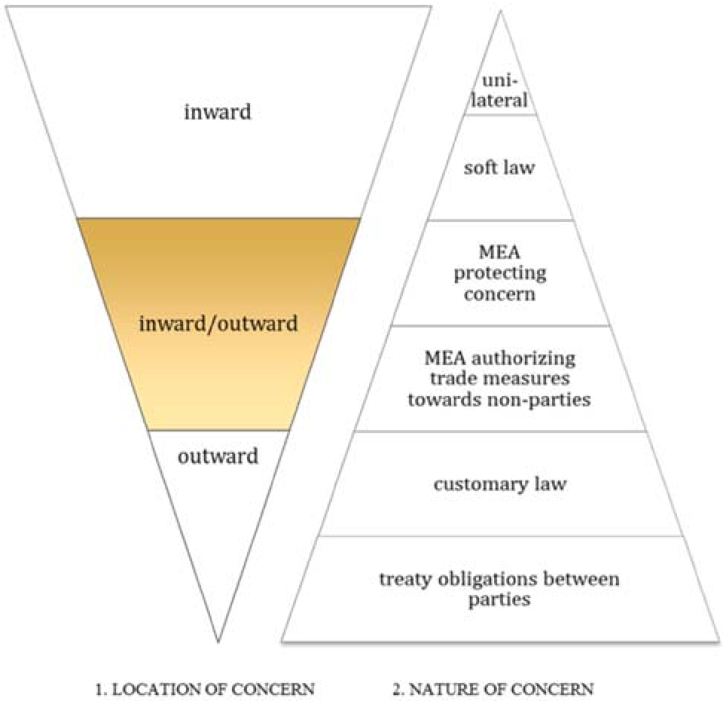

Figure 5. Step 1 US-Shrimp

8.2.3.3 Necessity and recognition of the concern

The second element that needs to be assessed under the paragraphs of Article XX GATT is the degree of necessity.[361] This necessity test involves a three-stage analysis: first, the measure must be suitable to achieve the objective; second, the measure must be necessary to attain the objective; and third, determining the degree of necessity involves a process of weighing and balancing a series of factors, which results in an ad hoc, contextual assessment of each measure.[362] This includes among others a consideration of the trade-restrictiveness of the measure. Necessity takes different forms in the different paragraphs of Article XX GATT. Article XX(b) demands that measures are *necessary* to protect

361 See chapter 7.2.1.2; 7.2.3.

362 See AB Report *Korea-Various Measures on Beef* 2000, para.164; AB Report *EC-Asbestos* 2001; AB Report *Brazil – Retreaded Tyres* 2007, para.182; AB Report *EC-Seal Products* 2014, para.5.169.

the environment, whereas Article XX(g) requires a measure to be *related to* the protection of an exhaustible resource. As argued in chapter 6, international support can be considered as part of the necessity test.[363] Assessing the nature of the concern, or in other words, the level of recognition of a particular concern and/or substantive norm, is helpful to determine the acceptability of the measure at issue. The more common and important the interest, the more easily a measure will be deemed necessary.[364] The more international support for an environmental concern, the easier a measure will 'relate' to that policy objective.[365] As noted by the AB, the WTO agreements are not to be read 'in clinical isolation' from public international law,[366] and the exceptions of Article XX GATT should be interpreted in light of contemporary concerns, which can be evidenced by international instruments of environmental law.[367] The international support found in international environmental legal instruments is considered in combination with the environmental effects on the territory of the regulating state: stronger effects can be justified even with weaker international support, such as soft law instruments; whereas weaker environmental effects require more international support in order to pass the extraterritoriality threshold. States cannot adopt npr-PPMs with extraterritorial effects when the concern at issue is not yet recognized by any international instrument (i.e. unilateral norms).[368]

363 See chapter 7.2.3.
364 AB Report *Korea-Various Measures on Beef* 2000, para.162.
365 AB Report *US-Shrimp* 1998, para.135.
366 AB Report *US-Gasoline* 1996, p.17. See also a recent example where the AB interpreted external treaty provisions in order to interpret WTO law: WTO, *Peru-Additional Duty on Imports of Certain Agricultural Products* AB Report 2015, WT/DS457/AB/R; James Mathis, 'WTO Appellate Body, *Peru-Additional Duty on Imports of Certain Agricultural Products*, WT/DS457/AB/R, 20 July 2015' 2016, 43 Legal Issues of Economic Integration 97, 105.
367 AB Report *US-Shrimp* 1998, paras.129.
368 See chapter 6.2.3.6.

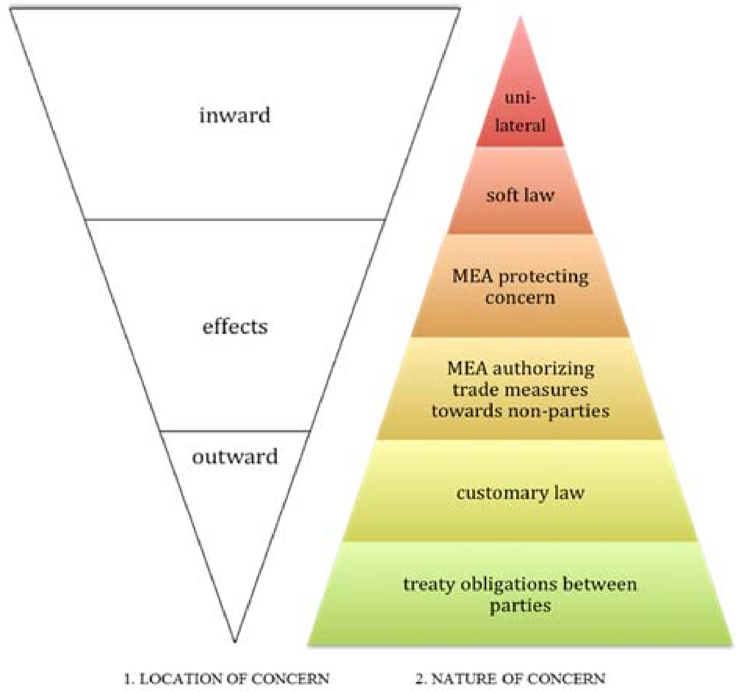

Figure 6. Step 2

In the case at hand, the US measure aimed to protect sea turtles from bycatch of commercial fisheries by requiring the use of TEDs. Thus, firstly, can international support be found for the protection of sea turtles; and secondly, for the use of TEDs? The AB noted when assessing necessity under Article XX(g) (whether the measure related to the conservation of exhaustible natural resources) that the policy of protecting sea turtles is 'shared by all participants and third participants in this appeal, indeed, by the vast majority of nations in the world', referring to the, at the time, 144 parties to CITES, which included the complainants.[369] While CITES recognizes sea turtles as an endangered species, it does not oblige the adoption of specific conservation or protection measures.[370] CITES supports the concern addressed by turtle protection measures, but does not offer support for the specific method of using TEDs. The Convention on the Conservation of Migratory Species and Wild Animals (CMS) recognizes the need to protect sea turtles but emphasizes the importance

369 AB Report *US-Shrimp* 1998, para.135.
370 CITES, 1973, Appendix I.

of cooperation and concerted action with all respective states.[371] The CMS equally does not address specific protection measures.

The use of TEDs is required by the Inter-American Convention for the Protection and Conservation of Sea Turtles (IAC), a Caribbean/Western Atlantic regional agreement with 12 signatories at the time, including the US; but to which none of the complainants were signatory.[372] Next to the IAC parties, a few other countries have opted to require the use of TEDs on shrimp trawl vessels subject to their jurisdictions.[373] Even though the US identified 19 countries in total using TEDs, the fact that the complainants and third parties to the dispute objected to the use of TEDs led the panel to find that the mandatory use of TEDs could not be considered as a customarily accepted multilateral environmental standard.[374] Despite the emphasis of the CMS on concerted action and the provisions of Section 609 calling for the initiation of negotiations to conclude bilateral and multilateral agreements for the protection of sea turtles, the US failed to undertake such negotiations for an agreement on sea turtle conservation techniques with countries outside the Caribbean/Western Atlantic region before the imposition of the import ban.[375]

Applying the decision tree to this case, the international support at the time was limited to MEAs recognizing the need to protect sea turtles as threatened species (CITES, CMS). The US could not rely on the IAC with regard to the complainants, even though the IAC can be taken into account to demonstrate a wider use of TEDs beyond the US. However, in the absence of binding agreements between the US and the complainants on the matter, the question is why such agreement did not exist. Failure to conclude an agreement can be due to a number of reasons, and as the AB later held, it cannot be required that an agreement be *concluded*, rather, the emphasis must be on the efforts

371 Convention on the Conservation of Migratory Species of Wild Animals, UNTS 1651, 1979. In 2001 the Indian Ocean – South-East Asian Marine Turtle Memorandum of Understanding came into effect, as a non-binding intergovernmental agreement to protect sea turtles in the Indian Ocean and the South-East Asia region. The MoU falls under the auspices of the Convention on the Conservation of Migratory Special of Wild Animals (Article IV, para.4).

372 Inter-American Convention (IAC) for the Protection and Conservation of Sea Turtles, 1996, Annex III para.3. The signatories at the time were Mexico, Venezuela, The Netherlands (Antilles), Peru, Brazil, Belize, Costa Rica, Ecuador, Honduras, Nicaragua and Uruguay. Later Argentina, Chile and Panama have joined. The treaty entered into force upon the ratification of the eighth state in 2001. The Convention is open for accession by any state in the Americas and the Caribbean.

373 Panel report *US-Shrimp* 1998, para.123; para.7.57. Next to the signatories of the Inter-American Convention the US identified Colombia, El Salvador, Guatemala, Guyana, Indonesia, Nigeria, China, Thailand, Trinidad and Tobago as countries requiring the use of TEDs, and 'other nations in Asia and Africa had informed the US of their intention or desire to establish TEDs programmes'.

374 Ibid para.7.59. The use of TEDs was also supported by the NGO WorldWildLife (WWF), at http://www.worldwildlife.org/species/sea-turtle.

375 Ibid para.7.56; AB Report *US-Shrimp* 1998, para.166. The AB considered the negotiation efforts under the chapeau, see ibid para.172.

being made in negotiations.[376] Requiring that a multilateral agreement be *concluded* rather than displaying one's good faith in terms of efforts, would give any country party to the negotiations in effect a veto over the other country's actions, which would be unreasonable.[377] However, in the original proceedings no evidence was presented of any US attempts to negotiate such an agreement with the complainants. The fact that the US did not undertake any such efforts weakens a finding of necessity, as the PPM in question could be seen as a circumvention of the multilateral decision-making process. Nonetheless, the existing MEAs offer support for the US to undertake measures with regard to sea turtle protection.

Later, when the panel considered the Article 21.5 DSU claim by Malaysia, the panel found that the US had engaged in negotiations with the complainants and other countries in the Indian Ocean.[378] The US reached agreements with a number of countries, including three out of the four complainants (not Malaysia). In 2000, 24 countries, including the US, adopted the text of the South-East Asian Memorandum of Understanding as a non-binding instrument.[379] The panel noted that the US was in favour of a legally binding agreement, but that it could not be held liable for the fact that other parties favoured a non-binding text.[380] Even though the US measure was found justifiable under Article XX GATT in the compliance proceedings, the US still had the continuing obligation to make serious efforts towards arriving at a binding agreement, to promote further international cooperation and agreement on the protection and conservation of sea turtles.

In conclusion, in light of the existing MEAs recognizing the threat to sea turtles combined with the likelihood of environmental effects on the US ecosystem, the US could indeed undertake action to protect migratory sea turtles that are at least partly located outside US territory. This outcome does not differ from the AB's outcome, which confirms that the AB's analysis was intuitively correct by not requiring a strong territorial link as per general international law principles. However, by considering scientifically determinable effects in combination with the international environmental legal framework, the decision tree has systematized and substantiated the AB's nexus test, providing for a rigorous assessment of environmental npr-PPMs. This two-tier test of effects and legal support warrants a wider scope for states to address extra-

376 As argued in chapter 7.2.3.6, in *US-Shrimp* the AB addressed this point under the *chapeau* as an aspect of the good faith test implied in the *chapeau* prohibition on arbitrary and unjustifiable discrimination. However, I submit it is more appropriate to consider at this stage of the decision tree whether attempts to international negotiations have been made.

377 AB Report *US-Shrimp (Article 21.5 Malaysia)* 2001, para.123.

378 WTO, *United States – Import Prohibition of Certain Shrimp and Shrimp Products, Recourse to Article 21.5 of the DSU by Malaysia* Panel Report 2001, WT/DS58/RW.

379 Under the auspices of the CMS. See Indian Ocean – South-East Asian Memorandum of Understanding, at http://www.ioseaturtles.org/.

380 Panel Report *US-Shrimp (Article 21.5 Malaysia)* 2001, para.5.83.

territorial concerns under Article XX GATT, as it stands, than would be permitted under public international law or competition law.[381]

The finding that the US could adopt measures with regard to sea turtle protection does not necessarily mean that the US could adopt a requirement for the use of TEDs. While the general threat to sea turtles is recognized in international instruments, there is less international support for the binding requirement to use TEDs, which makes it more challenging to accept that part of the measure as necessary. However, the question of the prescribed protection method must be considered separately from the question whether the US can protect sea turtles, even when located outside its territory (i.e. the extraterritorial element): both are subject to a necessity test. Having passed the extraterritoriality threshold, a Member still needs to comply with the other requirements of Article XX, including demonstrating why (the design of) the chosen measure is the least trade restrictive. The US would thus still need to demonstrate that the import ban on shrimp not harvested with TEDs was the least trade restrictive measure to reach the objective of turtle protection. With regard to the contribution of a measure to achieving its stated goal, the AB stated in *Brazil-Tyres* that even where the contribution of a law to protecting an environmental concern such as climate change is not immediately obvious because it is part of a broader program of which the impact can only be evaluated over time, that should not prevent a finding that measure is necessary.[382] In the case at hand, the contribution can indeed only be evaluated over time. Assessing the contribution of TEDs to the protection and conservation of sea turtles remains very challenging: not only due to the lack of systematic data collected,[383] but also due to other factors such as discrepancies between certification and the actual use of TEDs, and the political implications of trade embargoes, making it very difficult to attribute observations such as an increase in sea turtle populations to specific factors.[384]

381 See chapters 3 and 4 for a study on extraterritoriality under public international law and competition law.

382 AB Report *Brazil – Retreaded Tyres* 2007, para.151.

383 There are a few exceptions, such as a study in northern Australia by David Brewer and others, 'The Impact of Turtle Excluder Devices and Bycatch Reduction Devices on Diverse Tropical Marine Communities in Australia's Northern Prawn Trawl Fishery' 2006, 81 Fisheries Research 176.

384 Interview with Dr. Jack Frazier, Smithsonian Institute, National Zoological Park, Conservation and Research Center, October 2015.

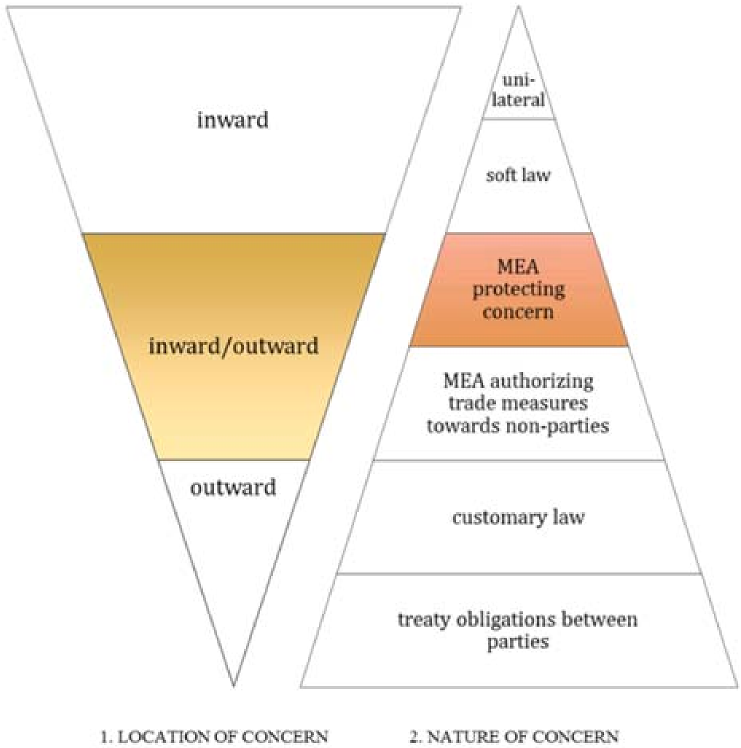

Figure 7. Full model US-Shrimp

8.2.3.4 Chapeau

Following the extraterritoriality analysis, a npr-PPM, like any other trade measure seeking justification, still needs to comply with the good faith requirements of the *chapeau* of Article XX. The analysis of the *chapeau* is thus not specific to npr-PPMs with an extraterritorial objective, but can offer additional safeguards against a possible overreach or abuse. This analysis of the *chapeau* does not form part of the decision tree, but is included in this assessment for the sake of completeness.

In its analysis under the *chapeau*, the AB in *US-Shrimp* focused on the inflexible nature of the measure,[385] the coercive effect of a country-based measure,[386] as well as the failure to engage in serious negotiations with countries

385 AB Report *US-Shrimp* 1998, para.177.
386 Ibid para.162.

other than the IAC parties.[387] Because of these elements, the US measure could not be justified under Article XX GATT. In the compliance proceedings, both the panel and the AB held that due to the good faith efforts by the US to reach multilateral agreement and the increased flexibility of the measure, the measure was compliant with the chapeau and thus could be justified under Article XX.[388]

With regard to the coercive effect on other states, the import ban was first phrased as a combination of a country-based and a process-based measure: either shrimp was harvested by commercial shrimp trawl vessels using TEDs or in countries that were certified by the US government.[389] Such certification could be granted where countries had adopted a regulatory programme for the protection of sea turtles that was comparable to that of the US and where the average take rate of bycatch was comparable to the US rate.[390] The US Court of International Trade ruled in October 1996 that the US had to apply the import ban to all shrimp imports as long as the country of origin had not been certified, thus including to TED-caught shrimp. In other words, the US had to ban the import of shrimp from any country not meeting certain policy conditions.[391] The US measure thus became a purely country-based or government-policy measure.[392] The panel reasoned that country-based measures cannot be accepted under the *chapeau* of Article XX, because 'if one WTO Member were allowed to adopt such measures, then other Members would also have the right to adopt similar measures on the same subject but with differing, or even conflicting, requirements', which would be a serious threat to the multilateral trading system.[393] For that reason the panel found the country-based measure to fall outside the scope of Article XX.[394] The AB did not fully agree with the panel's reasoning and emphasized that government-policy standards could in principle be justified under Article XX; however, the measure must be sensitive to the conditions in each country and the administrative process must meet minimum standards of transparency and procedural fairness. In complying with the AB decision, the US measure was revised to permit shrimp imports so long as the shrimp are harvested under conditions that do not adversely affect sea turtles, and to provide more flexibil-

387 Ibid para.166. The parties to the Inter-American Convention were at the time apart from the US: Brazil, Costa Rica, Mexico, Nicaragua and Venezuela.

388 Panel Report *US-Shrimp (Article 21.5 Malaysia)* 2001, paras.5.42;5.84;5.104. ; AB Report *US-Shrimp (Article 21.5 Malaysia)* 2001, para.144. Revised guidelines for the implementation of section 609 of Public Law 101-162.

389 See chapter 7.4.2.

390 1996 Guidelines, 61 Federal Register 17342 (19 April 1996), Pub L 101-162 para 609(b)(1), (b)(2), 103 Stat 1038.

391 Panel report *US-Shrimp* 1998, paras.7.6; 7.16.

392 Charnovitz (2002), 95.

393 Panel report *US-Shrimp* 1998, para.7.45.

394 Ibid para.7.51.

ity in the recognition of foreign programmes eligible for US certification.[395] Under the revised guidelines, it became possible to acquire shrimp from countries that had not received a country-wide certification under the government policy standard, when harvested using TEDs, allowing for a process-based standard in combination with the country-based standard.[396] Since every fisherman could in principle choose to use TEDs and export, the US measure should mainly be considered as a process-based measure.

With regard to the flexibility of a measure, the AB noted that conditioning market access on the adoption of a programme *comparable in effectiveness* (rather than *essentially the same)* can be allowed under Article XX as it allows the exporting Member to adopt a regulatory programme that is suitable to the specific conditions prevailing in his territory.[397] Discrimination results 'when the application of the measure at issue does not allow for any inquiry into the appropriateness of the regulatory program for the conditions prevailing in exporting countries'.[398]

8.2.4 Challenges

The main challenge for the extraterritoriality decision tree emerging from the analysis of the US sea turtle measure is the difficulty to determine environmental effects in light of insufficient scientific evidence. The number of factors and complex interaction to be considered in marine ecosystems, the challenge of systematic data collection, and the time span required for this type of research (long-term observations) make it an extremely difficult and enormous task to collect and present conclusive evidence. If there is a lack of scientific evidence demonstrating or rebutting the existence of environmental effects on the territory, and states were to adopt a precautionary approach to the conerns at issue, they must act with caution when the adopted measures affect other states. The wide international support for the conservation of sea turtles shows that even with the limited available knowledge, the international community is concerned about protecting the species. Even without knowing the exact magnitude of environmental effects, in light of what is known about the role of sea turtles in marine ecosystems, it is plausible that marine (and possibly also terrestrial) ecosystems will suffer. As already noted above, due

395 Revised Guidelines for the Implementation of Section 609 of Public law 101-162, 64 Federal Register 3086 (8 July 1999). The US Court of Appeals for the Federal Circuit issued a ruling in June 1998 that vacated the CIT decision of 1996 that would not allow the import of TED-harvested shrimp in countries that were not certified under Section 609.

396 Panel Report *US-Shrimp (Article 21.5 Malaysia)* 2001, para.5.107; Charnovitz (2002), 98.

397 AB Report *US-Shrimp (Article 21.5 Malaysia)* 2001, para.144.

398 AB Report *US-Shrimp* 1998, para.165. See for the expert opinions on the socio-economic factors that need to be taken into account when requiring the use of TEDs, Panel report *US-Shrimp* 1998, paras.5.142.

to the fact that the targeted sea turtle species are known to occur in US waters, it is similarly plausible that the US ecosystem will be affected. US action with regard to sea turtles, even those located outside its territory, can thus be permitted under the decision tree. However, in light of the lack of evidence and uncertainty about the environmental effects of different protection methods, it is crucial to put strong emphasis on international cooperation and deliberation, as well as consideration of alternative measures. In the absence of strong international support and agreement, the flexibility of a measure, and accepting alternative protective initiatives, is key. Environmental protection measures should be adaptable to the environmental, social and economic conditions prevailing in the countries or areas where they are to be applied.[399] The safeguards of the paragraphs of Article XX with regard to the design of the measure as well as the *chapeau* of Article XX play an important role in protecting against overreach by WTO Members, even where the extraterritoriality threshold is passed.

The outcome from the application of the decision tree to *US-Shrimp* does not differ from the AB's findings. However, where the AB relied on the 'sufficient nexus' between the US and the turtles, an approach that has been criticized for its ad hoc approach that might not hold in disputes dealing with less tangible environmental concerns, the decision tree allows for a more systematic and robust assessment of trade measures with extraterritorial effects. Where environmental effects on the territory of the regulating state are weaker, additional support for action can be found in international instruments of hard and/or soft law. A precautionary approach could furthermore be adopted where effects are still uncertain in light of the complexity and long-term materialization of environmental effects. *US-Shrimp* was already considered good precedent from an environmental perspective; but the current analysis has demonstrated that the AB's position was – despite its shortcomings – commendable from a legal perspective as well. The AB was correct in accepting weaker territorial effects within the regulating state under WTO law than would be required under public international law (and competition law), but should have expressed more clearly that and why it did so. The application of the decision tree to *US-Shrimp* has not only confirmed the AB's position but has been strengthened and systematized it by considering environmental effects on the territory in combination with support for the concern at issue in international environmental law.

399 Rio Declaration of Environmental and Development, UN Doc A/CONF151/26 (vol I) / 31 ILM 874 (1992), 1992, Principle 2. See also Panel report *US-Shrimp* 1998, para.7.52.

8.3 Illegal, Unreported and Unregulated Fishing

8.3.1 Measure and Context

The international community has increasingly realized the damaging economic, social and environmental impacts of illegal, unreported and unregulated fishing[400] (IUU Fishing). Illegal fishing activities include fishing activities by vessels that have no permission from the state in whose waters they are fishing; or, fishing vessels flying the flag of states that are party to a relevant regional fisheries management organization, but operating in contravention of the measures adopted by that organization; or, fishing vessels acting in violation of national laws applicable in maritime waters or international obligations held by the flagstate.[401] Unregulated fishing means fishing activities in the area of application of a relevant regional fisheries management organization by fishing vessels flying the flag of a state not party to that organization, contravening the measures of that organization; or in areas where there are no applicable measures in force, but where vessels are acting in a manner not consistent with responsibilities of the flag state for the conservation of living marine resources under international law.[402]

IUU Fishing constitutes a threat to the sustainable exploitation of living aquatic resources and to marine biodiversity, jeopardizing international efforts to promote better ocean governance.[403] Destructive fishing methods cause damage to fisheries habitats and result in high levels of by-catch of non-target species, such as marine mammals, turtles and seabirds.[404] Furthermore, IUU Fishing also has an impact on the socioeconomic situation of those fishermen who do abide by the rules on conservation and management of fisheries resources.[405] High demand for specific seafood products (e.g. shark fin), the global character of fisheries production chains allowing for money laundering, and the anonymity and transactional speed that exists within global markets for vessel flags, crews and vessels allow in particular for IUU Fishing. IUU

400 IUU fishing encompasses a wide range of fishing activities which can be considered in violation of or without regard to applicable international, regional or national fisheries regulations and standards. For a comprehensive definition and scope of illegal, unreported and unregulated fishing, see Mary Ann Palma, Martin Tsamenyi and William Edeson, *Promoting Sustainable Fisheries: The International Legal and Policy Framework to Combat Illegal, Unreported and Unregulated Fishing* (Brill/Nijhoff 2010) Chapter 2; Jens Theilen, 'What's in a Name? The Illegality of Illegal, Unreported and Unregulated Fishing' 2013, 28 International Journal of Marine and Coastal Law 533.

401 Council Regulation (EC) No 1005/2008 of 29 September 2008 Establishing a Community System to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing (IUU Regulation), 2008, Article 2(2).

402 Ibid Article 2(4).

403 Ibid recital (3).

404 Palma, Tsamenyi and Edeson(2010), 11.

405 IUU Fishing Regulation, 2008, recital (6).

Fishing can even overlap with other forms of maritime crime such as piracy and drug smuggling.[406] IUU Fishing can have negative consequences for food security as it can lead to the collapse of fisheries resources.[407] In light of these concerns, the Food and Agriculture Organization (FAO) adopted an international plan of action in 2002 to prevent, deter and eliminate IUU Fishing.[408] This voluntary Action Plan provides for a toolbox with measures with regard to e.g. monitoring, enforcement and economic incentives that can be used by flag states, coastal states and market states to combat IUU Fishing within their jurisdiction.[409] Overall, governance of the global fisheries economy is a decentralized, but relatively coherently coordinated, system of treaties and non-binding international and regional fisheries instruments and private initiatives by NGOs such as WWF and Greenpeace.[410]

Traditionally flag states have held a prominent position with respect to fisheries regulation and enforcement.[411] However, fishing vessels can circumvent IUU Fishing obligations by flying the flag of state that is not party to any regional agreement (this can be a flag of convenience, without any genuine link to the flag state). Flag states that are unwilling or unable to regulate vessels flying its flag considerably complicate fisheries management.[412] Indeed, if all flag states would adopt and implement principles contained in the United Nations Convention on the Law of the Sea (UNCLOS), the UN Fish Stocks Agreement,[413] the FAO Compliance Agreement and the FAO Code of Conduct, IUU Fishing would not be as problematic as it is today. Trade

406 Martin Tsamenyi and others, *Fairer Fishing: The Impact on Developing Countries of the European Community Regulation on Illegal, Unreported and Unregulated Fisheries* (Commonwealth Secretariat 2009) 7.

407 Palma, Tsamenyi and Edeson(2010), 4.

408 FAO, International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing, 2001. The Action Plan was adopted within the framework of the 1995 FAO Code of Conduct for Responsible Fisheries.

409 FAO International Plan of Action, Title IV.

410 See e.g. the setting up of a vessel black-list by Greenpeace at http://www.greenpeace.org/international/en/campaigns/oceans/pirate-fishing/Blacklist1/ or the development of tracking technology for vessels on onboard surveillance by WWF at https://www.worldwildlife.org/threats/illegal-fishing.

411 Olav Schram Stokke, 'Trade Measures and the Combat of IUU Fishing: Institutional Interplay and Effective Governance in the Northeast Atlantic' 2009, 33 Marine Policy 339, 340.

412 Ibid 341.

413 This agreement strengthens the duty to cooperate with other states on high seas fisheries by providing that only states that are members of a regional fisheries regime, or that agree to apply the conservation and management measures taken under such a regime, shall have access to the fishery. Enforcement mainly lies with flag-state responsibilities, such as preventing its vessels from engaging in high-seas fishing without a permit. Under the agreement, port states can conduct inspections of vessels and port states can prohibit landings or transshipment when it has been established that the catch has been taken in a manner contrary to the conservation and management measures on the high seas.

measures can be effective tools in finding a solution to this problem.[414] Rather than focusing on flag states, trade measures will focus primarily on port states, particularly on port control where access to the market can be limited or prohibited. While fishing vessels may avoid the authorities of flag states and coastal states, they must come into port to bring their fish to market, so port state measures may be more effective in deterring IUU Fishing because of their commercial importance.[415] The port is the market entry point, so it is a crucial economic choke point in the IUU Fishing supply chain. Whereas vessels could easily fly under a convenient flag to circumvent national or international regulation, the market choice is of great economic importance.

The EU is the world's largest importer of fish and fish products.[416] In an effort to improve global fisheries' sustainability and address IUU Fishing, the EU adopted the IUU Fishing Regulation 1005/2008 which stated explicitly that, as the world's largest market for fishery products, the 'Community has a specific responsibility in making sure that fishery products imported into its territory do not originate from IUU Fishing'.[417] The IUU Fishing Regulation provides for a range of control and enforcement measures primarily aimed at keeping illegally caught fish off the EU market and has been designed to ensure proper control of the supply chain for imported fishery products. The regulation applies to all IUU Fishing 'within the territory of the EU Member States, within Community waters, within maritime waters under the jurisdiction or sovereignty of third countries and on the high seas'.[418] In other words, all fishing activities on sea fall within the scope of the regulation, but fishing activities in internal waters of third states seem to be excluded.

Key elements of the IUU Fishing Regulation with trade implications are port control over third country fishing vessels, catch certification requirements, the establishment of a Community IUU vessel list, and the establishment of a list of non-cooperating third countries. The port control of third country vessels entails that landings or transshipments will only take place in desig-

414 Linda Chaves, *Illegal, Unreported and Unregulated Fishing: WTO-Consistent Trade Related Measures to Address IUU Fishing* (2000) para.14.

415 Blaise Kuemlangan and Michael Press, 'Preventing, Deterring and Eliminating IUU Fishing: Port State Measures' 2010, 40 Environmental Policy and Law 262, 264.

416 Developed states absorb more than 80% of total world fisheries imports in value terms, of which the EU accounts for appr. 40%, and Japan and the US for around 35%. Developing states are the largest exporters, at around 60% in quantity of total fish exports. Cumulative net exports of fisheries products from developing states far exceed export earnings from major commodities such as coffee, bananas, and rubber. See UN, FAO, Fact Sheet, the International Fish Trade and World Fisheries, June 2008, www.fao.org.

417 IUU Fishing Regulation, 2008, recital (9). The regulation was adopted in the framework of the Common Fisheries Policy and the Community Plan of Action for the Eradication of IUU Fishing, COM(2002) 180 final. The Regulation entered into force in 2010.

418 Ibid Article 1(3).

nated ports and upon presentation of a catch certificate.[419] Such catch certificate must be validated by the flag state of the fishing vessel, certifying that catches have been made in accordance with the applicable laws, regulations and international conservation and management measures[420] – as any flag state has a duty under international law that fishing vessels flying its flag comply with international rules on conservation and management of fisheries resources. Flag states that want to grant certificates must notify the European Commission on their applicable law and the necessary checks their public authorities can carry out.[421] The Commission shall cooperate with third countries to facilitate this process. Without a valid catch certificate, fishery products cannot be imported into the EU.

The Commission can furthermore put vessels suspected of IUU Fishing on a 'black list', including both vessels flying the flag of third countries and EU member states. This blacklist results among others in a prohibition to fish in Community waters and no authorization will be granted to enter into a port of a member state, except in case of *force majeure* (EU flagged vessels may only access their home port). EU member states shall also refuse the granting of their flag to IUU Fishing vessels.[422]

Next to the IUU vessel list, the European Commission can establish a list of non-cooperating third countries. A country may be identified as such if it 'fails to discharge the duties incumbent upon it under international law as flag, port, coastal or market State and to take action to prevent, deter and eliminate IUU Fishing'.[423] This duty includes ratification of the international IUU Fishing instruments, as well as membership to regional fisheries management organizations.[424] The importation into the EU of any fishery products caught by fishing vessels flying the flag of such countries shall be prohibited and catch certificates by that flag state will not be accepted.[425] It may be that the import ban only applies to a particular species or stock. The Commission can grant cautionary 'yellow cards', after which it engages in dialogue and

419 Such certificate must contain the name of the fishing vessel, home port and registration number, call sign, license number, information about the fishery product (type of species, catch areas, dates, weight, applicable conservation and management measures) and a declaration on export and import of the fishery product (if applicable). Catch documents and related documents validated in conformity with catch documentation schemes adopted by an RFMO will be accepted by the EU as catch certificates. Ibid Article 13.

420 Ibid Article 12.

421 Ibid Article 20.

422 Vessels can ask to review their status and to be removed from the list if evidence can demonstrate that the vessel did not engage in IUU fishing. Otherwise, a vessel can only be removed from the list if at least 2 years have lapsed since its listing during which time no further reports of alleged IUU fishing have been received (ibid Article 28.).

423 Ibid Article 31(3). Specific constraints of developing countries, the capacity of the competent authorities, the circumstances, the gravity of the IUU fishing manifestation etc. are taken into account by the Commission (ibid Article 31 (4.).

424 Ibid Article 31(5).

425 Ibid Article 38(1).

cooperation, before handing out the actual 'red card' that puts a third country on the list of non-cooperating third countries (thereby banning all imports from fishing vessels flying their flag). Countries such as Fiji, South Korea and Philippines have been yellow-carded, but were delisted after adopting new legislation and improving their monitoring and control systems. Belize was red-carded but also saw the threat of sanctions lifted after making the required changes. Sri Lanka, Cambodia and Guinea among others were red-carded in 2014, and their fisheries products are still banned from import.[426]

8.3.2 Extraterritorial effect

The extraterritorial effect of the EU IUU Fishing Regulation is apparent from the fact that EU port and market access is made dependent on fishing activities occurring in the High Seas or in the maritime waters of other states.[427] The EU thereby extends her prescriptive jurisdiction beyond the vessels flying an EU flag and vessels fishing in EU waters and Exclusive Economic Zones (EEZ). Surely, the measure is only activated once port or market access is sought. So are all npr-PPMs with an extraterritorial effect, which makes that element of little help in determining whether this extension of European jurisdiction is justified.

8.3.3 The decision tree applied

8.3.3.1 Inconsistency with substantive obligations under GATT

The IUU Fishing Regulation raises several questions under GATT. The prohibition of the importation or exportation on the basis of non-compliance with the catch certification requirement could be seen as a quantitative restriction under Article XI GATT, leading to an inconsistency and requiring the need for justification under Article XX. The catch certificate, containing information on

426 Fiji, Panama, Togo, and Vanuatu were yellow carded in 2012, South Korea in 2013, Philippines in 2014. Belize was red carded in 2014. All were delisted and had the threat of sanctions lifted (October 2013; South Korea and Philippines in April 2015). Sri Lanka, Cambodia and Guinea were also red carded in 2014, and their fisheries products are still banned from import. Ghana and Curacao received a yellow card in November 2013, and are developing new legislation and improving their monitoring, control and inspection systems. As a result, the process of dialogue and cooperation with these three countries is still ongoing. Papua New Guinea received a formal warning by the Commission in June 2014, whereas Solomon Islands, Tuvalu, Saint Kitts and Nevis and Saint Vincent and the Grenadines were formally warned in December 2014. Thailand was yellow carded in April 2015.

427 Theilen (2013), 548.

e.g. vessel, catch area and date, authorizations, etc.,[428] must be validated by the flag state. This certificate could be considered as a (non-automatic) import licensing requirement under Articles 1(1) and 3 of the WTO Import Licensing Agreement, as the submission of documentation is required as a prior condition for importation.[429] The competent authorities of the importing member states (mostly fisheries agencies or services[430] rather than customs) must check the certificate.[431] Import licenses are considered quantitative restrictions, incompatible with Article XI GATT.[432] Likewise will the import ban pursuant to the flag state black list result in a violation of Article XI GATT.

However, even if enforced at the border, the IUU Fishing Regulation could also be considered an internal measure under Article III GATT, if the Regulation were applicable to both imported and domestic products.[433] The Regulation applies to fishing within and outside the EU, and to EU and third country fishing vessels.[434] In order to determine whether it violates Article III:4 GATT, likeness of the products and less favourable treatment of the imported products must be established. With regard to likeness, IUU Fish products and non-IUU Fish products (i.e. legally harvested fish) can be considered directly competitive or substitutable. It could perhaps be argued that based on consumer preferences (depending on evidence and market research) these products are not like,[435] or an argument could be made based on compliance with international obligations: illegally harvested products cannot be like legally harvested products.[436] In the absence of any conclusive guidance on those points, based on the other criteria such as physical characteristics, tariff classification and end use, illegal and legal fish can be considered directly competitive. The group of imported products (products that seek importation) is like the group of domestic products (products that seek market access domestically) as both include in principle illegally and legally harvested fish products. Imports of

428 IUU Fishing Regulation, 2008, Annex II.
429 Despite this finding, the catch certificate requirement has not been notified by the EU to the Committee on Import Licensing.
430 List of Member States and their competent authorities concerning Articles 15(2), 17(8) and 21(3) of Council Regulation (EC) No 1005/2008 (OJ 2015/C 93/07).
431 IUU Fishing Regulation, 2008, Article 17.
432 The exemptions for fisheries under Article XI:2(c) GATT do not apply to the catch certificates at hand. See also WTO, *India – Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products* Panel Report 1999, WT/DS90/R, para.V.75.
433 Ad Note to Article III GATT.
434 IUU Fishing Regulation, 2008, Article 1.
435 See chapter 2.
436 See for an argumentation on likeness of legal and illegal products in the context of Timber, Duncan Brack, Alexander Chandra and Herjuno Kinasih, *The Australian Government's Illegal Logging Prohibition Bill: WTO Implications* (2012) 9; Dylan Geraets and Bregt Natens, 'The WTO Consistency of the European Union Timber Regulation' 2014, 48 Journal of World Trade 433, 443; Andrew Mitchell and Glyn Ayres, 'Out of Crooked Timber: The Consistency of Australia's Illegal Logging Prohibition Bill with the WTO Agreement' 2012, 29 Environmental and Planning Law Journal 462, 468.

IUU Fish products are prohibited, as is bringing domestically caught IUU Fish products on the market. The question is whether the IUU Fishing Regulation then accords less favourable treatment to the group of imported products, so as to protect domestic products. Treatment no less favourable requires an effective equality of competitive opportunities, or in other words, a determination whether the conditions of competition are modified to the detriment of the group of imported products.[437] As the regulation applies both to imported and domestic fish products, there is no *de jure* violation. As the catch certification requirement applies both to vessels flying EU and third country flags, and all vessels can be blacklisted, there is no a *de facto* violation either. All certificates must be validated by the flag state, and refer back to among other international and regional conservation and management measures.[438] While there might be differences in the particular procedures in the flag state, the EU measure does not accord protection to domestic products. With regard to inspections and port measures for EU vessels, that are not included in the regulation, differentiation between EU vessels and third country vessels does not lead to less favourable treatment of the third country vessels either, as the member countries are already subject to at least equally strict rules for inspection and reporting.[439] Accordingly, the IUU Regulation is unlikely to violate Article III GATT.

An argument could be made that the EU rules violate Article V GATT on freedom of transit. The EU herself brought that argument in a dispute with Chile over swordfish: Chile prohibited the transshipment of swordfish catches (taken from the High Seas bordering Chile's EEZ) from foreign and Chilean vessels in Chile's ports when the catches were made in contravention of Chile's swordfish conservation rules.[440] The prohibition to unload the fish in Chile's ports was seen as a significant obstacle to further export. The EU is now imposing a similar measure: fish cannot be unloaded or transshipped in EU ports without a valid catch certificate in order to deter and prevent IUU Fishing. Because of the reference to international obligations in the catch certificates, the EU could argue that the regulations imposed are nevertheless 'reasonable' under Article V:4 GATT. If that is not the case, the denial of port access for transshipment without a valid certificate could be considered a violation of Article V GATT.

437 See chapter 2.
438 IUU Fishing Regulation, 2008, Articles 15.
439 For all EU fisheries legislation, see http://ec.europa.eu/fisheries/cfp/index_en.htm.
440 WTO, *Chile – Measures Affecting the Transit and Importing of Swordfish* withdrawn, WT/DS193. The case was withdrawn in 2010 after mutual agreement between the parties was reached after a decade of negotiations. See e.g. Peter-Tobias Stoll and Silja Vöneky, 'The Swordfish Case: Law of the Sea v Trade' 2002, 65 Zeitschrift für Ausländisches Öffentliches Recht und Völkerrecht 21, 21.

8.3.3.2 Environmental objective and location of the concern

Assuming that a violation of substantive WTO rules is established, the extraterritoriality question arises when seeking justification under Article XX GATT. Measures aiming to protect fish stocks could fall both within Article XX(b) and XX(g) as necessary for the protection of animal life and health, and relating to the conservation of exhaustible resources.[441] The question is whether there is a jurisdictional limitation to these environmental objectives: are paragraphs (b) and (g) limited to environmental concerns within the territory of the regulating state, or can members also rely on these exceptions to address concerns outside their jurisdiction?

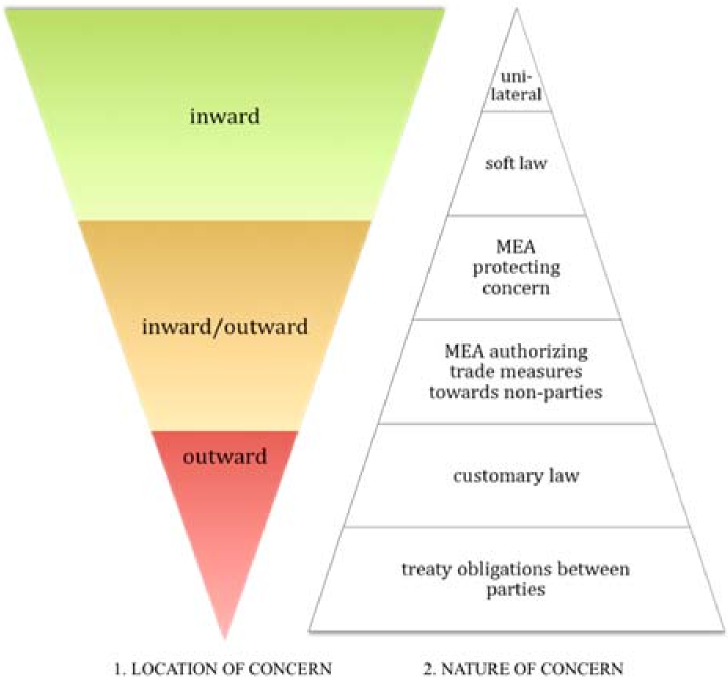

Figure 8. Step 1

The proposed extraterritoriality decision tree first considers the location of the concern. The IUU Fishing Regulation has an inward- and an outward-

441 FAO, *The State of World Fisheries and Aquaculture: Opportunities and Challenges* (2014). According to the report fish stocks are exhaustible. See also AB Report *US-Shrimp* 1998; GATT Panel *US-Tuna (Mexico)* 1991; GATT panel *US-Tuna (EEC)* 1994.

looking purpose, as it addresses both the depletion of fish within EU waters and outside EU waters. Following the AB's reasoning in *US-Shrimp*, finding a 'sufficient nexus' due to the some sea turtles traversing US waters, all migratory fish stock and species which may at one time or another traverse EU waters would lead to the establishment of a sufficient nexus. In response to the unconvincing sufficient nexus requirement, I propose to look at the environmental effects on the territory of the imposing country. In this case, evidence would need to demonstrate that the depletion of certain fish stock has an impact on biodiversity, marine ecosystems or has, for instance, affected EU food supply, thus leading to direct, substantial and foreseeable effect on EU environment. If fishing resources are shared and clearly present in EU waters, evidencing an impact on biodiversity should not be a big hurdle.[442] If no direct and substantial environmental effects on EU territory could be demonstrated (for instance when a certain species is concerned that is not migratory and has little impact on global biodiversity), the measure will be considered outward-looking and will not pass the extraterritoriality threshold. In such case, states must seek other means to incentivize others states as well as producers to take action against IUU Fishing.

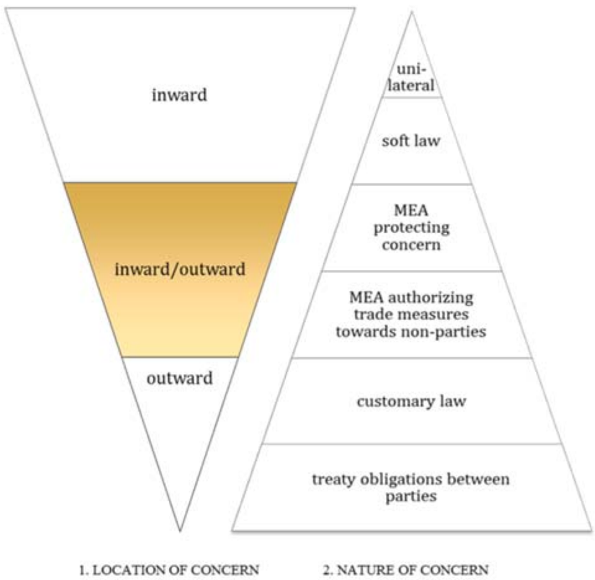

Figure 9. Step 1 IUU Fishing

442 See for instance FAO, 'The State of World Fisheries and Aquaculture: Opportunities and Challenges', 2014; FAO/UNEP, Report of the Expert Meeting on Impacts of Destructive Fishing Practices, Unsustainable Fishing, and Illegal, Unreported and Unregulated (IUU) Fishing on Marine Biodiversity and Habitats, September 2009, FAO report nr 932, FIRF/R932; Africa Progress Panel, 'Protect our Fisheries', at www.africaprogresspanel.org/fishing; WWF on overfishing, at www.worldwildlife.org/threats/overfishing.

8.3.3.3 Necessity and recognition of the concern

With regard to requirement of 'related to' or necessity, determining the degree of necessity involves a process of weighing and balancing a series of factor, which results in an ad hoc, contextual assessment of each measure.[443] In *Korea-Beef*, the AB stated that the more vital or important the concerns are that a measure is intended to protect, the easier it would be accept that measure as necessary.[444] In that light, the necessity requirement is linked to the international support for an international concern.[445] The more common the interest, the more easily a measure will be considered necessary. Necessity refers to the question whether less-trade restrictive measures can reach the same objective. A measure adopted by a WTO Member based upon or suggested by international instruments would find additional support for deeming a measure necessary. If a measure goes beyond what is proposed by international instruments, the imposing Member would need to demonstrate why it opted for this specific measure in order to demonstrate necessity.[446]

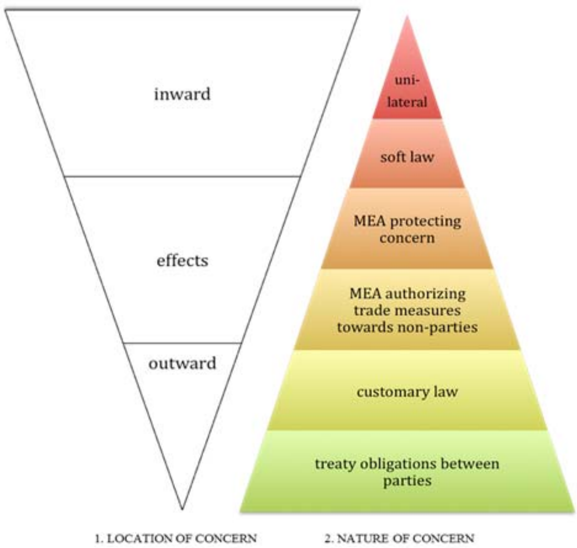

Figure 10. Step 2

443 AB Report *Korea-Various Measures on Beef* 2000; AB Report *EC-Asbestos* 2001; AB Report *Brazil – Retreaded Tyres* 2007.

444 AB Report *Korea-Various Measures on Beef* 2000, para.162.

445 See chapter 7.2.3.

446 The burden of proof to come up with less-trade restrictive alternatives is on the complaining party. See AB Report *Brazil – Retreaded Tyres* 2007, para.156. AB Report *US-Gambling* 2005, para.309; AB Report *EC-Tariff Preferences* 2004, para.88; AB Report *Thailand-Cigarettes (Philippines)* 2011, para.180.

The general concern about sustainable fish resources management and IUU Fishing is widely recognized through international and regional instruments, some of which are binding while others are non-binding. UNCLOS provides for the principles of sustainable and shared use of the high seas.[447] The FAO Compliance Agreement[448] and the UN Fish Stocks Agreement[449] are both binding instruments in a broader fisheries framework. Soft-law instruments include the FAO Code of Conduct for Responsible Fisheries[450] and different UN resolutions on sustainable fisheries.[451] Whereas these instruments do not deal directly with IUU Fishing, many issues dealt with in these instruments are related to IUU Fishing, providing the catalyst for the development of more specific instruments to address IUU Fishing, starting with the 2001 FAO Plan of Action (IPOA-IUU).[452] There are also environment-related instruments of relevance to combating IUU Fishing, such as CITES,[453] CMS,[454] the Convention of Biological Diversity (CBD)[455] and the Agenda 21.[456]

The FAO IPOA-UU is the most specific international instrument to IUU Fishing. It is a voluntary, non-binding agreement, but many of its provisions have been given binding legal effect through their incorporation in national, regional and international legal instruments. Furthermore, even if the instrument was initially non-binding, some norms could develop into customary international law. International instruments forming part of the broader framework to implement the IPOA-IUU include the FAO 2005 Rome Declaration on IUU

447 United Nations Convention on the Law of the Sea, UNTS 1833; 21 ILM 1261, 1982, Part VII

448 FAO, Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas, UNTS 2221; 33 ILM 968, 1993. This agreement focuses among others on the issue of reflagging.

449 UN, Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, 2167 UNTS 88; 34 ILM 1542 1995.

450 FAO, Code of Conduct for Responsible Fisheries, Adopted at the 28th Session of the FAO Conference, Rome, 31 October 1995.

451 See e.g. Resolution 46/215 on a global moratorium on large-scale pelagic drift-net fishing; Resolution 49/116 on unauthorized fishing in zones of national jurisdiction and its impact on the living marine resources; Resolution 49/118 on fisheries by-catch and discards and their impact on the sustainable use of living marine resources.

452 FAO International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing, 2001. See also Palma, Tsamenyi and Edeson(2010), 57.

453 CITES, 1973.

454 Convention on the Conservation of Migratory Species of Wild Animals, 1979.

455 UNCED, Statement of Principles for a Global Consensus on the Management, Conservation and Sustainable Development of All Types of Forest, 1992.

456 United Nations Conference on Environment and Development, Agenda 21, 1992, Chapter 17 (Protection of the Oceans.

Fishing,[457] the FAO Model Scheme of Port State Measures[458] and the binding Agreement on Port State Measures to Combat IUU Fishing.[459]

Next to the international instruments, a number of regional instruments also regulate IUU Fishing through regional fisheries management organizations (RFMOs). States can either become a member of RFMOs or agree to apply their conservation and management measures. Non-members or non-participants in RFMOs are still under the international obligation to cooperate in the conservation of straddling and migratory fish stock, as laid down by other agreements.[460] Relevant RFMOs[461] include the Commission for the Conservation of Southern Bluefin Tuna (CCSBT), the Northwest Atlantic Fisheries Organisation (NAFO), the Northeast Atlantic Fisheries Commission (NEAFC[462]), the Commission for the Conservation of Antarctic Marine Living Resources (CCAMLR), the Indian Ocean Tuna Commission (IOTC), the Inter-American Tropical Tuna Commission (IATTC), the Western and Central Pacific Fisheries Commission (WCPFC) and the International Commission for the Conservation of Atlantic Tunas (ICCAT). The measures adopted by these RFMOs include the establishment of IUU vessel lists (for vessels flying the flag of non-contracting parties, as well as contracting and cooperating non-contracting parties), monitoring systems, port inspection schemes and trade-related measures such as prohibition of fish landings from IUU vessels.

The specific measures adopted by the EU IUU Fishing Regulation are mostly based on the mentioned international and regional instruments. For instance, the port state measures find support in the binding FAO Agreement on Port State Measures, as well as a number of RFMOs.[463] These port state measures include specific designation of ports, advance notice of port entry, vessel inspections and prohibition of landing and transshipment of vessels engaged

457 The 2005 Rome Declaration on Illegal, Unreported and Unregulated Fishing, Adopted by the FAO Ministerial Meeting on Fisheries, Rome, 12 March 2005. The Declaration was adopted to enlist the commitment of states to fully implement international fisheries instruments.

458 FAO, Model Scheme on Port State Measures to Combat Illegal, Unreported and Unregulated Fishing, 2007.

459 FAO, Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing, Appendix V of the FAO Council, Hundred and Thirty-Seventh Session, Rome, 28 September-2 October 2009, Report of the 88th Session of the Committee on Constitutional and Legal Matters (CCLM), 23-25 September 2009, CL 137/5, 2009 2009.The Agreement will enter into force thirty days after the twenty-fifth instrument of ratification, acceptance, approval or accession.

460 UN Fish Stocks Agreement, 1995, Article 17; 1993, preamble; Agenda 21, 1992, para.17.60.; FAO Code of Conduct, Article 7.1.5.

461 There are over forty regional fisheries organizations, of which ten have been established under FAO and the others created under international agreements between three or more contracting parties. These organizations can be divided into scientific research organizations, advisory and regional coordination organizations and management organizations (RFMOs).

462 For discussion of the NEAFC regime, see Stokke (2009).

463 See among others ICCAT, NAFO, NEAFC, CCAMLR and IOTC.

in IUU Fishing.[464] Furthermore, similar measures have been adopted by a range of developed and developing countries in their national legislation,[465] as well as in Plans of Action of regional cooperation.[466]

Catch certifications or other documentation that is required to accompany fish in order to identify its origin is commonly used in RFMOs. ICCAT, IATTC, IOTC and CCSBT have trade documentation schemes in order; CCAMLR requires catch documentation; NAFO and NEAFC have requirements for product labeling similar to a catch certification.[467] The vessel black list is a common and effective measure adopted by RFMOs to combat IUU Fishing.[468] Members and cooperating non-members of the RFMOs shall take the necessary measures to ensure that no business is conducted with these black listed vessels and that proper actions are taken. ICCAT, NEAFC, CCAMLR, IATTC and IOTC require their members and cooperating non-members to prohibit the imports of fish from vessels on the IUU list.[469]

The non-cooperating states black list could be seen as more trade-restrictive, as such a measure discriminates against vessels that operate consistently with international regulations but fly a 'wrong' flag.[470] However, similar measures

464 Interestingly it almost came to a WTO dispute between Chile and the EU on port access restrictions, but the case was withdrawn after mutual agreement was reached (DS193). In 1991 Chile unilaterally banned imports of swordfish to protect dwindling South Pacific stocks. In 2000 the EU requested consultations with Chile on the issue. One of the claims of the EU was precisely the lack of international agreement supporting the Chilean measure.

465 See for an overview of national legislation on port state measures, FAO Database on Port State Measures (Portlex), at http://www.fao.org/legal/databases/portlex/en/. See for instance US Magnuson-Stevens Fishery Conservation and Management Reauthorisation Act prohibits import of fishery products from offending countries (16 USC 1826(a), (b)(3) and (b)(4)); New Zealand fisheries Act 1996, Amendment Act no 2 1999, Art113A; Australia, Fisheries Management Act 1991, Division 5A, Subdivision AA; Norway, Legal Order 6 August 1993.

466 For instance the Lake Victoria Fisheries Organization adopted a Plan of Action in 2004; the Southern African Development Community has made a statement of Commitment in 2008; the Southeast Asian Region adopted a Regional Plan of Action to Promote Responsible Fishing in 2007.

467 See also IPOA-IUU, 2001, para.69.

468 For instance ICCAT, IATTC, IOTC, WCPFC, SEAFO, NEAFC, NAFO and CCAMLR have established IUU vessel lists. See also ibid para.81.4. Several regional regimes for tuna management (ICCAT, IOTC) have even introduced white lists (as opposed to black lists), whereby only explicitly named vessels are allowed to land or transship their catches in member-state ports.

469 ICCAT, Recommendation by ICCAT to establish a list of vessels presumed to have carried out IUU Fishing activities in the ICCAT Convention Area, 02-23 GEN, 2003, para.9(e); NEAFC, Scheme of Control and Enforcement, Article 45(2)(e); CCAMLR, Conservation Measure 10-07 (2006), Article 11(f); CCAMLR, Conservation Measure 10-06 (2008), Article 18(vii); IATTC, Resolution C-05-07, Article 9(e); IOTC, Resolution 09/03, para.12(e).

470 Stokke (2009), 346. While this is true, in practice states can very easily reflag, and those vessels who are sincere in there intentions and indeed comply with IUU obligations could reflag to another state that is not blacklisted. Surely, there might be other considerations taken into account by vessels when deciding under which flag to fly, however, flags of

have been adopted by, for instance, the ICCAT, and thus find at least some international support. According to the IPOA-IUU, 'trade-related measures should only be used in exceptional circumstances, where other measures have proven unsuccessful to prevent, deter and eliminate IUU Fishing, and only after prior consultation with interested States'.[471] The EU clearly refers to international obligations before blacklisting a non-cooperating country. In light of the multiple negotiations and available instruments, the EU could argue that other measures have proven unsuccessful when a country fails to respect its international obligations with regard to IUU Fishing. A country is only blacklisted after at least six months of formal dialogue and consultation between the European Commission and the affected state after being yellow-carded. Nevertheless, due to the limited international support, this part of the measure will be under closer scrutiny under the extraterritoriality decision tree, even if inward environmental effects of IUU activities outside the EU can be shown within the EU.[472]

Applying the extraterritoriality decision tree to this analysis, the broad international support can be classified within the categories of treaty obligations between parties, MEAs authorizing trade measures towards non-parties, MEAs protecting the concern at issue as well as soft law. As the key elements and trade-related measures of the IUU Regulation find their support in binding treaty obligations, as well as MEAs recognizing trade measures, it can be concluded that the international support for and recognition of the concern would further justify the extraterritorial effects of the measure, and the extraterritoriality threshold would be passed for the IUU Fishing Regulation. This conclusion carries most weight for measures taken against imports of fish species explicitly covered under a treaty or RFMO, but similar measures taken on the basis of MEAs, recognizing the concern of species not covered by RFMOs, would also seem to have sufficiently widespread support through the more general agreements on IUU Fishing.

Specific elements in the design of the IUU Fishing Regulation, unrelated to the extraterritorial nature of the regulation, that could furthermore come up in a necessity assessment,[473] can for instance relate to port control require-

convenience with suboptimal environmental standards should not be actively supported. Such a blacklist can thus act as an incentive, either for the vessels to pressure the flag state to adapt its legislation if they want to fly that flag, or for the flag state to take action if they do not want to lose vessels flying their flag. It could also be argued that controlling each vessel is more resource-intensive than blocking all vessels flying a certain flag, and thus less effective. The sole measure of checking vessels would thus not reach the same objective to effectively combat IUU fishing.

471 IPOA-IUU, 2001, para.66.

472 See *infra* at 8.3.4. Tsamenyi and others(2009), xiv.

473 See chapter 7. The extraterritoriality threshold finds its legal basis in the paragraphs of Article XX, but passing the threshold does not invalidate the rest of the analysis of Article XX, whereby the measure as a whole must not be more trade-restrictive than necessary, as well as the conditions of the chapeau of Article XX.

ments for vessels, whereby one could wonder whether the IUU Fishing Regulation foresees in sufficient safeguards to protect third country vessels against delays in the procedures. A requirement that inspections 'cause minimum disturbance to the vessel's activities and cause no deterioration in fish quality' was proposed by the Commission but not included in the final IUU Fishing Regulation. Clear and transparent procedures must be developed, in order to avoid inconsistencies and discrimination in the implementation of port state measures.[474] The FAO Agreement on Port State measures also recognizes that a balance must be sought between combating IUU Fishing and appropriate safeguards against abuse of port state powers. Furthermore, with regard to the blacklisting of IUU vessels, whereas this listing is in line with international fisheries agreements, the application of interim measures may be necessary to ensure procedural fairness.[475]

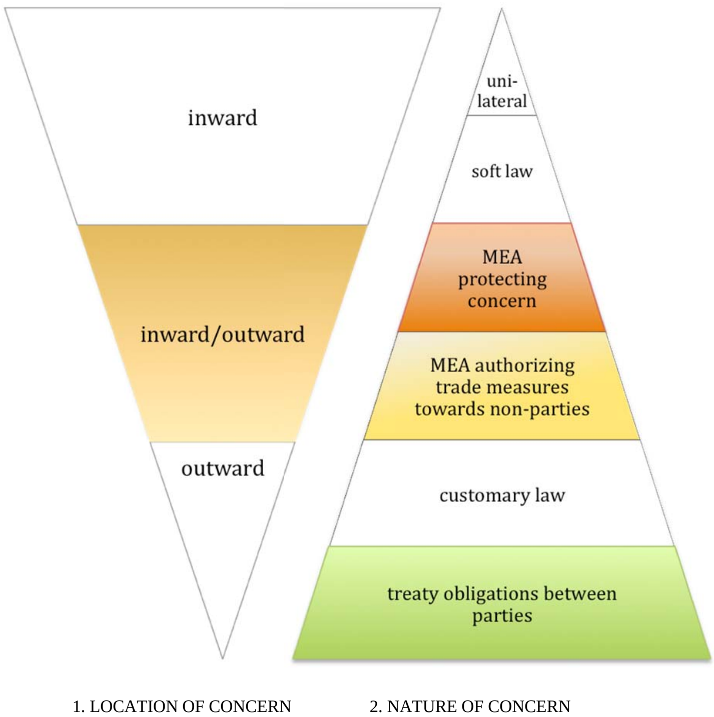

Figure 11. Full model IUU Fishing

474 Tsamenyi and others(2009), 46.
475 Ibid 50.

8.3.3.4 Chapeau

Even if a measure passes the extraterritoriality threshold, and the extraterritorial aspect of the measure is no impediment for justification of a measure, a trade measure seeking justification still needs to comply with the conditions of the *chapeau* of Article XX GATT. The *chapeau* consists of three elements, which can be interpreted both together and apart: a measure shall not discriminate arbitrarily nor unjustifiably between countries where the same conditions prevail, nor shall the measure be a disguised restriction on international trade. These conditions can be seen as an expression of the principle of good faith,[476] which in this context can be reflected in a duty to cooperate and show respect for multilateral and international interests. In *US-Shrimp,* the AB emphasized the need for flexibility in a measure, as rigid and coercive measures are considered inconsistent with the *chapeau*.[477]

With regard to international interests and respect for multilateralism, the IUU Fishing Regulation follows up on multiple attempts at the regional and international level to come to agreement to combat IUU Fishing, whereby trade-restrictive measures have only been adopted after less restrictive measures have failed (such as control and inspection measures by the flag state). As has been outlined above, a range of binding and non-binding instruments prescribe actions against IUU Fishing. The EU in its Regulation has mainly implemented these obligations. Trade restrictions embedded in a multilateral framework make it more difficult to tailor provisions for protectionist reasons.

The measure can be considered coercive in the sense that it refers to the international obligations, and expects third country flag states and fishing vessels to comply with these obligations. These obligations are thus not unilaterally imposed – rather the EU acts as an enforcer of these international norms through its IUU Fishing Regulation. The flag state blacklist in particular is coercive in the sense that it requires countries to adapt their policies (rather than only target fishing vessels), and bring them in line with their international obligations. Non-cooperating states whose imports will be banned are identified based on transparent, clear and objective criteria relying on international standards,[478] whereby specific circumstances related to the resources and development level of the country can be taken into account. Depending on the transparent and objective application of these criteria, this would not lead to discrimination between countries where the same conditions prevail. However, for reasons of effectiveness and the fact that these countries are 'coerced' into 'adopting' their own international obligations rather than unilaterally imposed requirements, it can be argued that a country-based measure could be accepted in this case. Any blacklisting is furthermore combined with assist-

476 AB Report *US-Shrimp* 1998, para.158.
477 See chapter 2 and chapter 7.
478 IUU Fishing Regulation, 2008, recital (31).

ance and cooperation between the EU and the affected states and a state will first be warned by a yellow card before an import ban (red card) is made effective. The IUU Fishing Regulation has been mentioned in the WTO's Trade Policy Review, but no aspect has been indicated as potentially problematic.[479]

The vessel black list, leading to port measures against vessels, is not arbitrary as objective and well-defined criteria can be determined in order to place vessels on the list. However, at this point the EU vessel list is solely based on vessel lists of RFMOs. In that regard it should be noted that each RFMO has its own procedures and criteria in placing vessels on a list, which at times can be politically motivated.[480] It is important that objective criteria are applied and provisions for transparency are respected. Where the Regulation is more specific in its requirements, the Regulation allows for sufficient flexibility: for instance, with regard to the required catch certificates, the EU will also accept similar catch documentations and related documents that are in conformity with catch documentation schemes by RFMOs.[481]

8.3.4 Challenges

The main challenge for the extraterritoriality discussion in the IUU Fishing case study is to what extent states can, through trade measures, enforce international obligations held by other states. The flag state blacklist as established by IUU Fishing Regulation goes beyond what is required by international law and is only rarely applied by RFMOs. As has been explained above, all imports from states on this blacklist are banned by not accepting any catch certificate issued by that state. As no fish or fish products can be imported without such a catch certificate, all imports from those states are effectively banned. In order to be delisted, the EU requires states to implement their international obligations related to sustainable and IUU Fishing and adopt the necessary legislation. By targeting states rather than fishing vessels, the purpose of the measure is to create an effective incentive for the state to adapt its legislation. The EU is not just demanding that fish are being harvested with respect to certain standards, but is demanding real legislative change. As the EU only requires the implementation of existing international obligations of the targeted states,[482] and does not force them to implement new and/or EU-imposed (higher) norms

479 See e.g. Trade Policy Review European Union, WT/TPR/S/284, 28 May 2013, p.129; Trade Policy Review European Communities, WT/TPR/S/214, 6 April 2009, p.114.

480 Isabella Lövin, *European Parliament Report on Combating Illegal Fishing at the Global Level – The Role of the EU* (2011) 14. However, regional schemes are open to regime outsiders (cooperating states) and a trend can be discerned that provisions for transparency are more respected. Stokke (2009), 347.

481 IUU Fishing Regulation, 2008, Article 13.

482 As outlined in e.g. the FAO Compliance Agreement, the UN Fish Stocks Agreement, the relevant RFMOs etc. See *supra* at 8.3.3.3.

(norm creation), the EU is acting with the objective of international norm enforcement and regime support.[483]

While this blacklisting is indeed proving to be rather effective, in light of the number of states that have been yellow- or red-carded in recent years and have effectively adapted their legislation,[484] such actions remain controversial. Can the EU act as an enforcer of international obligations? Is it a duty of powerful markets, to use their commercial weight to the benefit of the global environment?[485] If it can be accepted that states have the right not to use their market for detrimental effects on health or environment, can it then also be accepted that states will use their market as an incentive for other states to take positive action? If powerful states act upon such duty or responsibility, they should also have the responsibility to ensure that the targeted states are able to comply with the requirements, by offering assistance and the necessary management tools. In the case at hand, that is indeed what the EU has been doing: countries can ask for assistance at any stage, but after receiving a formal warning (yellow card), the Commission will engage in formal assistance and cooperation to help the targeted countries, in order to avoid a red card. Also after a country has received a red card will the EU assist that country in taking the necessary measures so that the ban can be lifted.

Applying the decision tree to cases of norm enforcement, I would propose the following. Firstly, how strict is the requirement of norm enforcement? Does a measure require that products are produced in line with international standards? If so, the regular steps of the decision tree can be followed: if a measure is inward-looking or there are environmental effects on the territory of the regulating state, and the required standards find support for the concern in international instruments, the measure would pass the extraterritoriality threshold. Does the measure, however, require a legislative change, in other words coerce another country into changing its laws (country-based measure),

483 Unilateral trade measures as critical elements of a solution to the global fisheries problem, such as the EU's IUU Fishing Regulation, are suggested by Rashid Sumaila, *Trade Policy Options for Sustainable Oceans and Fisheries* (The E15 Initiative: Strengthening the Global Trade and Investment System for Sustainable Development, 2016) 17; Margaret A. Young, *Trade-Related Measures to Address Illegal, Unreported and Unregulated Fishing* (The E15 Initiative: Strengthening the Global Trade and Investment System for Sustainable Development, 2015).

484 Fiji, Panama, Togo, and Vanuatu were yellow carded in 2012, South Korea in 2013, Philippines in 2014. Belize was red carded in 2014. All were delisted and had the threat of sanctions lifted (October 2013; South Korea and Philippines in April 2015). Sri Lanka, Cambodia and Guinea were also red carded in 2014, and their fisheries products are still banned from import. Ghana and Curacao received a yellow card in November 2013, and are developing new legislation and improving their monitoring, control and inspection systems. As a result, the process of dialogue and cooperation with these three countries is still ongoing. Papua New Guinea received a formal warning by the Commission in June 2014, whereas Solomon Islands, Tuvalu, Saint Kitts and Nevis and Saint Vincent and the Grenadines were formally warned in December 2014. Thailand was yellow carded in April 2015.

485 See chapter 7.6.1.

then I would argue that such a measure could be accepted only to the extent that what is required is already a binding obligation on the targeted country. The country black list as regulated by the EU IUU Fishing Regulation, could thus be accepted to the extent that the required legislative changes are based solely upon binding international obligations under international and regional fisheries agreements.

8.4 Aviation in the European Emission Trading System

8.4.1 Measure and Context

One example of EU environmental regulation that has received a lot of attention since its adoption is the inclusion of aviation emissions into the European Emission Trading System (EU ETS).[486] The EU's rule that required emissions of all flights departing from or arriving at a European airport to be included in the EU ETS has led to strong international protests[487] which eventually urged the Commission to put a hold on the full application of the Directive, limiting its scope to intra-EEA flights.[488] To allow time for negotiations on a global-market-based measure applying to aviation emissions under the ambit of the International Civil Aviation Organization (ICAO), the EU ETS requirements are currently suspended for flights to and from non-European countries.[489]

The inclusion of aviation into the EU ETS will be studied as the main example of the extraterritorial reach of measures taken in light of climate change action. In April 2015, a Regulation was adopted to monitor and report emissions from shipping, in order to contribute to designing an international system to reduce emissions in the maritime sector.[490] From 1 January 2018,

486 Directive 2008/101/EC of the European Parliament and of the Council of 19 November 2008 amending Directive 2003/87/EC so as to Include Aviation Activities in the Scheme for Greenhouse Gas Emission Allowance Trading within the Community, 2008.

487 See Grand Chamber, *Air Transport Association of America and Others v Secretary of State for Energy and Climate Change* CJEU 21 December 2011, C-366/10. See below: New Delhi Declaration; China's threat to cancel Airbus order; The US adopted the 'European Union Emissions Trading Scheme Prohibition Act' in 2011.

488 Decision No 377/2013/EU of the European Parliament and of the Council of 24 April 2013 derogating temporarily from Directive 2003/87/EC establishing a scheme for greenhouse gas emission allowance trading within the Community, 2013.

489 The Commission is to report back on the issue after the 2016 ICAO Assembly. Ibid Article 5.

490 Regulation (EU) 2015/757 on the monitoring, reporting and verification of carbon dioxide emissions from maritime transport, and amending Directive 2009/16/EC, 2015. See Article 1, 'This Regulation lays down rules for the accurate monitoring, reporting and verification of carbon dioxide (CO2) emissions and of other relevant information from ships arriving at, within or departing from ports under the jurisdiction of a Member State, in order to promote the reduction of CO2 emissions from maritime transport in a cost effective manner.'

companies will have to monitor CO_2 emissions for each ship[491] and from 2019, they will have to submit an emissions report concerning the CO_2 emissions for each ship.[492] Market-based mechanisms to reduce emissions would then only be foreseen in the medium to long term, with a strong preference for finding a multilateral solution.[493] As the monitoring obligations extend to all distances covered, also those outside waters under EU jurisdiction, a similar extraterritorial element as under the aviation directive is present. However, the nature of the obligations differs ships are only subject to a minotoring requirement at this state, whereas aviation submissions were already to be included into the EU ETS. I will refer back to the shipping example where relevant. The scope of the EU ETS might be broadened in the future, an example of which may be found in the Commission proposal to require emission allowances for importers of goods that would take emissions of the production process into account, so as to address carbon leakage.[494] No legislative proposal has yet been drafted in this respect.

The issue of climate change needs little introduction. While scientists differ on the exact scope of the consequences of climate change and on the required contributions, there is no doubt that too little is being done today, while emissions continue to increase globally.[495] Climate change is an outstanding example of a global concern, affecting us all, but some countries and people

491 Ibid Article 8. Companies are free to determine the monitoring method, as long as the method is consistent and accurate.

492 Ibid Article 14. Member States shall set up a system of penalties for failure to comply with the monitoring and reporting obligations (ibid Article 20.).

493 European Commission, *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: Integrating Maritime Transport Emissions in the EU's Greenhouse Gas Reduction Policies* (2013) 8. There is currently no international agreement on shipping emissions, but the International Maritime Organization (IMO) adopted in 2011 the Energy Efficiency Design Index (EEDI), which sets compulsory energy efficiency standards for new ships aiming to prevent air pollution from ships, and the Ship Energy Efficiency Management Plan (SEEMP), a management tool for shipowners. There is no agreement yet on any market-based measure to limit or reduce emissions. The Commission's 2011 White Paper on transport puts forward that the EU's emissions from maritime transport should be cut by at least 40% of 2005 levels by 2050. International shipping is not yet covered by the EU's emission reduction target.

494 Directive 2009/29/EC of the European Parliament and of the Council of 23 April 2009 amending Directive 2003/87/EC so as to improve and extend the greenhouse gas emission allowance trading scheme of the Community, 2009, recital (25); European Commission, *Analysis of Options to Move Beyond 20% Greenhouse Gas Emission Reductions and Assessing the Risk of Carbon Leakage* (2010) 11; Kati Kulovesi, Elisa Morgera and Miquel Munoz, 'Environmental Integration and Multi-Faceted International Dimensions of EU Law: Unpacking the EU's 2009 Climate and Energy Package' 2011, 48 Common Market Law Review 829, 860; Nicole Ahner, 'Final Instance: World Trade Organization – Unilateral Trade Measures in EU Climate Change Legislation' 2009, EUI Working Papers; Quick(2011); Yassen Spassov, 'EU ETS: Upholding the Carbon Price Without Incidence of Carbon Leakage' 2012, 24 Journal of Environmental Law 311.

495 Intergovernmental Panel on Climate Change, *IPCC Fifth Assessment Report* (2013-2014). The IPCC reports can be found at http://www.ipcc.ch/. See also Bacchus (2016), 10.

considerably more than others. The most affected victims are not necessarily the largest emitters (rather the opposite) and those who are less affected cannot be allowed to ignore the effects of their actions. Every state has the responsibility to take action in accordance with its capabilities, as recognized in a number of international agreements, starting with the United Nations Framework Convention on Climate Change of 1992 (UNFCCC).[496]

International negotiations to mitigate the effects of climate change have been developed under the multilateral framework established by the UNFCCC.[497] Under this agreement, the Kyoto Protocol was adopted in 1997 (entered into force in 2005), by which a number of industrialized countries[498] agreed to reduce their greenhouse gas emissions by an average of 5,2% below 1990 levels in the period 2008-2012.[499] The Kyoto Protocol distinguishes between developed countries carrying a heavier burden (Annex I countries) and non-Annex I countries, because the former are considered principally responsible for the high level of historical greenhouse gas emissions, and because they have greater capacity to take actions to reduce emissions. This distinction is an expression of the principle of 'common but differentiated responsibilities and respective capabilities' (CBDRRC).[500]

In December 2012, the Doha Amendment to the Kyoto Protocol was adopted, introducing commitments for a second commitment period running from 2013 to 2020. The parties[501] agreed to reduce emissions by at least 18%

496 UNFCCC, 1992. The notion that a state is responsible for pollution originating within its borders but traversing into another jurisdiction is also one of the most developed principles of international environmental law. See Nash(2012), 167.

497 UNFCCC, 1992.

498 37 countries and the EU committed to these reductions. For a list of participants, see http://maindb.unfccc.int/public/country.pl?group=kyoto. A significant absentee is the US.

499 Kyoto Protocol, 1997. The Kyoto Protocol was adopted in Kyoto, Japan, on 11 December 1997 and entered into force on 16 February 2005. The detailed rules for the implementation of the Protocol were adopted at COP 7 in Marrakesh, Morocco, in 2001, and are referred to as the 'Marrakesh Accords.' Its first commitment period started in 2008 and ended in 2012.

500 UNFCCC, 1992, preamble; Article 4. The principle of CBDR-RC is one of the biggest challenges of environmental law, because it is debated how to best interpret and apply this principle of differentiation. The distinction between Annex 1 and non-Annex 1 countries can said to be no longer a reflection of the actual situation today, especially in light of emission contributions by countries such as China or India. See below for a further discussion.

501 All 192 Parties to the Kyoto Protocol have agreed to the Doha Amendment establishing the second commitment period. However, only developed country Parties listed in the Kyoto Protocol's Annex B take on emission commitments under the Protocol. 38 developed country Parties, including the EU, its Member States and Iceland, have taken on legally-binding emission commitments for the second period. Japan, New Zealand and the Russian Federation, which did have commitments for the first period, have not taken on commitments for the second period. This means that the second commitment period covers a much smaller share of global emissions – around 14-15% – than the first. 38 countries have ratified the Amendment by July 2015. The EU has not yet ratified the Amendment, but the necessary

below 1990 levels.[502] In December 2015, a new binding[503] (albeit obligations of conduct rather than strictly of result so it will be very hard to enforce) agreement on climate change was adopted at the COP21 in Paris (due to enter into force in 2020).[504] Rather than a top-down agreement, prescribing national measures, the Paris deal is based on bottom-up contributions by individual countries. Before Paris, countries have agreed to publicly outline what post-2020 climate actions they intend to take, known as their 'Intended Nationally Determined Contributions' (INDCs).[505] These national contributions now carry the name of NDC's under the Agremeent.[506] The Paris Agreement has set out that the parties will pursue efforts to limit the increase in the global average temperature to 1,5ºC of pre-industrial levels.[507] However, the irony of this ambitious target is that two of the most polluting sectors, aviation and shipping, have been excluded from the Agreement – which may seriously jeopardize the fulfillment of the objective to limit the temperature increase to 1,5ºC or keep it well below 2ºC.

In light of the commitments made under Kyoto, the EU launched its ETS in 2005, as the first and biggest emissions trading scheme in the world.[508] The EU ETS is a cap-and-trade system aimed at reducing greenhouse gas emissions cost-effectively. The total amount of greenhouse gases that can be emitted by factories, power plants and other installations in the system is 'capped' or limited.[509] Participants receive a number of emission allowances

legislation was adopted by the Council on 13 July 2015. The EU Member States will need to ratify the Amendment nationally in parallel. For an overview see http://unfccc.int/kyoto_protocol/doha_amendment/items/7362.php.

502 The EU and Iceland committed to a reduction of 20%.

503 For a discussion of the legal form of the Agreement, see Joost Pauwelyn and Lilliana Andonova at http://www.ejiltalk.org/a-legally-binding-treaty-or-not-the-wrong-question-for-paris-climate-summit/; Jorge Vinuales at http://www.ejiltalk.org/the-paris-climate-agreement-an-initial-examination-part-iii-of-iii/; and Annalesi Savaresi at http://www.ejiltalk.org/the-paris-agreement-a-rejoinder/.

504 The agreement was prepared by the Ad Hoc Working Group on the Durban Platform for Enhanced Action (ADP). For updates, see http://unfccc.int/bodies/body/6645.php. The Agreement can be found at http://unfccc.int/resource/docs/2015/cop21/eng/l09r01.pdf; For an analysis of the engagements, see http://paristext2015.com/.

505 For an overview of all INDCs, see http://www4.unfccc.int/submissions/indc/Submission%20Pages/submissions.aspx. The US for instance aims at reducing its emissions by 26-28% below 2005 levels by 2025. China wants to lower carbon dioxide emissions per unit of GDP by 60% to 65% from 2005 levels by 2030.

506 Paris Agreement, 2015, Articles 3;4.

507 Ibid Article 2(1)(a).

508 Directive 2003/87/EC of the European Parliament and of the Council of 13 October 2003, establishing a scheme for greenhouse gas emission allowance trading within the Community and amending Council Directive 96/61/EC 2003. (EU ETS Directive).

509 From the start, a number of energy-intensive industrial sectors were covered by the scheme, such power stations, combustion plants, oil refineries, steel works, as well as factories making cement, glass, bricks, etc. Altogether the EU ETS covers around 45% of total greenhouse gas emissions from the 28 EU countries. The EU ETS now covers more than

based on historical emissions (benchmarks of sectoral best performing installations)[510] that they can trade on the emissions market: to sell, if they have a surplus, or to buy additional allowances when needed (either from participants in the EU ETS or other international credits created by the Kyoto Protocol). In the first years of the EU ETS the majority of emission allowances was given for free to the participants, but auctioning is becoming the main method of allocating allowances.[511] Businesses now have to buy an increasing proportion of their allowances at auction. The limit on the total number of allowances available ensures that the allowances have a value. Installations must measure and report their emissions and surrender one allowance for every tonne of CO_2 emitted during annual compliance periods. They will be heavily fined upon failure to do so. The total number of allowances is gradually reduced so that total emissions will drop: in 2020 emissions should be 21% lower than in 2005. The proportion of free allowances also decreases over time (so the proportion of needed allowances to be purchased will increase), thereby providing the financial incentive to participants to cut emissions. The goal is that the EU ETS as the largest cap-and-trade scheme worldwide can serve as a model and that over time similar national or regional schemes can be linked to the EU scheme.[512]

The aviation (and shipping) sectors are major contributors emitters of greenhouse gases.[513] Even though aviation emissions only account for 3%

11,000 power stations and industrial plants in 31 countries, as well as emission from aviation. See http://ec.europa.eu/clima/policies/ets/index_en.htm.

510 Commission Decision of 27 April 2001 determining transitional Union-wide rules for harmonized free allocation of emission allowances pursuant to Article 10a of Directive 2003/87/EC (2011/278/EU).

511 See http://ec.europa.eu/clima/publications/docs/factsheet_ets_en.pdf.

512 The EU ETS is a complex scheme that is currently in phase 3, after a three-year pilot period (phase one – 2005-2007), and phase two coinciding with the first commitment period of the Kyoto Protocol (2008-2012). The European Commission is currently revising the system for phase 4 (2021-2030), see http://ec.europa.eu/clima/policies/ets/revision/index_en.htm. For an overview of its flaws and successes, see e.g. A. Denny Ellerman and Paul L. Joskow, *The European Union's Emissions Trading System in Perspective* (2008); Martijn Verdonk and others, *Evaluation of Policy Options to Reform the EU Emissions Trading System: Effects on Carbon Price, Emissions and the Economy* (2013); Tim Laing and others, *Assessing the Effectiveness of the EU Emissions Trading System* (2013); Friends of the Earth Europe, *The EU Emissions Trading System: Failing to Deliver* (2010); Stefan Weishaar, *Emissions Trading Design: A Critical Overview* (Edward Elgar Publishing Ltd 2014).. For an overview of the current linking negotiations, see http://ec.europa.eu/clima/policies/ets/linking/index_en.htm.

513 Someone flying from London to New York and back generates roughly the same level of emissions as the average person in the EU does by heating their home for a whole year. Direct emissions from aviation account for about 3% of the EU's total greenhouse gas emissions. The large majority of these emissions comes from international flights. By 2020, global international aviation emissions are projected to be around 70% higher than in 2005 even if fuel efficiency improves by 2% per year. ICAO forecasts that by 2050 they could grow by a further 300-700%. Shipping accounts for around 4% of EU emissions. (European Commission at http://ec.europa.eu/clima/policies/transport/aviation/index_en.htm).

of EU emissions, and 2% of global emissions, air transport remains the least environmental-friendly transport method, and the ICAO estimates that these numbers can increase to 15-20% of global emissions by 2050.[514] By including global aviation emissions into the EU ETS, the EU has the potential to cover almost 60% of international aviation emissions.[515] No binding commitments were made for either aviation or shipping under the Kyoto Protocol, even though domestic aviation emissions were taken into account under the binding emission reduction targets. However, states failed to agree on how to tackle international aviation emissions mainly because they disagreed on how to allocate responsibility for these emissions. Annex I countries did agree to pursue the 'limitation or reduction of emissions of greenhouse gases from aviation through the International Civil Aviation Organization' but have been unable to do so.[516] The ICAO is a specialized UN Agency that serves as a forum for cooperation on civil aviation matters for its 191 members. Even though there has been discussion on environmental protection measures and emission reduction schemes ever since the 1990s, in 2004 the ICAO still had not come any closer to agreement on how to limit or reduce emissions from aviation. It adopted a resolution, endorsing the development of a global emissions trading scheme for aviation, as well as the idea of including aviation in existing emission trading schemes, but also urging states to refrain from unilateral action awaiting further discussions.[517]

The EU acted upon this ICAO 'proposition' by including aviation in its emission trading scheme: in 2009, Directive 2008/101 was adopted on aviation into the EU ETS. From 1/1/2012 onwards, emissions from all domestic and international (commercial) flights arriving at or departing from European airports (EU+EFTA) were to be covered by the EU ETS. Not only emissions from within EU airspace, but from the entire flight, including over the high seas and airspace of third countries, would be covered.[518] The entire flight refers to an uninterrupted flight, thus for flights that transit only the last leg of the journey counts.[519] Under the system, operators would only be allowed to fly as many ton-kilometers as are covered by the allowances allocated to them, or acquired on the market. Airlines' allowances would be allocated based on the historical emissions from the period 2004-2006 and calculated through a formula taking account of fuel consumption. A percentage of allowances would

514 The UK Committee on Climate Change, 'International Aviation', at www.theccc.org.uk.
515 Scott and Rajamani (2012), 474.
516 Kyoto Protocol, 1997, Article 2.
517 ICAO Assembly Resolution A35-5 (2004), Appendix I, paragraph 2(c).
518 There is a *de minimis* exception for commercial air transport operators operating 2 flights a day or less, or emitting less than 10000 tonnes of CO2/year.
519 Under this system 75 states have no operator with flights to the EU, and 23 have commercial operators that qualify under the *de minimis* exception. (See presentation by A. Runge-Metzger, Aviation and Emission Trading, ICAO Council Briefing (29 Sept 2011), 24, at http://ec.europa.eu/clima/policies/transport/aviation/docs/presentation_icao_en.pdf).

be auctioned. Free allocations were to be given to new entrants and to existing airlines that are experiencing considerable growth. If a third state would have measures in place for reducing emissions from aviation, the Commission would be obliged to seek to achieve an 'optimal interplay' between the EU and the foreign measures, in close consultation with the third state. This could then, for instance, lead to an exemption from the Directive.[520]

Despite the ICAO's 2004 endorsement of the idea to include emissions from aviation in emission trading systems, this unilateral EU action was raised great controversy among states or airline operators.[521] In 2009, the US Air Transport Association of America together with American, Continental and United Airlines (ATA and others) challenged the validity of (the implementing measures of) Directive 2008/101 and their inclusion in the EU ETS through a British Court,[522] which turned to the Court of Justice of the European Union (CJEU) for a preliminary ruling.[523] They claimed the Directive was unlawful as it was in breach of international treaties (the 1944 Chicago Convention on International Civil Aviation, the Kyoto Protocol and the EU-US Open Skies Agreement) because the EU ETS imposed a form of tax on fuel consumption; as well as principles of customary international law because the EU was seeking to apply the EU ETS beyond the EU's territorial jurisdiction.[524] The CJEU, in

520 Aviation Directive, 2008, Article 25a.

521 In September 2007 (after the Commission's proposal) a resolution was passed at the ICAO Assembly urging its members 'not to implement an emissions trading system on other contracting states' aircraft operators except on the basis of mutual agreement between those states'. See ICAO Assembly, A36-22: Consolidated Statement of Continuing ICAO Policies and Practices Related to Environmental Protection.; A coalition of 26 countries opposing the EU ETS signed the New Delhi Agreement, including India, the US, China, the Russian Federation, Japan, Brazil and Saudi Arabia. ('coalition of the unwilling'); The US adopted the 'European Union Emissions Trading Scheme Prohibition Act' in 2011, making it illegal for US airlines to comply with the EU ETS requirements; China as well has forbidden its airlines to comply with EU ETS obligations, after blocking a billion dollar order of Airbus aircrafts by Hong Kong Airlines, citing that as a retaliatory measure against the EU ETS. See also Schiano di Pepe(2014), 292.

522 High Court of Justice of England and Wales, Queen's Bench Division, preliminary reference to CJEU on 8 July 2010.

523 CJEU *ATAA-case* 21 December 2011.

524 In particular, the Chicago Convention is claimed to forbid states to impose taxes, duties and charges on airline operators; the Kyoto Protocol requires aviation emissions to be addressed through the UN's International Civil Aviation Authority (ICAO); the Open Skies Agreement states that aircraft that enter, depart from or are within the territory of a party, are governed by the laws and regulations of that party (Art.7); that fuel load is exempted from taxes, duties or charges (Art.11); and that there shall be no discrimination between EU and US airlines when it comes to the adoption of environmental measures, as to ensure fair competition (Art.15(3)).

The principles of customary international law referred to by the claimants are the sovereignty of states over their airspace, the illegitimacy of claims to sovereignty over the high seas, the freedom to fly over the high seas and that aircraft flying over the high seas should be governed by the laws of the country in which they are registered, save as expressly provided for by international treaty.

a controversial and much criticized judgment, rejected all claims and found the Directive to be valid and compatible with international law.[525] Nevertheless, in 2012 the EU decided to 'stop the clock' on international aviation[526] into the EU ETS for one year to allow for a constructive dialogue within the ICAO, showing that the EU would not be the one to stand in the way of an international agreement.[527] The ICAO set up a high-level policy group tasked with proposing options for a market-based emission reduction measure. The Commission's decision to postpone the application of the EU ETS to aviation was conditional upon results coming out of the ICAO negotiations by the end of 2013. Reactions to the decisions were mixed: while European airline carriers feared a two-tier system, other airline associations reacted more positively.[528] Others still opposed the inclusion of intra-EU flights.[529] For the period 2013-2016 the legislation has been amended so that only emissions from flights within the European Economic Area fall under the EU ETS.[530] In October 2013,

525 CJEU *ATAA-case* 21 December 2011. The Court observed that the directive is not intended to apply as such to aircraft flying over the high seas or over territory of the EU or third states and does not infringe the principle of territoriality nor the sovereignty of third states, as the scheme is only applicable when aircraft are physically in the territory of the EU, where they are subject to unlimited jurisdiction of the EU (para.124). Rather, it is only if the operators of such aircraft choose to operate a commercial air route arriving at or departing from an airport situated in the EU that they are subject to the EU ETS (para.127). Nor is the directive in breach with the customary principle of freedom to fly over the high seas since an aircraft only flying over the high seas is not subject to the EU ETS (only when it touches ground in the EU) (para.126). As for the fact that the entire flight is covered by the EU ETS, and not only the distance within EU airspace, the Court states that the EU aims at a high level of environmental protection (Art.191(2) TFEU) and that therefore, the EU legislature may decide to only permit commercial activities if they comply with criteria established by the EU, designed to fulfill such environmental objectives – in particular when such objectives follow from international agreements such as the Kyoto Protocol. (para.128) Furthermore, certain factors contributing to pollution of air, sea or land territory of the MS can originate from activities occurring partly outside of that territory (para.129).
Much has been written about the judgment, see among others Christina Voigt, 'Up in the Air: Aviation, the EU Emissions Trading Scheme and the Question of Jurisdiction' 2011-2012, 14 Cambridge Yearbook of European Legal Studies 475; Sanja Bogojevic, 'Legalising Environmental Leadership: A Comment on the CJEU's Ruling in C-366/10 on the Inclusion of Aviation in the EU Emissions Trading Scheme' 2012, 24 Journal of Environmental Law 345.

526 EU ETS obligations for intra-EU flights were not suspended, also with regard to non-EU based airlines.

527 European Commission Memo, 12 November 2012, 'Stopping the clock of ETS and aviation emissions following last week's ICAO Council'.

528 Holman Fenwick Willan LLP, Aerospace EU & Regulatory, 'EU ETS Update: Stopping the Clock – Where Do We Go From Here?', February 2013, p.2.

529 The US for instance passed into law its anti-ETS bill (approved by the House of Representatives the day after the Commission announced the suspension).

530 'Stop the Clock' Decision, 2013.; The first fine was imposed by the Belgian government on a Saudi airline in May 2015, see http://www.euractiv.com/sections/transport/first-major-airline-fined-breaking-aviation-ets-law-314673?utm_source=EurActiv+Newsletter&utm_

the ICAO Assembly reached agreement to develop a global market-based mechanism by fall of 2016 that would be applied by 2020. In 2017, the Commission will need to report to the European Parliament and the Council on the temporary modification to the inclusion of aviation into the EU ETS, in light of the ICAO 39th Assembly outcome in fall 2016.[531]

8.4.2 Extraterritorial effect

The extraterritorial effect of the original aviation Directive (which is currently 'on hold' for those flights to and from non-European countries) lies in the fact that airlines have to participate in the EU ETS whereby emissions from the entire flight are covered, thus including those emissions of the part of the flight that falls outside EU jurisdiction (EU airspace). Airline operators that fail to comply with the ETS requirements will be fined. The CJEU's main argument to reject any extraterritoriality claims was that the measure is only activated through physical presence in the EU, i.e. by landing at or departing from a EU airport. As the aircraft are at that point physically in the territory of the EU, they are subject to unlimited jurisdiction of the EU.[532] While that is true, it has been indicated on multiple occasions in this thesis that that trigger does not negate the extraterritorial effect of the measure. The decision tree will be applied to see whether this extension of European jurisdiction is justified.

What is peculiar in the example of climate change is that despite the (almost) general recognition of the seriousness of the climate threat, it has proven to be very difficult to agree upon stringent and binding commitments, and there are plenty of 'excuses' (and undoubtedly, plenty of pressure from powerful actors) to avoid responsibility.[533] In that regard, states can feel

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531 Regulation 421/2014 of the European Parliamant and the Council of 16 April 2014 amending Directive 2003/87/EC establishing a scheme for greenhouse gas emission allowance trading within the Community, in view of the implementation by 2020 of an international agreement applying a single global market-based measure to international aviation emissions, Article 1.

532 CJEU *ATAA-case* 21 December 2011, para.124. AG Kokott argued that the EU merely induced or influences behaviour abroad, but does not compel certain behaviour and the Aviation Directive is therefore compatible with international law. (para.50)

533 Despite the difficulties that need to be overcome regarding scientific measuring methods etc, states' political preferences play an important role as well. This is of course inherent to the international legal system. However, the example of climate change shows particularly well the conflict between different approaches. The EU for instance advocates a top-down, multilateral and internationally driven model with binding targets, while the US for instance favours a bottom-up approach, whereby parties can define their own commitments and actions unilaterally. See Kati Kulovesi, 'Climate Change in EU External Relations: Please Follow My Example (or I Might Force You)' in Elisa Morgera (ed), *The External Environmental Policy of the European Union* (Cambridge University Press 2012) 121.

compelled to complement the insufficient actions taken at the international level with domestic measures. However, numerous studies show that isolated action will not only lead to negative economic consequences domestically, but can also have a negative impact on the climate globally through carbon leakage.[534] In that regard, in order to reach the most effective outcome through unilateral action from an environmental perspective, all states *need* need to get involved. By doing so, the effect of any environmental action will be more significant, creating an incentive for other countries to commit to environmental commitment themselves (domestically, bilaterally and/or multilaterally), if only to have a say in the decisions made. The unilateral actions taken by the EU in the Aviation Directive (as in the Shipping Regulation) encourage such action, and are even contingent upon it. The extension of the EU ETS, or in other words the extraterritorial effect, can be avoided if other states take action, and if the goods or services are subject to adequate climate change regulation in those states or through an international system.[535]

8.4.3 The decision tree applied

8.4.3.1 Inconsistency with substantive obligations under GATT and GATS

The first question that arises with regard to aviation is whether the EU measure illegally restricts airline services, or in other words: is there an inconsistency with GATS? Airline services provide a Mode 1 supply of a service, which is the supply of a service from the territory of one Member into the territory of another Member.[536] The GATS Annex on Air Transport Services exempts any measures affecting 'traffic rights' or 'services directly related to the exercise of traffic rights' from the application of the GATS.[537] Traffic rights are defined as the right to 'operate and/or to carry passengers, cargo and mail for remuneration (…) within or over the territory of a Member, including points to be served, routes to be operated, types of traffic to be carried, (…) tariffs to be charged'.[538] The Aviation Directive does not directly affect traffic rights, it imposes an additional condition that airline operators need to comply with when landing or departing from EU airports. While arguably related to the

534 Joshua Meltzer, 'Climate Change and Trade – The EU Aviation Directive and the WTO' 2012, 15 Journal of International Economic Law 111, 119.

535 Aviation Directive, Article 25a. Scott and Rajamani (2012), 472.

536 GATS, Article I:2(a).

537 GATS, Annex on Air Transport Services, para.2.

538 GATS, Annex on Air Transport Services, para.6(d). These have been laid down in the 1944 Chicago Convention on International Civil Aviation, as well as the multilateral Transit Agreement and Transport Agreement, and over 2500 bilateral agreements. See WTO, Air Transport and the GATS, Documentation for the First Air Transport Review under the GATS, 2006, pp192-216. See also Meltzer (2012), 125.

terms of authorization to operate air services in a WTO Member's territory,[539] it is unclear to what extent this really affects or directly relates to traffic rights. Furthermore, the Directive does not impose a tariff, as was held by the CJEU,[540] because the costs (or possibly the gains for well-performing operators) depend on the airline's performance, as well as whether the home state has an emission reduction scheme in place.[541] Thus, GATS might still apply to the Directive, despite the Annex on Air Transport Services.

The Annex also stipulates that the GATS does not reduce or affect obligations under bilateral and multilateral agreements[542] and that the DSB may only be invoked when dispute settlement proceedings in bilateral and other multilateral agreements have been exhausted.[543] The point is to ensure the primacy of the ICAO system over WTO rules, where there is overlap.[544] However, that requires that the relevant dispute settlement bodies have competence over the matter, and that a dispute must arise with regard to their respective agreements. The only ruling on this matter by the CJEU did not find any violations of ICAO obligations.[545]

If the GATS were to apply and dispute settlement were available, it could be argued that the EU measure violates the MFN obligation under Article II:1 GATS. The measure can have a disproportionate effect on services and service suppliers in certain countries: the longer the distance covered, the higher the costs. The advantage granted would thus be directly linked to origin.[546] Furthermore, the exemption for airline operators whose home state has equivalent measures in place could violate the requirement to grant any advantage immediately and unconditionally to all WTO Members. Most of the other obligations under the GATS only apply to the extent that a Member has made specific commitments. Bartels has argued that the EU's commitments in Mode 2 (consumption abroad) in tourism services could be relevant, which could lead to a possible inconsistency with the national treatment obligation under Article XVII GATS, as flight ticket prices might become more expensive for flights

539 Article 6 of the Chicago Convention lays down the right to fly into or transit third states' territories, or to land for technical reasons, but any air services over the territory must be authorized by that state, and must be operated 'in accordance with the terms of such authorization'.
540 CJEU *ATAA-case* 21 December 2011.
541 Aviation Directive, 2008, Article 25a.
542 Annex on Air Transport Services, para.1.
543 Annex on Air Transport Services, para.4.
544 Lorand Bartels, 'The Inclusion of Aviation in the EU ETS: WTO Law Considerations' 2012, ICTSD Programme on Trade and Environment, 23. Lorand Bartels, 'The WTO Legality of the Application of the EU's Emissions Trading System to Aviation' in CL Lim and Bryan Mercurio (eds), *International Economic Law After the Global Crisis: A Tale of Fragmented Disciplines* (Cambridge University Press 2015).
545 CJEU *ATAA-case* 21 December 2011.
546 Bartels (2012), 24.

originating outside the EU, compared to intra-EU flights.[547] If an inconsistency is established, justification can be sought under the environmental exception of Article XIV(b) GATS.[548]

The EU aviation scheme also has implications for goods transported by airplanes and could thus be governed by GATT as well.[549] The CJEU determined that the EU's aviation scheme is not a tax measure[550] or any type of fiscal measure. The measure is not a charge either, as it will depend on the performances of the airline operators whether they will be charged, or be able to sell surplus allowances. In order to fall within the scope of Article III:2 GATT, the measure must be an internal charge: as airline operators are only charged upon entry or departure from EU airports, the charge incurs only within the EU. The imported and domestic goods must furthermore be like or directly competitive which will depend on the facts of the case and the specific goods in question, but there is little reason that the use of airfreight will make them unlike. Furthermore, the charge applied to imported goods must be in excess of that applied to like domestic goods, for which the smallest amount of excess is too much.[551] Non-EU flights might cover longer distances, and depending on their performance, are thus likely to emit more CO_2, an excess cost that the airline operator may pass through to cargo rates. However, the distance from North-Africa to Southern Italy might be much shorter than from the North of Sweden to Greece. Airline operators may also decide to make a stop-over at an airport close to Europe, thereby limiting the application of the aviation scheme to only the last distance covered. Nevertheless, overall, it is likely that the costs for non-EU flights will be higher than for intra-EU flights, and that when they are passed through on cargo rates, non-EU goods will indirectly be charged higher.

If the aviation scheme were considered a non-fiscal measure, the measure might be considered a quantitative restriction under Article XI GATT as a border measure, or under Article III GATT as an internal measure.[552] Under Article III:4 GATT, it could be argued that increased cargo rates would affect the internal sale of imported goods. If the imported and domestic products are

547 Ibid 25.

548 For the purpose of the analysis, justification will only be dealt with under Article XX GATT. However, the extraterritoriality decision tree can be transposed to Article XIV(b) GATS.

549 The same regulatory scheme can be affect trade in goods and services, see AB *EC-Bananas III* 1997, para.211.

550 CJEU *ATAA-case* 21 December 2011. The Court found that the scheme was not a tax or a charge because it was 'not intended to generate revenue for the public authorities, does not in any way enable the establishment, applying a basis of assessment and a rate defined in advance, of an amount that must be payable for tonne of fuel consumed for all the flights carried out in a calendar year'. Furthermore the EU ETS requires airlines to purchase carbon emission allowances through which the airlines gain a tradable property right. That is rather different form imposing a fiscal charge. See also Bartels (2012), 9.

551 AB *Japan-Alcoholic Beverages II* 1996, para.23.

552 Bartels(2015); Meltzer (2012), 135.

like, treatment less favourable of the imported products must be established. As imported goods might be subject to additional costs due to the distance covered, the scheme might have a *de facto* detrimental impact on imported products, even though that is not necessarily the case for all imported products: if the country of origin of the airline operator has a comparable emissions system in place, those flights would not be covered, hence no additional costs would be borne under the EU ETS. In that regard, a finding that the scheme protects domestic products to the detriment of imported products is not obvious.

With regard to Article XI GATT, measures that have the effect of restricting imports and exports of products are prohibited. In *Colombia – Ports of Entry*, the panel found that a measure that restricted the ports of entry could be seen as a quantitative restriction if the measure affected the cost of shipping products from the port of origin to the place of sale.[553] The question is whether the measure can have a restrictive *effect* on the importation of any given product, and not whether it concerns a right of importation.[554] This reasoning could be applied with regard to goods being imported through air transport,[555] as transport costs will likely increase through participation in the scheme, the costs of which are furthermore unpredictable depending on the price of allowances.[556] In that regard, it could be said that the aviation directive has a restrictive effect on imports within the meaning of Article XI:1.

Questions can also arise with regard to the freedom of transit under Article V GATT. Bartels has argued that the EU measure is not an 'unnecessary restriction' (Article V:3) or 'unreasonable regulation' (Article V:4) as it is unclear what the benchmarks are for necessary and reasonable. The scheme could be considered necessary or reasonable to implement the polluter pays principle in light of the climate change threat.[557] However, Article V:6 prohibits discrimination against products because they have transited via the territory of another WTO Member. If products from the same origin would be subject to different charges depending on whether they transited through a non-EU airport or not, a possible discrimination could be established. However, as it is likely that those products who transited would be subject to lower costs, and Article V:6 requires 'treatment no less favourable' goods in transit, it is unlikely that the Aviation Directive would amount to a violation of Article V:6 GATT.[558]

553 WTO, *Colombia-Ports of Entry* Panel Report 2009, WT/DS366/R, paras.7.258.
554 Bartels (2012), 9.
555 35% of global cargo by value occurs through air transport (IATA Data). While air cargo can be transported using dedicated freighter flights, approximately 50% of air cargo is carried on passenger flights.
556 Bartels (2012), 10.
557 Ibid 14.
558 Meltzer (2012), 140.

8.4.3.2 Environmental objective and location of the concern

The environmental objective of the Aviation Directive and the EU ETS is clear: combating climate change and preventing the environmental damage that could arise as a consequence. Both Article XX(g) (the atmosphere is an exhaustible natural resource,[559] as is air or are the oceans, deserts, forests and the other living and non-living resources that would be affected by climate change) and XX(b) (e,g. the threat to biodiversity and extinction of plant species)[560] are very likely to qualify as valid grounds for environmental protection under Article XX GATT. The fact that the Aviation Directive might also address competitiveness concerns and serve to level the playing field is not necessarily an impediment: these objectives are not conflicting,[561] and it is inherent to complex regulation that multiple objectives can be addressed.[562] The regulating country needs to demonstrate though that the main objective of the measure is indeed protection of the environment.[563]

Even though these environmental concerns could fall within the material scope of Article XX, the question is whether there is a jurisdictional limitation to these environmental objectives: are paragraphs (b) and (g) limited to environmental concerns within the territory of the regulating state, or can members also rely on these exceptions to address concerns outside their jurisdiction?

559 Ahner (2009), 13.

560 See for examples of research on the effects on climate change on plant species: Botanic Gardens Conservation International at https://www.bgci.org/policy/climate-change-and-plants/; Northern Arizona University at https://nau.edu/research/feature-stories/how-climate-change-affects-plants/.

561 There has been more debate about multiple conflicting objectives, a possibility that the AB seemed to reject in the *EC-Seal Products* case. For some commentaries on this position, see Donald Regan, 'Measures with Multiple Purposes: Puzzles from EC-Seal Products' 2015, AJIL Unbound; Julia Qin, 'Accomodating Divergent Policy Objectives under WTO Law: Reflections on EC-Seal Products' 2015, AJIL Unbound; Bartels (2015).

562 Panel Report *EC-Seal Products* 2013, paras.7.399; AB Report *US-Clove Cigarettes* 2012, paras.113.

563 This can be done through an assessment of the text, legislative history, structure and design of the measure. Panel Report *EC-Seal Products* 2013, paras.7.401; Howse and Regan (2000), 280.

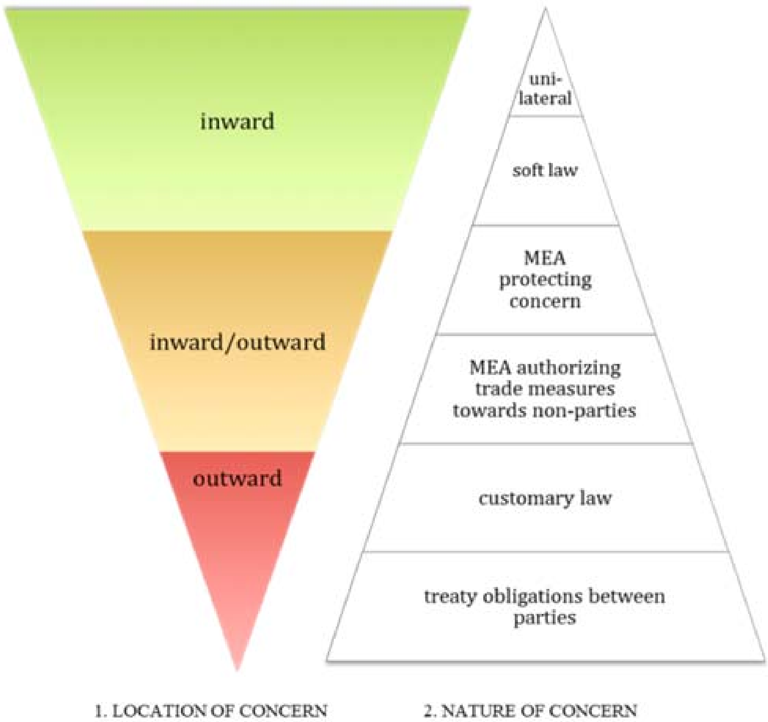

Figure 12. Step 1

The main challenge with climate change issues is exactly that all are affected, regardless of where the greenhouse gases are emitted. As Dannenmaier described it,

> 'concerns about climate change focus on the risk to human and non-human species as well as to habitat and natural landscapes; they also focus on the impact that measures to mitigate anthropogenic climate forcings might have on human economies and social prosperity.'[564]

Air and the climate are the perfect examples of common resources, whereby every state automatically has an interest because all states are affected. Some will suffer the more direct consequences on their territory through droughts or floods, others might only feel the more indirect consequences such as rising sea levels, but there is sufficient evidence[565] pointing to the global conse-

564 Dannenmaier(2012), 521.
565 See the Fifth IPPC Assessment Report (released in four volumes between September 2013 and November 2014) and previous IPCC Reports.

quences of climate chance, on the seas, on the climate, on biodiversity, even on migration, as they are all closely related and dependent on one another. Any state could thus in principle claim environmental effects on its territory. However, in order to pass the first step of the decision tree, the effects must be direct, substantial and foreseeable.

On the one hand, based on the present state of scientific knowledge,[566] the mere fact that all states are affected can suffice to establish direct, substantial and forseeasable effects. On the other hand, the effects from such emissions cannot be considered 'direct'. As Voigt argues,

> 'due to the accumulation of GHG emissions from multiple sources and a plurality of emitters as well as due to the inertia of the climate system it is extremely difficult, if not impossible, to establish a direct link between the emitting activity and the local impact.'[567]

I would argue nevertheless that as indeed all states are affected by climate change, npr-PPMs addressing emissions would qualify as measures with an inward- and an outward-looking effect. Nevertheless, because of the partly outward-looking effect, international support for the concern at issue is required to further justify the extraterritorial effects.

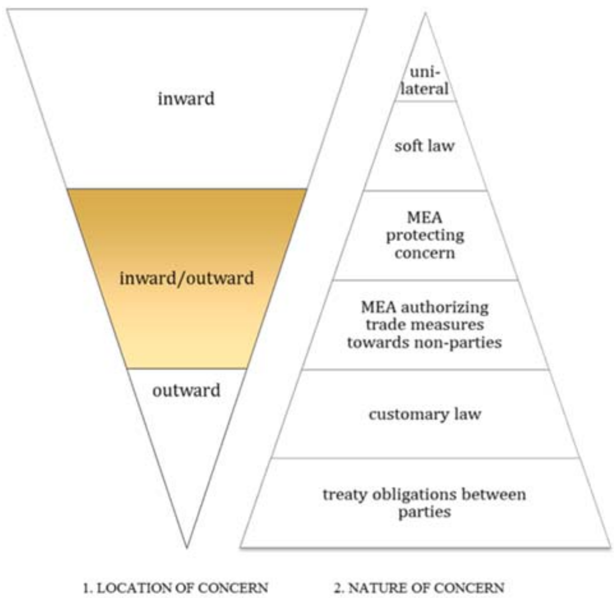

Figure 13. Step 1 Aviation in EU ETS

566 See IPCC Reports; Rehbinder(2012), 158.
567 Voigt (2011-2012), 501.

8.4.3.3 *Necessity and recognition of the concern*

As argued in chapter 7, the necessity test of the paragraphs of Article XX can be interpreted to give added value to international support.[568] Several elements can be taken into account. The AB stated in *Korea-Beef* that the more vital or important the concerns are that a measure is intended to protect, the easier it would be accept that measure as necessary[569] so international support for an international concern can be a supporting factor in that regard.[570] Any assessment of international support and recognition would need to take into account among others the complexity of the issue, the negotiation history of agreements, the efforts for multilateral alternatives made by the country taking the unilateral measures, and the nature of the failure to reach full agreement (division about the concern itself or the appropriate action).

Necessity refers to an assessment whether less-trade restrictive measures can reach the same objective. Where less international support exists for an objective or method to reach that objective, the threshold for proving there are no less trade restrictive alternatives will become higher. Equally, if a PPM is enforcing a treaty obligation, then that measure will most likely be considered appropriate and not more trade-restrictive than necessary. The material contribution to the achievement of the policy objective can also be considered.[571] The AB has stated in *Brazil-Tyres*, a dispute *not* concerning climate change, that even where the contribution of a law to protecting an environmental concern such as climate change is not immediately obvious because it is part of a broader program of which the impact can only be evaluated over time, that should not prevent a finding that this measure is necessary.[572] Howse interpreted this unexpected reference to climate change as a message by the AB that

> 'it would not be inclined to second guess lightly the choices of WTO members on how to regulate in the area of climate change, given the complexity of policy design, the evolving nature of the problem and our understanding of it, and the multiple interactions of any particular policy with other policies.'[573]

For instance, the objective of the EU ETS and the Aviation Directive is the reduction of emissions by a certain % by a certain date. Apart from the evaluation over time, it is also difficult to give a prognosis as the ETS has also been struggling with low carbon prices and a growing surplus of allowances due

568 See chapter 7.2.3.
569 AB Report *Korea-Various Measures on Beef* 2000, para.162.
570 See chapter 7.2.3.
571 AB Report *Brazil – Retreaded Tyres* 2007, para.210.
572 Ibid para.151.
573 Robert Howse, 'Commentary: The Political and Legal Underpinnings of Including Aviation in the EU ETS' 2012, ICTSD Programme on Trade and Environment, 30.

the financial crisis, growing pains as the first and largest emissions trading system being set up, carbon leakage, etc.[574]

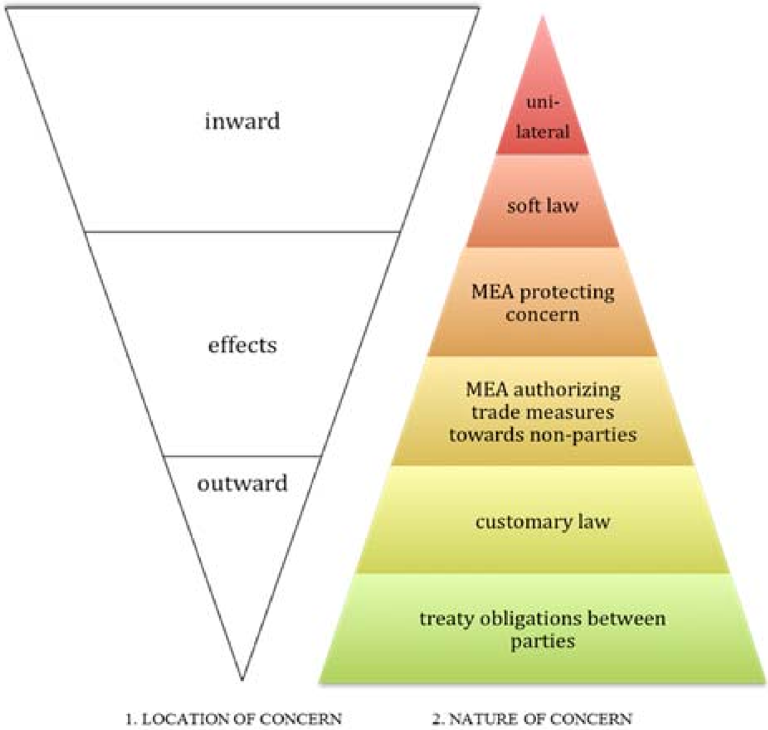

Figure 14. Step 2

The general concern for climate change is recognized in the UNFCCC, ratified by 195 countries including all EU member states, with its objective to stabilize greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system[575] and whereby states should protect the climate system and take precautionary measures to anticipate, prevent or minimize the causes of climate change and mitigate its adverse effects.[576] The Kyoto Protocol to the UNFCCC sets out binding emission reduction targets. The reports by the Intergovernmental Panel on Climate

574 Laing and others (2013). See in that regard also the Commission's efforts for a structural reform of the European carbon market, an update of which can be found at http://ec.europa.eu/clima/policies/ets/reform/index_en.htm.
575 UNFCCC, 1992, Article 2.
576 Ibid Article 3.

Change (IPCC)[577] present a scientific view on the current state of knowledge in climate change and its potential environmental and socio-economic impacts.[578] The Paris Agreement emphasizes again the urgency of the threat of climate change and the need to hold the increase in the global average temperature well below 2ºC above pre-industrial levels.[579] Climate change considerations are also reflected in EU bilateral and inter-regional cooperation, and the EU has included cooperation clauses on climate change in its association, partnership and trade agreements with developing countries.[580] It can thus be concluded that the general concern for climate change finds wide support through existing binding international agreements. However, much disagreement exists on the required efforts, the responsibility of historic emitters as opposed to new emitters, contradictory interests, financing etc, which has led to the failure of the 2009 climate summit in Copenhagen.[581] The 2015 Paris climate summit was of major importance for the discussion of further stringent cooperation, and setting ambitious but necessary global reduction targets.[582]

With regard to emissions from international aviation, it is set out under Article 2(2) of the Kyoto Protocol[583] that the ICAO is to tackle the problem, but the ICAO has so far been unable to do so. The EU's aviation scheme came as a unilateral response to failed efforts to reach international agreement on the issue within the ICAO.[584] In its 2004 Resolution A35-5, the ICAO explicitly endorsed the development of an emission trading system to reduce international aviation emissions. However, the Group on International Aviation and Climate Change, tasked with developing proposals for such system, was

577 The IPCC has been formed in 1988 by the World Meteorological Organization and the United Nations Environmental Programme.

578 The fifth IPPC Assessment Report was released in four volumes between September 2013 and November 2014.

579 Paris Agreement, 2015, Article 2.

580 Kulovesi(2012), 138. See e.g. Cotonou Agreement, art 32bis.

581 See http://unfccc.int/meetings/copenhagen_dec_2009/meeting/6295.php.

582 Elizabeth Kolbert, *The Weight of the World* (August 24, 2015). at http://www.newyorker.com/magazine/2015/08/24/the-weight-of-the-world.

583 'Parties included in Annex I shall pursue *limitation* or *reduction* of emissions of greenhouse gases...from aviation and marine bunker fuels, working through the International Civil Aviation Organization and the International Maritime Organization, respectively'. Unlike other sectors, responsibility for cutting international aviation emissions was not given to individual countries (parties). Instead reductions should be achieved by Annex 1 Parties working through international bodies that regulate these modes of transport – ICAO for aviation and IMO for maritime transport.

584 For an overview of the failed proposals and negotiations, see Transport & Environment, 'Grounded: How ICAO failed to tackle aviation and climate change and what should happen now', 2010, at http://www.transportenvironment.org/sites/te/files/media/2010_09_icao_grounded.pdf, 4; Steven Truxal, 'The ICAO Assembly Resolutions on International Aviation and Climate Change: an Historic Agreement, a Breakthrough Deal and the Cancun Effect' 2011 36 Air and Space Law 217, 217.

only set up in 2007. In the 2010 Resolution A37-19, the ICAO Assembly recognized that 'some states may take more ambitious actions prior to 2020, which may offset an increase in emissions from the growth of air transport in developing states'. It also implicitly endorsed unilateral measures, 'urging states to respect the guiding principles listed in the Annex, when designing new and implementing existing market-based measures for international aviation', even when it also urged them to 'engage in constructive bilateral and/or multilateral consultations and negotiations with other states to reach an agreement'.[585] Whereas the EU lodged a reservation setting out that the Chicago Convention did not require contracting parties to obtain the consent of other parties before applying market-based measures to operators of other states,[586] a number of other states lodged reservations expressly denying that unilateral measures were permitted.[587] Thus, one could say that there is definitely recognition at an international level that action with regard to aviation emissions is required, but the support for unilateral action is doubtful. However, the EU did engage in consultations and negotiations, which did not lead to any results at the time of adoption of the Aviation Directive. It remains to be seen at this point whether the 'stop the clock' action induced a sense of urgency to come to international agreement before the EU would again 'start the clock', and whether other states are as committed to reaching agreement as they were fierce in their protesting against EU action. In any case, Article 4(1) (b) and (f) of the UNFCCC establishes a common responsibility for all states to reduce greenhouse gas emissions. Continued opposition by ICAO members to come to international agreement is not consistent with the obligations and responsibilities of states under the UNFCCC.

With regard to the inclusion of both departing and arriving flights in the system, there is no agreement under the UNFCCC or the IPCC guidelines as to how responsibility for GHG emissions from international aviation (nor international shipping) should be apportioned between them. While article 3(5) of the UNFCCC acknowledges the right of parties to adopt unilateral acts to combat climate change, without specifying how these international emissions should be allocated, the question of when, if ever, it may be lawful for states to enact unilateral measures that include extraterritorial GHG emissions is left open.[588] According to the IPPC guidelines, countries are responsible for the emissions that arise in the territories under their jurisdiction (a territorial or

585 Consolidated statement of continuing ICAO policies and practices related to environmental protection, IAO Assembly Res A37-19, 8 oct 2010, para 6(c), para 10.

586 Bartels(2015), 436.

587 As was noted above, in 2011 the ICAO Council endorsed a working paper presented by 26 ICAO Members, containing a New Delhi declaration, which 'urged the EU and its MS to refrain from including flights by non-EU carriers to/from an airport in the territory of an EU Member State in its emissions trading system'. See ICAO working paper, 'Inclusion of international civil aviation in the EU ETS', C-WP/13790, 17 Oct 2011.

588 Scott (2015), 8.

production-based consumption system);[589] however, emissions that arise in international airspace are not allocated to individual countries. Thus, the guidelines do not specify which consumed fuel or which ship/flight movements are to be attributed to which state.[590] The EU has opted for a framework that allocates responsibility for aviation emissions to the departure state: if arriving flights are subject to adequate climate change regulation in the state of departure, they can be exempted from the EU ETS.[591] Where a departure state fails to take responsibility for aviation emissions by adopting the necessary measures, the EU as the arrival state asserts a right to 'step in'.[592] This unilateral determination by the EU is one of the controversial aspects of the measure, as it has now opted for a criterion of market access, currently unsupported by international agreement – but note that there is no agreement in support of any other solution either.

The Aviation Directive does not make a distinction between developed and developing countries, and might in that regard not be in line with international recognition for the principle of common but differentiated responsibilities and respective capabilities (CBDRRC).[593] The principle implies differentiation based on the level of economic development and capabilities of a country, as well as on the contribution to global environmental harm.[594] CBDRRC is

589 A production-based system boundary allocates responsibility for GHG emissions in the state where these emissions are generated or produced. A consumption-based system on the other hand allocates GHG emissions according to the country of the consumer, usually based on final consumption. The total GHG emissions of a state then equal the emissions of consumption added with the emissions of production of imports reduced by the emissions of production of exports. According to a territorial or production-based system boundary, the GHG emissions of developed countries (so called Annex I countries) appear to have leveled off in recent years, while from the perspective of a consumption-based system boundary they have continued to rise at an annual rate of approximately 10%. See Scott, ibid 7., referring to Alice Bows and John Barrett, 'Cumulative emission scenarios using a consumption-based approach: a glimmer of hope?' 2010, 1 Carbon Management 161, 168.

590 Scott (2015), 17. See IPPC Guidelines Vol 1 and chapter 3.5 (water borne transportation) & 3.6 (civil aviation) of Vol 2.

591 Aviation Directive, 2008, Article 25a.

592 Joanne Scott and Lavanya Rajamani, 'Contingent Unilateralism: International Aviation in the European Emissions Trading Scheme' in Bart Van Vooren, Steven Blockmans and Jan Wouters (eds), *The EU's Role in Global Governance: the Legal Dimension* (Oxford University Press 2013) 213.

593 The CBDRRC principle is articulated in Article 3 of the UNFCCC and lies at the heart of the international compact on climate change. The Impact Assessment to the Commission's proposal for the Aviation Directive argued that the directive would be in conformity with the principle, but the Commission argued later that the principle does not apply as the Aviation Directive applies to businesses and the CBDRRC principle applies to states. (see Runge-Metzger, 40, at http://ec.europa.eu/clima/policies/transport/aviation/docs/presentation_icao_en.pdf).

594 See principle 7 of the Rio Declaration, defining CBDRRC and stating that 'The developed countries acknowledge the responsibility that they bear in the international pursuit to sustainable development in view of the pressures their societies place on the global environment and of the technologies and financial resources they command.'

one of the biggest challenges of environmental law, because it is debated how to best interpret and apply this principle of differentiation. The problem is that a distinction is often made between Annex I and non-Annex I countries to the Kyoto Protocol, a distinction that can no longer be said to be a reflection of the actual situation today, as some of the richest countries in the world are excluded from Annex I.[595] Also it is questionable whether the Annex I/non-Annex I distinction is the right approach for climate change,[596] in light of for instance the massive and increasing emission contributions by countries such as China or India. It is disputed whether the CBDRRC principle is a legal obligation or merely a consideration that should be taken into account, yet as a fundamental part of the climate change regime,[597] it can be argued that there is at least a duty of good faith to take the principle into account when drafting policy, including unilateral instruments.[598]

The CBDRRC principle can manifest itself through differential treatment with regard to implementation, with regard to assistance, and more disputed, with regard to key obligations.[599] That duty of good faith could also be read in the chapeau of Article XX GATT, which would leave an opening for the EU to implement CBDRRC in a climate change related trade measure.[600] Differentiation between developed and developing countries based on objective criteria should not pose a problem at WTO level, as it could be interpreted as special and differential treatment in light of the 1979 Enabling Clause.[601] In *EC-Tariff*

595 Such as Kuwait, United Arab Emirates, Brunei, Singapore, and Qatar, which are amongst the top 20 richest countries in the world. Also OECD members such as Chile and South Korea are excluded.

596 Pauw and others (2014), 2.

597 The principle of CBDRRC can also be read into the preamble to the WTO Agreement, stating 'seeking both to protect and preserve the environment and to enhance the means for doing so in a manner consistent with their respective needs and concerns at different levels of economic development'. For other possible manifestations of the principle in WTO law, see Fabio Morosini, 'Trade and Climate Change: Unveiling the Principle of Common but Differentiated Responsibilities from the WTO Agreements' 2010, 42 George Washington International Law Review 714, 723.

598 Pananya Larbprasertporn, 'The Interaction between WTO Law and the Principle of Common but Differentiated Responsibilities in the Case of Climate-Related Border Tax Adjustments' 2014, 6 Goettingen Journal of International Law 145, 149; Scott and Rajamani (2012), 478; Pauw and others (2014).

599 Scott and Rajamani (2012), 478.

600 Michael Hertel, 'Climate-Change-Related Trade Measures and Article XX: Defining Discrimination in Light of the Principle of Common but Differentiated Responsibilities' 2011, 45 Journal of World Trade 653, 676.

601 GATT Contracting Parties, Decision of 28 November 1979 (L/4903) on Differential and more favourable treatment reciprocity and fuller participation of developing countries. The Enabling Clause has been applied with regard to tariff preferences, but also allows for special and differential treatment with regard to non-tariff measures (paragraph 2(b)). See also Keck and Low (2004). Special and differential treatment allows for differentiated treatment for developing countries by justifying a deviation from the MFN obligation. What could in theory lead to some discussion is when a non-Annex I country under the Kyoto

Preferences, the AB emphasized the importance of elaborating objective criteria for differentiating between developing countries and ensuring that such criteria would be applied transparently and consistently, and allow for the necessary flexibility.[602]

In conclusion, there is wide international agreement about climate change in the form of the UNFCCC, as well as the recognition within the ICAO that aviation emissions need to be reduced. The Kyoto Protocol is a binding agreement prescribing specific commitments – though with notable exceptions, such as the US and China, and withdrawals, such as Canada. The 2015 Paris Climate Agreement is a binding agreement setting out an ambitious limit to the increase of the average global temperature – but excludes the aviation sector. Thus, if the Aviation Directive constitutes a violation of WTO law, and the measure would need to be justified under Article XX GATT, the extraterritoriality threshold is passed with regard to product-based measures that target emissions from airline operators, as firstly, environmental effects on the territory can be demonstrated, and secondly, there is wide international support for the general concern of reducing emissions in the fight against climate change.

However, there is no agreement yet on the methods for reduction of aviation emissions: a global emission trading system is still under development and it remains unclear which system boundary will be applied. In order to determine support for the methods prescribed, scientific research and/or state practice should be considered. If there is no state practice, and no consensus on the appropriate methods (e.g. the Aviation Directive opts for a primary responsibility for the country of departure), a deferential approach should be

protocol would not have listed itself as a developing country under the WTO. In that regard differential treatment that is made according to Annex I – non-Annex I countries could conflict with the countries qualifying for special and differential treatment. A further distinction could then be made between countries based on their economic capabilities, which would justify differentiation under the Enabling Clause; and between countries based on their historic and current share in emissions (responsibility), which would not lead to discrimination between countries where the same conditions prevail, as these conditions would be linked to the objective of the measure, emission reductions. The E15 Expert Group on Trade and Climate Regimes proposes common action by the UNFCCC and the WTO to clarify the differences, if any, between the concept of common but differentiated treatment in the climate regime and the concept of special and differential treatment in the WTO. See Bacchus (2016), 14.

602 AB Report *EC-Tariff Preferences* 2004, para.182. Scott and Rajamani propose two options for the EU to implement CBDRRC into the Aviation Directive. First, the EU could differentiate between countries in terms of the conditions required for an exemption of the system. Developing countries should be required to adopt measures to reduce the climate impact of their flights commensurate with their respective (historic) responsibilities and capabilities. Surely, as any choice to be made, this will be a subjective exercise, but such criteria ensure a fair differentiation. Second, the revenues raised as a result of developing country flights in the ETS could be committed to a global climate fund, used for the financing of climate mitigation and adaptation activities in developing countries. See Scott and Rajamani (2012), 487.

adopted with respect to the scientific validity of the prescribed rules. If alternative, less-trade restrictive methods would exist, it is up to the imposing Member to demonstrate why it opted for this specific measure and justify why the objective cannot be reached through reasonably available less-trade restrictive measures.[603] For lack of alternatives that are reasonably available at this moment, the EU ETS could be accepted as it long as the choices made are substantiated by evidence demonstrating to the extent possible the effectiveness of the system.

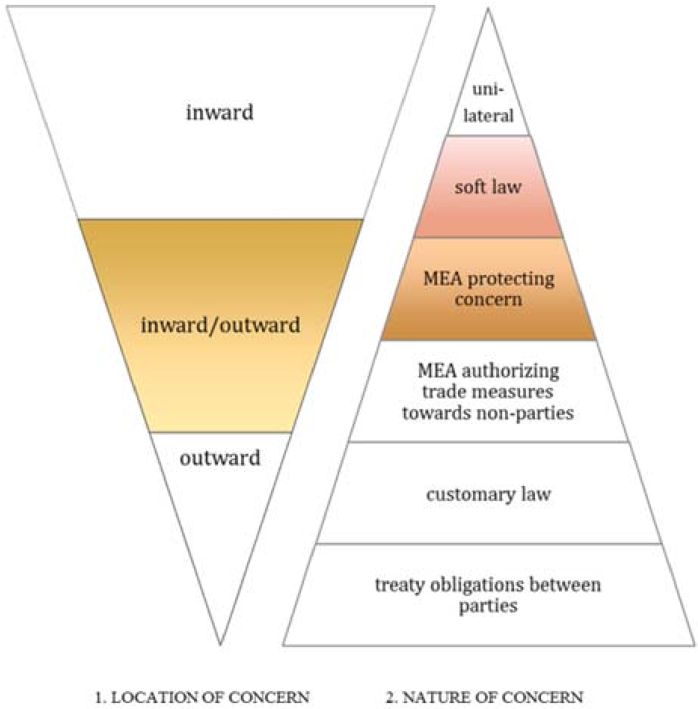

Figure 15. Full model Aviation in EU ETS

8.4.3.4 Chapeau

The chapeau prohibits arbitrary and unjustifiable discrimination between countries where the same conditions apply. In terms of aviation emissions and the effect of those emissions, the same conditions apply for all countries. The fact that some countries produce greater emissions than other does not

603 AB Report *EC-Seal Products* 2014, para.5.215.

matter for this finding.[604] The Directive applies to all airline operators irrespective of their country of origin. While this might result in higher emissions costs for longer distances, it cannot be said that this amounts to discrimination that is arbitrary or unjustifiable. In principle all airlines can opt to make transit stops, and all operators can be exempt from the directive for inbound flights if their home country has appropriate climate regulation in place.[605] In view of this latter condition, countries with equivalent climate regulation could be found to differ from countries without such regulation. As different conditions apply in these countries, differentiation does not amount to unjustifiable or arbitrary discrimination. By exempting operators when third country schemes in place, as well through as multiple references to the ICAO and international emission trading schemes,[606] the EU Directive is open for and contingent on international developments.

In determining which countries are considered for an exemption, it is important to have clear, objective and transparent criteria in place to determine the adequacy of third country programs.[607] In its original proposal, the Commission suggested that an exemption for a non-EU country should be made conditional upon the adoption of measures that are at least equivalent to the requirements of the Aviation Directive.[608] That reference for equivalence was later on dropped in the decision-making process, but is still included in the preamble of the adopted directive.[609] Equivalence can be interpreted in several ways, for instance effort-based or outcome-based. It is in any case important that sufficient flexibility is allowed for the third country to determine how to reach the objectives. In 2013 the Commission had proposed as an amendment to the Aviation Directive an exemption for flights to and from developing countries accounting for less than 1% of total revenue ton kilometers, as specified in the ICAO resolution, but only if they are also beneficiaries of the EU's GSP.[610] Such a criterion would most likely not have complied with

604 In *US-Shrimp* for instance, the AB also did not quantify the number of turtles: it was sufficient that they existed in the affected countries.
605 Aviation Directive, 2008, Article 25a(1).
606 Ibid recital (9).
607 See in that regard also AB Report *EC-Tariff Preferences* 2004, para.183.
608 See Commission proposal for a EU ETS Directive, COM(2006)818, 20 Dec 2006, 21.
609 Aviation Directive, 2008, recital (17).
610 Proposal for a Directive of the European Parliament and of the Council amending Directive 2003/87/EC establishing a scheme for greenhouse gas emission allowance trading within the Community, in view of the implementation by 2020 of an international agreement applying a single global market-based measure to international aviation emissions, COM/2013/0722 final, recital 10. This proposal was not adopted in the amending regulation, which only refers to an exemption for non-commercial aircraft operators emitting less than 1 000 tonnes CO_2 per annum, without any reference to developing or developed countries. (Regulation (EU) 421/2014 of the European Parliament and of the Council of 16 April 2014 amending Directive 2003/87/EC establishing a scheme for greenhouse gas emission allowance trading within the Community, in view of the implementation by 2020 of an

the chapeau, as from an environmental perspective this exemption is entirely arbitrary. There is no environmental rationale behind GSP beneficiaries.[611] Furthermore, the reason why flights departing from countries with adequate climate regulation could be exempted from the system is to avoid a double burden for flight operators. The Aviation Directive provides an exemption for arriving flights, based on the regulation of departure. As this is not yet an internationally accepted system boundary (even though referring to the country of departure is most closely linked to the established production-based emission allocation system), if a third country system would adopt a different standard, the EU may have to consider different exemptions as well.[612]

8.4.4 Challenges

Apart from the particular challenges related to aviation emissions and climate change regulation (for instance, the operationalization of CBDRRC or the system boundary determination: production-based or consumption-based),[613] the example of the Aviation Directive allows to identify challenges that are of broader relevance for the extraterritoriality discussion as well.

Firstly, as has already been indicated above,[614] climate change affects all states and any measure that a state would adopt to fight climate change would thus be considered as both inward- and outward-looking. If substantial and direct environmental effects can be demonstrated, a first important hurdle to establish jurisdiction for measures with an extraterritorial effect is passed. The second step of the decision tree is then of crucial importance: the international support for the environmental concern in question is very relevant to determine which the acceptable scope of extraterritorial measures. If international law prescribes binding obligations, as in the IUU Fishing example, then a state could adopt country-based measures, with the aim to 'force' other states to change their legislation and act in accordance with their obligations under international law.[615] However, if international law does not lay down

international agreement applying a single global market-based measure to international aviation emissions, Recital 9.)

611 Bartels(2015), 480.

612 See also AB Report *US-Shrimp* 1998, 161.

613 The Directive foresees in not including EU-arriving flights when an equal or similarly adequate system is in place in the country of departure. (Aviation Directive, 2008, Article 25a(1).) Article 3(5) of the UNFCCC acknowledges the right of parties to adopt unilateral acts to combat climate change, but it does not specify the system boundary to be relied upon by states in operationalizing measures of this kind (eg consumption based or production based). 'It therefore does not settle the question of when, if ever, it may be lawful for states to enact unilateral measures that include extraterritorial GHG emissions within their scope.

614 See *supra* at 8.4.3.2 for the assessment of inward- outward-looking.

615 See *supra* at 8.3.4.

binding obligations, or is not specific enough, then one could argue that states are only allowed to adopt product-based measures. The regulatory space to impose product-based measures is larger, because such a measure targets the product or service that will actually enter the market, and does not *impose* anything on a sovereign third country (even though surely depending on the export flows there might be an incentivizing effect to adapt legislation in the country of origin as well). Country-based measures would only be allowed to be used as leverage, when binding obligations already exist and countries refuse to comply with these obligations. A country that consciously chooses not to take part in an international system, without taking adequate measures itself, cannot be forced to comply with such a system. Nevertheless, process-based measures targeting producers (or in this case operators) can be imposed and can indirectly create an incentive for governments to take action. For instance, if the US finds the Kyoto protocol and its mechanisms fundamentally flawed, then it should install alternatives with methods that it deems more appropriate, but the US cannot refuse to undertake action so as to do its fair share, when the global impact of its actions is undeniable. While the EU cannot force the US to commit to obligations under e.g. the Kyoto Protocol, it can condition market access for US operators, which may lead to increased pressure on the US government to act. The Aviation Directive is a process-based measure (compliance is at the level of individual flights, targeting the emissions from the specific flights arriving and departing from the EU). The option for an exemption if the country of departure has climate regulation in place should be seen as a 'contingency-clause', through which the EU wants to avoid double counting. While such clause also holds an incentive for third countries to adopt legislation and participate in creating a global system, the formal objective of the exemption is not to target other governments and force them to adopt legislation. The EU exemption can be seen as a reward for third country's efforts.[616]

Secondly, the existence of binding obligations points to, as in the IUU Fishing example, a case of norm enforcement. However, the example of aviation emissions could rather be classified as norm furtherance: there is wide support for the concern, there are some commitments, but international negotiations are stalled. Through its measure the EU has created an incentive to boost negotiations at the ICAO level, and hopefully to set up other national or regional emissions trading systems. In a case of norm furtherance, there can be agreement on the importance of the concern, but not on the appropriate way to act. Thus, such measures are not necessarily based on existing international standards, but they nevertheless address global concerns in relation to which there is international agreement on their importance.[617] Norm enforcement and norm furtherance can be complemented with a third category,

616 Scott (2014), 110.
617 Scott (2014), 124.

norm creation. Norm creation would occur in case of unknown or little-known concerns, upon which states would like to act and create incentives for others to act. However, in line with norm enforcement and norm creation, unless a measure is only inward-looking and does not affect other states, states should first focus on raising international awareness and seeking international cooperation. If that would not work, then depending on the origin of the failure (no recognition of the specific concern, or as in the case of climate change, no agreement on the appropriate method to tackle the concern), that failure could possibly support further action, and be considered as an action of norm furtherance.

Thirdly, unilateral actions in the absence of international action raise the question of responsibility. Do states have an additional responsibility, or even a duty, to act beyond their own 'fair share' when other states, or even the international community as a whole, neglect to act and honor their responsibilities?[618] Caney distinguishes between two ways of climate justice: firstly, burden-sharing justice, focusing on how the problem should be shared fairly among the duty-bearers;[619] secondly, harm-avoiding justice, taking as a starting point the imperative to prevent climate change. Under the latter, the burden of someone who is failing or neglecting its own burden will (need to) be taken over someone else. Caney therefore identifies two types of responsibilities: first-order responsibilities, the obligation for an agent to do its fair share; and second-order responsibilities; responsibilities that seek to induce agents that fail to comply with their first-order responsibilities to step into line.[620] Second-order responsibilities would operate on the principle that 'with power comes responsibility', whereby power can be defined as 'A has power over B to the extent that he can get B to do something that B would not otherwise do'.[621] A strong market can thus become a powerful tool to incentivize conduct through market access, because of a moral responsibility to exploit that power. Applied to the example of GHG emissions, states would have a first-order responsibility over emissions generated within their territory (based on the territorial-based system constructed by the IPCC guidelines), and extraterritorial emissions (generated outside their territory) would then be considered second-order responsibilities. However, as aviation and shipping emissions are excluded from the IPCC guidelines, these responsibilities could be applied differently. Scott has argued that states enjoy the autonomy to 'plug this system

618 Anne Schwenkenbecher, 'Bridging the Emissions Gap: A Plea for Taking Up the Slack' 2013, 3 Philosophy and Public Issues 271.

619 He identifies several principles of burden-sharing justice, such as the principle that those who have caused the problem should bear the burden; the principle that those who have the ability to pay should bear the burden; and the principle that those who have benefited from the activities that cause climate change should bear the burden. Caney (2014), 126.

620 Ibid 134. See also Scott (2015).

621 Caney (2014), 141.

gap' as long as the sovereign equality of other states is respected.[622] The difficulty with the first- and second-order responsibilities is to determine when a state has not done its share. Who will determine how to share the burden, if the international community cannot reach agreement on this? Arguably, the refusal or delays in reaching such agreement can already be a failure to comply with first-order responsibilities. In that regard the 'most common position' could be used as a benchmark to determine what can be expected from states – even if this would not be a legal obligations without agreement on that issue. For instance, the standard set by the 37 states that committed to new reductions under the Kyoto-amendment could be seen as a benchmark. When that benchmark is not reached, second-order responsibilities could come into play.[623] Scott has proposed certain safeguards against their abuse: the overall efforts of countries should be taken into account, and not just in a specific sector; objective criteria must be given when exercising second-order responsibilities in a specific sector to guarantee that the measures are not adopted to rebut competitive disadvantages; and, the CBDRRC principle should be taken into account when assessing the 'fair share'.[624] Overall, it is submitted that states cannot 'unilaterally' set the benchmarks for second-order responsibilities: state action must rely on soft law instruments at least, supported by as many states as possible. However, precisely in light of the continued lack of international agreement, 'sovereign equality of states' should not be used as an excuse to oppose international action and escape one's moral responsibilities.

8.5 Timber and forest law enforcement, governance and trade

8.5.1 Measure and context

In 2003 the European Commission developed the Forest Law Enforcement, Governance and Trade (FLEGT) Action Plan. Illegal logging, or logging in

622 Thus, any gap-filling system that is endorsed by a state must be susceptible to replication by all other states without this resulting in the double counting of the GHG emissions. The exemption given to flights departing in third countries with climate regulation in place should be seen in that light: if only the country of departure regulates emissions, double-counting will be avoided. The inclusion of emissions of flights departing from countries without climate regulation, could then be seen as an exercise of second-order responsibility by the EU. See Scott (2015), 18.

623 Note, however, that it is highly debatable whether the commitments under Kyoto can even be seen as a 'fair share' to tackle climate change. Numerous studies show that also the EU emission reduction targets are far beyond what would be required. Ibid 24.

624 Ibid 26. CBDRRC should not necessarily follow the Kyoto division between Annex I and non-Annex I countries, but can be calculated by other parameters. See for instance the Climate Equity Reference Calculator, developed by EcoEquity and the Stockholm Environment Institute, at http://www.gdrights.org/calculator/.

violation of national laws (as well as the non-existence or weakness of local laws), is a global problem that can lead to substantial negative economic, environmental and social consequences.[625] From an environmental perspective, illegal logging can cause serious damage through deforestation and has a negative impact on climate change and biodiversity, for instance through the logging of national parks.[626] Deforestation is a serious threat: at the current rate of loss, tropical rainforests could disappear within 100 years.[627] Although the supply-side of the problem lies in timber-producing countries, the EU as a major source of demand can play an important role by not exploiting illegal logging operations and only allowing legally harvested timber on the market.

The FLEGT Action Plan has led to the adoption of two key pieces of legislation: the 2005 FLEGT Regulation, allowing for the control of the entry of timber to the EU from countries entering into bilateral FLEGT Voluntary Partnership Agreements (VPA) with the EU,[628] and the 2010 Timber Regulation as an overarching measure to prohibit placing illegal timber and timber products on the EU market, laying down obligations on operators who place timber on the market.[629] Next to these regulations, the Action Plan has further encouraged private and public initiatives to support the fight against illegal logging, such as commitments by timber trade federations and companies through Codes of Conduct to eliminate illegally harvested timber from their supply chains. The EU furthermore commits to increased dialogue through existing institutional structures with importing and exporting countries (notably including the US and Japan), integration of FLEGT in development cooperation programming at the stage of country strategy papers, and use of external funding.[630]

625 Economically, illegal logging leads to lost revenues in timber-producing countries and undermines the competitiveness of legitimate forest industry operators; socially, it can lead to among others conflicts over land and resources, corruption, organized crime and armed conflicts. In that light see also the so-called conflict timber, timber traded by armed groups, the proceeds of which are used to fund armed conflicts.

626 European Commission, Forest Law Enforcement, Governance and Trade (FLEGT) – Proposal for an EU Action Plan, 2003, 4. One should be aware that legal logging does not necessarily mean sustainable logging: this is why attention needs to be paid to the development (and enforcement) of laws supporting sustainable management of the environmental resources as well.

627 Non-legally Binding Instruments on All Types of Forests (UNGA Resolution A/RES/62/98, 17 December 2007).

628 Council Regulation (EC) No 2173/2005 of 20 December 2005 on the establishment of a FLEGT licensing scheme for imports of timber into the European Community, 2005. See also the implementing regulation 1024/2008, laying down detailed provisions relating to the conditions for acceptance of the FLEGT license, and for the application of the system of imports of timber products.

629 Regulation (EU) No 995/2010 of the European Parliament and of the Council of 20 October 2010 Laying Down the Obligations of Operators Who Place Timber and Timber Products on the Market, 2010.. The Regulation entered into force in 2013.

630 Marin Duran and Morgera(2012), 273.

The 2005 FLEGT Regulation establishes a licensing scheme system for imports of timber.[631] The EU is to conclude voluntary partnership agreements (VPAs) with third countries, under which 'legally produced or acquired' timber can be imported into the EU with a corresponding license, verifying the legality of importer timber. Without such license timber cannot be imported from those countries.[632] Legality of timber harvests is to be checked against compliance with the national law of the harvesting/exporting country as set out in the VPA.[633] One of the elements that can be given attention in defining 'legality' is compliance with environmental legislation of the country of harvest. In this regard, the EU is working with willing third countries on the legality of timber as a neutral concept, rather than the politically charged sustainable forest management that has resisted international definition thus far.[634] The main incentive for third countries to participate in the FLEGT VPA process – apart from access to the EU market – is receiving priority assistance for the upgrading of their legal and administrative framework related to forest management.[635] This is supported by the FAO, which is managing a global project funded by the EU to help ACP countries in the review of their legislation and upgrading of their forest governance and law enforcement capacities. By participating in the FLEGT VPA system, exporting countries undertaking efforts to tackle illegal logging ensure that only legally harvested timber will be accepted into the EU market, while importers purchasing timber will have a guarantee on the origin and legality of the timber, increasing market confidence for timber from the participating countries.[636] In principle, every timber-producing country can participate, but the EU identified priority countries to be approached for participation, including Cameroon, Gabon, Congo, Ghana, Russia, Brazil, Papua New Guinea, Indonesia and Malaysia.[637] Timber

631 FLEGT Regulation, 2005.. For an assessment of FLEGT, see the report by the Court of Auditors, 'EU support to timber-producing countries under the FLEGT action plan', Luxembourg: Publications Office of the European Union, 2015 at http://www.eca.europa.eu/Lists/ECADocuments/SR15_13/SR_FLEGT_EN.pdf.

632 The first VPA to be signed was with Ghana, followed by the Republic of Congo, Cameroon, Indonesia, Central African Republic and Liberia. Negotiations are ongoing with Cote d'Ivoire, Democratic Republic of the Congo, Gabon, Guyana, Honduras, Laos, Malaysia, Thailand and Vietnam. (*last update July 2015*).

633 The different VPAs determine legality on the basis of the legislation in the exporting country, with input of national stakeholders in that country. Six countries have signed a VPA and are currently developing the systems needed to control, verify and license legal timber (Cameroon, Central African Republic, Ghana, Indonesia, Liberia, Republic of the Congo); while nine others are currently negotiating (Cote d'Ivoire, Democratic Republic of the Congo, Gabon, Guyana, Honduras, Laos, Malaysia, Thailand, Vietnam).

634 Marin Duran and Morgera(2012), 273. Relying on the legislation of the third country arguably aims to ensure the third country's ownership of the initiative, as well as demonstrate respect for its national sovereignty over its forest resources.

635 E.g. Article 15 VPA EU-Ghana.

636 FLEGT Action Plan, 2003, 12.

637 Minutes from an ad hoc meeting on the FLEGT donor coordination of 26.2.2004.

originating from countries that have not concluded a VPA with the EU, is subject to the Timber Regulation.[638]

The 2010 Timber Regulation prohibits the placing on the EU market of illegally harvested timber and timber products, and requires EU operators who place timber products on the market to exercise 'due diligence'.[639] In the absence of an internationally agreed definition, legal timber is defined as timber that is in compliance with the laws of the countries where it is harvested.[640] Due diligence entails that the operator must minimize the risk of illegal timber in the supply chain, by providing information on the trader and the supply, by assessing the risks to illegal timber in the supply chain.[641] Monitoring organizations shall regularly evaluate due diligence systems and the competent authorities shall carry out checks on operators.[642] Traders are furthermore under the obligation throughout the supply chain to ensure they can identify the operators or traders who have supplied the timber and where applicable, the traders to whom they supplied the timber.[643] Penalties include fines proportionate to the environmental damage and economic detriment, seizure of the timber and timber products concerned; and suspension of the authorization to trade.[644]

8.5.2 Extraterritorial effect

The 2005 FLEGT Regulation might be considered as having an extraterritorial effect because imports will depend on the harvesting process in the country of origin. However, the conditions of import have been agreed upon in bilateral agreements (VPAs), and any 'extraterritorial effect' thus has the consent of the third country. The norm to be protected is determined by national law, supported by international law; and the sanction for a violation of that norm is clearly agreed upon in the VPAs.[645] The 2010 Timber Regulation is more relevant to our discussion of unilaterally imposed measures with an extraterritorial effect and the following sections will thus focus on that regulation only.

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638 The Timber Regulation also applies to FLEGT partner countries, but imports of timber from those countries should be considered to have been legally harvested provided those timber products have FLEGT licenses. Operators thus only have to verify the validity of documentation for FLEGT-licensed timber and idem for timber with a CITES permit. In that way, an additional incentive is created for third countries to engage in VPA negotiations. See Timber Regulation, 2010, recital (9).

639 Ibid Article 4.

640 Ibid recital (14); Article 2(f) and (g).

641 Ibid Article 6. Monitoring organizations shall regularly evaluate due diligence systems and the competent authorities shall carry out checks on operators.

642 Ibid Article 8; 10.

643 Ibid Article 5.

644 Ibid 19.

645 E.g. VPA between the EU and the Republic of Cameroon on FLEGT, Article 4.

The extraterritorial effect of the Timber Regulation lies in the fact that EU market access is made dependent on the logging process occurring in third countries (non-VPA-countries). If timber has been logged illegally, thus in violation of the national laws of the harvesting country, then that timber is not allowed to be placed on the EU market.[646] Even though the EU does not prescribe what legality entails, but rather enforces the norms of the third country, access to the EU market is linked to an activity occurring outside the EU's borders as regulating 'country'. The following assessment of the decision tree will be applied to determine whether jurisdiction can be established for this type of enforcement, and whether it matters that the enforced norms are the norms of the harvesting country, rather than externally imposed norms.

8.5.3 The decision tree applied

8.5.3.1 Inconsistency with substantive obligations under GATT

The Timber Regulation could be considered as a quantitative import restriction imposed at the border under Article XI GATT, or as an internal measure under Article III GATT. Even though the Timber Regulation does not explicitly prohibit the importation of illegally harvested timber, it prohibits the 'placing on the market' of illegally logged timber, foreseeing penalties upon infringements of the Regulation.[647] This creates a *de facto* restriction on the importation of timber,[648] leading to an inconsistency with Article XI.[649] However, even if enforced at the border, the Timber Regulation could also be considered an internal measure under Article III GATT, applicable both to imported and domestic products.[650] The national treatment obligation requires WTO Members not to treat foreign products less favourably than like domestic products. The Timber Regulation does not make a distinction between domestic and imported products but refers to 'placing on the market' of products, which can be through import, but equally through the placing on the market of domestically grown timber.[651] The Regulation is thus rather an internal measure, that can be enforced at the border.

646 Both illegally logged timber from outside the EU as from within the EU is not allowed on the market.
647 Timber Regulation, 2010, Article 19.
648 WTO, *Argentina-Measures Affecting the Export of Bovine Hides and the Import of Finished Leather* Panel Report 2000, WT/DS155/R, para.11.20.
649 Geraets and Natens (2014), 440. In *Brazil-Tyres* the Panel held that a system of fines could have a restrictive effect on importation, see Panel Report *Brazil-Retreaded Tyres* 2007, paras.7.372.
650 Ad Note to Article III GATT.
651 See for an example of felling licenses for UK grown timber, www.forestry.gov.uk/pdf/ON033EUTimberRegulationsv2.pdf/$FILE/ON033EUTimberRegulationsv2.pdf.

In considering likeness under Article III:4 GATT, the groups of products to be compared must be determined. Both groups of domestic and imported products can contain legal timber and illegal timber. If legal and illegal timber are identical, except for the fact that the former was logged in compliance with local laws and the latter not, then the group of imported timber products as a whole must be considered and compared to the group of domestic timber products as a whole. If legal and illegal timber are not considered to be like, because of a strong preference by consumers for legal timber products for instance, then the group of imported legal timber must be compared to the group of domestic legal timber. Imported timber is then like domestic timber, where the characteristics, end use of and consumer preferences for the wood type(s) put the products in a competitive relationship. Even though the legality of imported timber is determined by the national laws of the country of origin, and the legality of domestic timber is subject to domestic laws – and what is legal under one national system is not necessarily legal under another system –, all types of legal timber would still be in a competitive relationship on the importing market, and be considered 'like' for the purpose of this analysis. With regard to illegal timber, it can be questioned whether WTO rules apply to 'illicit' goods.[652] Can trade in illegal goods (as determined by the laws of the country of origin) be regulated by public measures (not allowing those goods equals a product ban), and if so, can those measures be subject to rules of non-discrimination et al? This seems unlikely.

If the products are like, it needs to be determined whether the imported products are treated less favourably so as to afford protection to domestic products; in other words, whether the conditions of competition are modified to the detriment of the group of imported products. As the regulation applies both to imported and domestically produced timber, there is no *de jure* violation. Could there be a *de facto* violation because the national laws of country of origin and country of import may differ? If timber is considered illegal in the country of origin, but would have been considered legal under the rules of the importing country due to lower standards, would this amount to treatment less favourable? Unless the regulatory requirements for legality in the importing country would be such as to clearly protect domestic production, these different regulatory requirements by themselves cannot amount to less favourable treatment. From a EU perspective, it seems unlikely that in light of the EU's efforts with respect to forestry management, EU local requirements would be less stringent than the requirements in third countries. Furthermore, national timber regulation is likely to be based on international private and public standards and norms.

The remaining question is then whether imported products bear a heavier burden than domestic products. The Timber Regulation is applied even-

652 Geraets and Natens (2014), 440; Mitchell and Ayres (2012), 468; Brack, Chandra and Kinasih (2012), 9.

handedly: even though the proportion of affected imports might be higher than the proportion of domestic production, mainly because of the higher proportion of imported timber on the market,[653] the Regulation does not modify the conditions of competition in that market to the detriment of the imported products.[654] It could possibly be argued that the due diligence requirements for operators that place timber on the market are harder to fulfil with regard to imported products than for domestic products, because of uncertainty about the foreign origin, and the distance making it more difficult to evaluate and examine the correctness of information. The imported products might then be at a competitive disadvantage. Nevertheless, this is not as to protect domestic products, and the mere different impact does not lead to treatment less favourable.[655] It is thus unlikely that the Timber Regulation is inconsistent with Article III:4 GATT.

The Timber Regulation could arguably be inconsistent with Article I:1 GATT, because of the discrimination between identical products based on the country of origin. Rather than referring to general environmental-friendly criteria, the Timber Regulation refers to the national laws of the harvesting country. Legality, and thus the right to be placed on the market, is determined based on the national laws of the harvesting country. Timber products that are physically identical, and logged in a similar way, could be legal according to the laws of country A but illegal according to the laws of country B. In this way, the Regulation could confer indirect 'advantages' on products from some countries (those with less stringent national laws), without according them to all like products originating in other WTO Members.

It is unlikely that the Timber Regulation would fall within the scope of the TBT Agreement, because firstly, the Timber Regulation is a non-product-related PPM, whereas the TBT Agreement may only apply to 'related' PPMs.[656] Whether 'related' can also include non-physical characteristics of a product has not yet been clarified in the case law. Secondly, even if the TBT could apply to npr-PPMs, it is not clear whether the Timber Regulation prescribes a technical regulation, as it does not lay down any rules itself, but refers to the national laws of the harvesting country. It is possible though that implementing measures could qualify as technical regulations under the TBT Agreement, for instance when EU Member States require the marking of imported products to indicate origin or verification.[657] However, the Timber Regulation itself does not prescribe such rules.

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653 Forest Trends, *European Trade Flows and Risks* (2013)., at http://forest-trends.org/documents/files/doc_4085.pdf.
654 AB Report *Korea-Various Measures on Beef* 2000, paras.135.
655 AB Report *EC-Seal Products* 2014, para.5.108.
656 See chapter 2.4.3. and chapter 7.5.1.
657 Akiva Fishman and Krystof Obidzinski, 'European Union Timber Regulation: Is It Legal?' 2014, 23 Review of European Community & International Environmental Law 258, 273.

8.5.3.2 Environmental objective and location of the concern

Assuming it can nevertheless be established that the Timber Regulation violates WTO law, a justification needs to be found in Article XX GATT, where the question of extraterritoriality arises. Sustainable forest management can be an environmental objective both under Article XX(b) (protection of flora and fauna), and Article XX(g). Forests are definitely exhaustible, and avoiding trade in illegal timber can contribute to preventing deforestation. Also the objectives of climate change and biodiversity have widely been recognized as important environmental objectives. The question is then again whether there is a jurisdictional limitation to these environmental objectives: are paragraphs (b) and (g) limited to environmental concerns within the territory of the regulating state, or can members also rely on these exceptions to address concerns outside their jurisdiction?

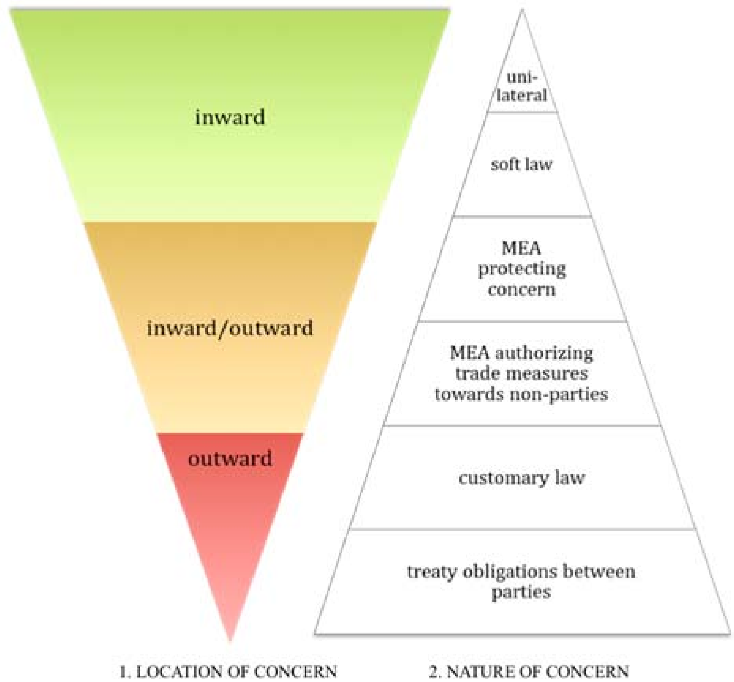


Figure 16. Step 1

With regard to forests within the EU, there is no doubt that the EU can take the necessary measures. With regard to forests outside the EU, however, it is again a question of whether the deforestation of those forests, and illegal harvesting of timber can have sufficient environmental effects on EU territory in order for the measure to be considered both inward- and outward-looking.

In order to justify an exercise of jurisdiction, the environmental effects must be direct, substantial and foreseeable. Several elements can be taken into account to determine these effects. Firstly, forests are the green lung of our planet and can be considered a common resource. Secondly, decreased forests have an impact on global biodiversity and climate change.[658] As those are global concerns that affect the planet as a whole, every state is affected and could this in principle substantiate a claim of environmental effects on its territory.[659] Measures taken to protect forests, would thus qualify as measures having an inward- and outward-looking effect, as there are environmental effects both within and outside the territory of the regulating country. Because of the partly outward-looking effect, further support for the concern at issue is still required to strengthen the exercise jurisdiction.

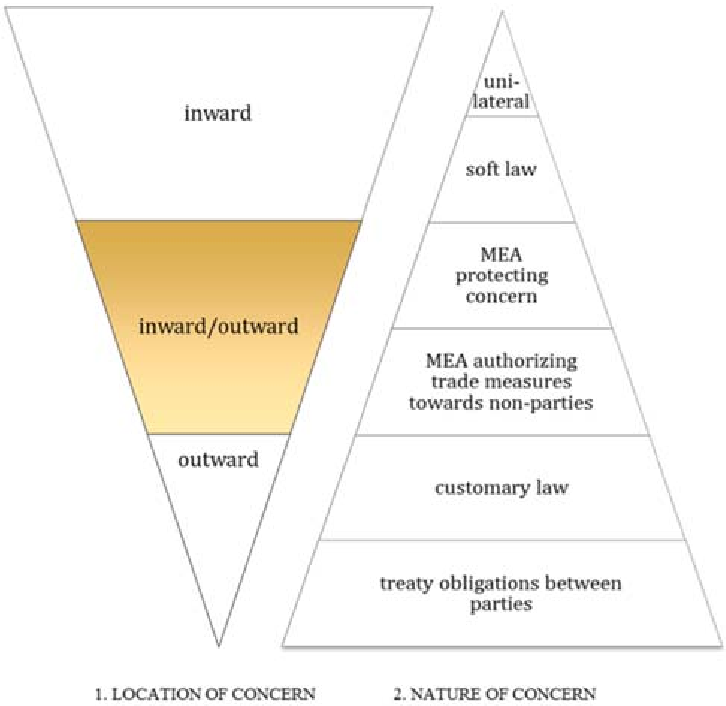


Figure 17. Step 1 Timber

658 See IPCC, Climate Change and Biodiversity (Habiba Gitay et al. eds, 2002), Climate Change and Biodiversity, (Thomas E. Lovejoy & Lee Hannah eds., 2005), see also Harro Van Asselt, 'Managing the Fragmentation of International Environmental Law: Forests at the Intersection of the climate and Biodiversity Regime' 2012, 44 NYU Journal of International Law, 1213.
659 See *supra* at 8.3.3.2. when discussing effects of climate change.

8.5.3.3 Necessity and recognition of the concern

The necessity test of the paragraphs of Article XX can be interpreted to give added value to international support.[660] Determining the degree of necessity involves a process of weighing and balancing a series of factors, which results in an ad hoc, contextual assessment of each measure.[661] The more common a concern - as recognized by international support for that particular concern -, the more easily a measure addressing it will be considered necessary.[662] Necessity also assesses whether less-trade restrictive measures can reach the same objective. If a measure finds support in or is even prescribed by international agreements, it is less likely that a measure will have a protectionist objective and that the measure would be considered too trade-restrictive.[663]

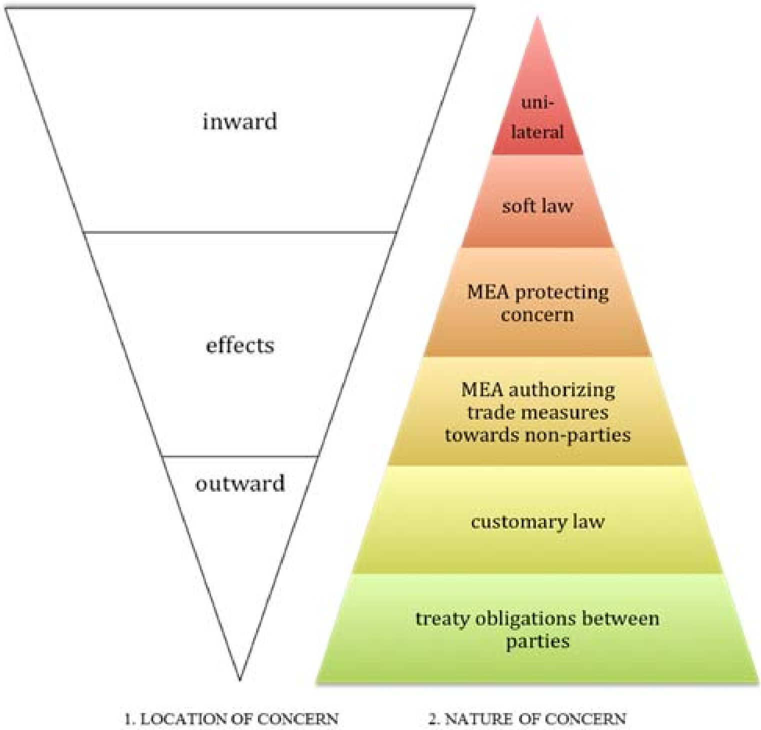


Figure 18. Step 2

660 See chapter 7.2.3.
661 AB Report *Korea-Various Measures on Beef* 2000; AB Report *EC-Asbestos* 2001; AB Report *Brazil – Retreaded Tyres* 2007.
662 AB Report *Korea-Various Measures on Beef* 2000, para.162.
663 See chapter 7.

At the Earth Summit in Rio 1992, the international community failed to reach agreement on a global forest convention. Two soft law instruments were adopted: the Forest Principles[664] and Chapter 11 on deforestation of Agenda 21.[665] Since 1992, in the absence of a hard-law international instrument on forests, sustainable forest matters are addressed in a fragmented and uncoordinated manner by a large number of private and public, international and regional soft-law instruments.[666] At the UN level, the Intergovernmental Panel on Forests was established in 1995 in order to share knowledge between states, and was replaced by the United Nations Forum on Forests in 2001.[667] In 2008 the UN General Assembly adopted a resolution on 'Non-legally Binding Instrument on All Types of Forests' (NLBI), strengthening commitment to sustainable forest management, through among other national forest programs.[668] The NLBI also promotes bilateral, regional and international cooperation aimed at curbing trade in illegal timber, without any binding obligations or commitments, however. In 1994, the United Nations Conference on Tropical Timber adopted International Tropical Timber Agreement (ITTA), succeeding an earlier 1983 ITTA, seeking to promote trade in timber from sustainable sources.[669] Its successor agreement, the ITTA of 2006, further emphasizes the need to improve the distribution and trade of legally harvested timber.[670] There have been a series of regional initiatives addressing forest law enforcement and governance, starting with the Asia Forest Law Enforcement and Governance process, raising awareness, and bringing together governments of timber-

664 Statement of Principles for a Global Consensus on the Management, Conservation and Sustainable Development of All Types of Forest, 1992.

665 Agenda 21, 1992, Chapter 11.

666 For a comprehensive overview, see Jeremy Rayner, Alexander Buck and Pia Katila, *Embracing Complexity in International Forest Governance: A Way Forward* (2010); *Embracing Complexity: Meeting the Challenges of International Forest Governance. A Global Assessment Report by the Global Forest Expert panel on the International Forest Regime* (2010); Lars Gulbrandsen, 'Overlapping Public and Private Governance: Can Forest Certification Fill the Gaps in the Global Forest Regime?' 2004, 4 Global Environmental Policy; FLEGT Action Plan, 2003, 24. A well-known example of a private initiative is the Forest Stewardship Council Certification Scheme. This organization has promoted responsible management of the world's forests since 1993. Its main tools are standard setting, certification and labeling. Use of the FSC logo is intended to signify that the product comes from responsible sources – environmentally appropriate, socially beneficial and economically viable. The FSC label is used on a wide range of timber and non-timber products from paper and furniture to medicine and jewelry. See http://us.fsc.org.

667 See http://www.un.org/esa/forests/forum/.

668 GA Res 62/98, UN Doc, A/RES/62/98 (Jan 31, 2008).

669 International Tropical Timber Agreement, Geneva, 26 January 1994. 45 parties ratified the Agreement.

670 International Tropical Timber Agreement, Geneva, 27 January 2006. 72 parties have ratified the agreement.

producing and consuming countries, civil society and the private sector.[671] A similar process is ongoing in Africa.[672] Both focus mainly on the legality of logging.

Using trade measures as a tool to promote sustainable forest management and legal logging has furthermore been recognized in CITES, with regard to the timber species listed, and its implementation in the EU Wildlife Regulation.[673] The International Tropical Timber Organization (ITTO) and CITES collaborate on a program to ensure that international trade in CITES-listed timber species is consistent with sustainable management.[674] Furthermore, initiatives such as the 1998 G8 Action Program on Forests have made the elimination of trade in illegally logged timber a priority.[675] The UN Security Council has been active against 'conflict timber' through imposing trade bans on all timber traded by armed groups, coming from war zones that might be illegally exploited and used to fuel armed conflicts.[676] The EU is not alone in using trade measures in the fight against illegal logging: Australia and the US have adopted similar legislation.[677]

Forest management is furthermore linked to biodiversity and the fight against climate change. Under the UNFCCC countries have committed to undertake action with regard to forests as 'sinks and reservoirs of greenhouse gases'. The linkages between climate change and biodiversity loss are manifold and complex.[678] Since 2007, REDD (reducing emissions from deforestation and forest degradation) has become an important part of the negotiations for long-

671 For an overview of the Forest Law Enforcement and Governance East Asia, see *Forest Law Enforcement and Governance: Progress in Asia and the Pacific* (2010).

672 African Law Enforcement and Governance, Ministerial Declaration 2003, at http://siteresources.worldbank.org/INTFORESTS/Resources/AFLEGMinisterialDeclaration_English.pdf.

673 A listing under the Appendices of CITES means that timber products from these species can only be imported into the EU when accompanied by an export permit from the country of origin and an EU import permit. Export permits are valid only if the timber was harvested legally within the country of origin, and an import permit can only be granted when it is established that the granting of such a permit would not have a detrimental effect on the survival of the species or the extent of the territory occupied by it.

674 https://www.cites.org/eng/prog/itto.php.

675 G8 Action Programme on Forests, initiated in 1998. See e.g. http://www.g8.utoronto.ca/foreign/forests.html;http://www.mofa.go.jp/policy/economy/summit/2002/g8forest2.html.

676 E.g. Security Council Resolution 1521 (2003) and Resolution 1579 (2004) against Liberia. The EU FLEGT Action Plan points to the need to advance work on conflict timber, with a view to set up an international process similar to the Kimberly Process to diamonds. (FLEGT Action Plan, 2003, 21.).

677 US Lacey Act (16USC §§3371-3378) as amended in 2008; Australia Illegal Logging Prohibition Act 2012, No 166, 2012.

678 See IPCC, Climate Change and Biodiversity (Habiba Gitay et al. eds, 2002), Climate Change and Biodiversity, (Thomas E. Lovejoy & Lee Hannah eds., 2005), see also Van Asselt (2012), 1213.

term cooperative actions under the UNFCCC[679] and deforestation issues are increasingly addressed in the context as a REDD-plus item. Through a REDD mechanism, countries with tropical forests could be compensated for their efforts to reduce the rate of deforestation and enhance sustainable forest management.[680]

The CBD then is the first MEA (with almost universal membership, albeit excluding the US)[681] approaching the protection of biological diversity, including forests, in a comprehensive manner.[682] Under its eco-system approach, particular attention is paid to the management and protection of biological resources, and forests form an important part of these resources, even though no explicit reference is made to forests. As forests are important for among others flora and fauna and natural heritage, the parties have acknowledged that forest issues are covered by the CBD mandate.[683] In 2002, the parties adopted an expanded work program on forests, which provided an extensive set of goals, objectives and activities for the conservation of forest biodiversity and the fair and equitable sharing of benefits arising from the utilization of forest genetic resources.[684] The program does not include quantified, time-bound targets, but lists a wide range of possible activities that can be undertaken at the national level.

Thus, the EU has been an active proponent of a global forest convention, but in light of the failure of reaching binding agreement at an international level, the EU has focused on a unilateral and bilateral approach to ensure the legality of timber brought within its borders.[685] The EU has a clear bottom-up strategy for building international consensus on sustainable forest management.[686] The concern of sustainable forest management has definitely been recognized at an international level, but the international community has so far been unable to agree on a binding regime. Both in its FLEGT and Timber Regulations, the EU is not creating new norms, but relying on definitions of legality based on the national law of the exporting country, which are often

679 It will most likely take some time before fully fledged rules for REDD are set up. In the mean time, several multilateral actions have been undertaken to support the development of and readiness for REDD, such as the Forest Carbon Partnership Facility (supported by the World Bank), and the UN-REDD Programme (established by FAO).

680 Van Asselt (2012), 1222.

681 The Convention has 196 parties. The US is the only nation that is not a party: while it has signed, it has not ratified the CBD. See https://www.cbd.int/information/parties.shtml.

682 Statement of Principles for a Global Consensus on the Management, Conservation and Sustainable Development of All Types of Forest, 1992.

683 Philippe Le Prestre, 'The CBD at ten: the long road to effectiveness' 2002, 5 Journal of International Wildlife Law and Policy 269, 276. The CBD

684 CBD Decision VI/22 'Forest Biological Diversity', UN Doc UNEP/CBD/COP/6/20 Annex I (2002).

685 Annalisa Savaresi, 'EU External Action on forests: FLEGT and the development of international law' in Elisa Morgera (ed), *External Environmental Policy of the European Union* (Cambridge University Press 2012) 149.

686 Marin Duran and Morgera(2012), 273.

also based on international standards.[687] Making use of trade measures as a tool for sustainable forest management has been recognized in instruments such as CITES or the G8 Action Program on Forests. In that regard, one could say that there is clear international support from different fora for the concern at issue (tackling illegal harvesting of timber), as well as for making use of trade measures. In light of the foregoing, it can be concluded that the extra-territoriality threshold would be passed.

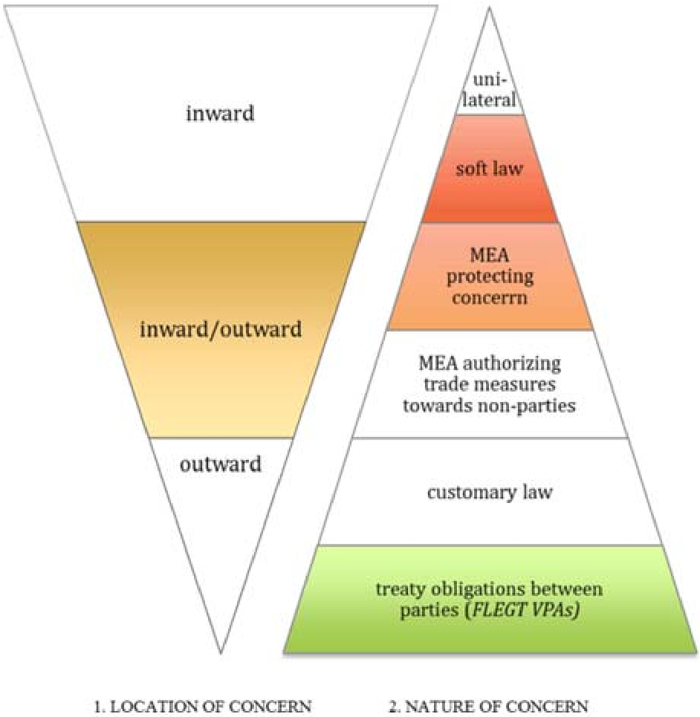


Figure 19. Full model Timber

8.5.3.4 Chapeau

Any measure that has complied with the extraterritoriality decision tree and has thus passed the extraterritoriality threshold, still needs to comply with the conditions of the *chapeau* of Article XX in order to be justified under the general exceptions. The *chapeau* is an expression of the principle of good faith, and several elements have been presented that play a role in the analysis of

687 E.g. explicit reference to international standards in the VPA EU-Cameroon.

the *chapeau*, such as a duty to cooperate, respect for multilateralism, a responsiveness to international developments and a need for flexibility in how to attain the environmental objectives. It has been questioned whether one could read a duty to assistance in the *chapeau*, meaning that when a country imposes a measure, it should also provide for the necessary management elements for success, such as transfer of technology or knowledge.[688]

The Timber Regulation is a product-based measure, whereby the finding of legality of timber products depends on the legislation in the harvesting country. The VPAs concluded pursuant to the FLEGT Regulation are bilateral agreements, under which the partner countries agree with the EU on the conditions of import. The EU is clearly aiming for a consensual and cooperative approach to address deforestation by exporter and importer countries. Reliance on the legislation of the third country arguably aims to ensure the third country's ownership of the initiative, as well as demonstrate respect for its national sovereignty over its forest resources.[689] Relying on the national law of the harvesting country to determine legality could lead to different standards applying depending on where the timber was harvested. However, as the Timber Regulation itself is neutral, this possible differential treatment cannot be seen as arbitrary or unjustifiable discrimination. The rationale of such differential treatment clearly bears a relationship to the objective of the measure, which is preventing the illegal harvesting of timber and its trade. The purpose of cooperation is also to serve as an incentive to come to international agreement, including a common definition and legal framework for the legal harvesting of timber.

With regard to assistance, a measure should be assessed in a broader regulatory context. For instance, the FLEGT Regulation is closely linked to the Timber Regulation, and all countries producing timber can enter into negotiations with the EU to become a FLEGT partner, so they would then be able to issue FLEGT licenses with a presumption of legality for timber products. As a FLEGT partner, the EU will grant assistance to the partner country for the upgrading of its legal and administrative framework related to forest management. VPAs can provide for financing and technical contributions from the EU,[690] as well as market incentives, such as encouragement of public and private procurement policies and market promotion.[691]

688 See chapter 7.4.
689 Marin Duran and Morgera(2012), 274.
690 E.g. Article 15(4) VPA between the EU and Ghana.
691 E.g. Article 18 VPA between the EU and Ghana.

8.5.4 Challenges

FLEGT is a cooperative effort for the enforcement of forest law, and more particularly the enforcement of national laws of the harvesting country. If country A is incapable of sufficiently enforcing its norms, to what extent can country B 'assist' with that enforcement? If country A believes that milder enforcement is appropriate than what country B adheres to, could country B then opt for stricter enforcement for imports coming from A? With the FLEGT Regulation and the VPAs, the EU has clearly opted for a consensual approach, whereby both parties agree on the concern to be protected and the norm (the legality definition under national law); as well as the applicable sanction, being no market access. In the absence of VPAs, the EU stills seeks to prohibit market access through the Timber Regulation. Under the Timber Regulation, the definition of 'legal timber' is still based on the national law of the harvesting country, but the measure is unilateral in the sense that there is no cooperation or assistance between country of export and country of import. Operators importing timber into the EU have an obligation of due diligence, to minimize the risk of bringing illegal timber to the market, which can be penalized among others with the seizure of the products.[692] The EU is not imposing a definition of legal timber, and it could thus very well be that legality definitions differ from country to country. However, as the definition of illegality implies that illegal products cannot legally be placed on the market, the EU's measure to prohibit the market entry of illegally logged timber is in line with the national laws of the country of origin. The sanctions that can be imposed upon violation of the law should be considered separately from the legal norm of legality: those sanctions are to be prescribed under national law (e.g. pecuniary penalty in country A, while seizure of the illegal goods if they are placed on the market in country B).[693]

What if country A exempts exports from more stringent domestic regulation? Can the country of import then still 'enforce' the more stringent domestic regulation on imports? It seems only reasonable that the importing country can solely refer to the national laws as they apply to the product at issue: if not considered illegal in the country of origin, then it cannot be considered illegal by the country of import based on that national legislation. Thus, enforcement of third country norms allows the importing state to impose measures with an extraterritorial effect, as long as that meausure fully relies on the applicable law of the country of origin. Where the country of import imposes additional obligations to a particular product, the measure is no longer only 'enforcing' third country norms. Those additional obligations would then

692 Timber Regulation, 2010, Article 6.
693 Ibid Article 19. The sanctions for the EUTR are furthermore set by the EU Member States, leading to a variation of sanctions across the Member States as well. See Commission Report to the Parliament and the Council, 18 February 2016 (COM(2016) 74 final), p.4.

need to be examined under the decision tree to assess whether they are acceptable as well. This example of third-country norm enforcement shows that an additional type of measure needs to be added to the second pyramid of the decision tree determining international support: enforcement of norms of the country of origin, i.e. enforcement of third country norms.

In the FLEGT and timber example, the EU is not imposing a standard for legality, and not imposing new norms. Nor is the EU explicitly enforcing or furthering existing international norms. Rather, the EU is enforcing third-country norms, shared by a common concern for sustainable forest management. The EU is supporting the further development of international law through a clear bottom-up approach, and is thereby acting as a regime generator. That regime cannot work without the cooperation of both exporting and importing states, and the EU is acting upon its responsibility to involve the necessary actors in the most sustainable way. The cooperation with FLEGT partners as well as the market access incentives will hopefully lead to the development of a multilateral/international regime.[694]

One could wonder whether the Timber Regulation with its reference to national law could not have a counterproductive effect and lead to a race to the bottom, whereby countries will consciously impose weak legislation with regard to the harvesting of timber, in order to ensure 'legal' supply. However, political pressure by other countries in similar conditions, as well as regional and international organizations can hopefully convince the harvesting countries of the importance of sustainable forest management.[695] Precisely because these environmental concerns have a global impact, it is important that all states are involved and have ownership. Furthermore, even though countries can formally adopt legislation, the legal culture of the country in question will affect compliance and enforcement, which is difficult to control. Even though under the Timber Regulation operators need to exercise due diligence when placing timber products on the EU market, their actions are limited by the available information from the country of origin. Distinguishing between countries based on their legal culture is likely to be a too sensitive and arbitrary exercise in order to pass a non-discrimination test under for instance the *chapeau* of Article XX GATT. If it were found that certain laws are structurally

694 For a review of the functioning and effectiveness of the Timber Regulation, see the Commission Report to the Parliament and the Council, 18 February 2016 (COM(2016) 74 final) and the Staff Working Document on the evaluation of the Regulation of the Timber Regulation, 18 February 2016 (SWD(2016) 34 final), at http://ec.europa.eu/environment/forests/eutr_report.htm.

695 So far, no race to the bottom has been identified, and the multitude of forestry initiatives seem to rather lead to upward harmonization. See Christine Overdevest and Jonathan Zeitlin, 'Assembling an Experimentalist Regime: Transnational Governance Interactions in the Forest Sector Revisited' in Laszlo Bruszt and Gerald A. McDermott (eds), *Leveling the Playing Field: Transnational Regulatory Integration and Development* (Oxford University Press 2014) 245.

not complied with, importing states would need to engage in talks and assistance to work towards respecting the rule of law. Extraterritorial trade measures relying on third country legislation, such as the EU Timber Regulation, thus need to be coupled with other assisting measures where necessary to optimize an effective outcome.

8.6 Regime generators: An *ex-ante* approach to the decision tree

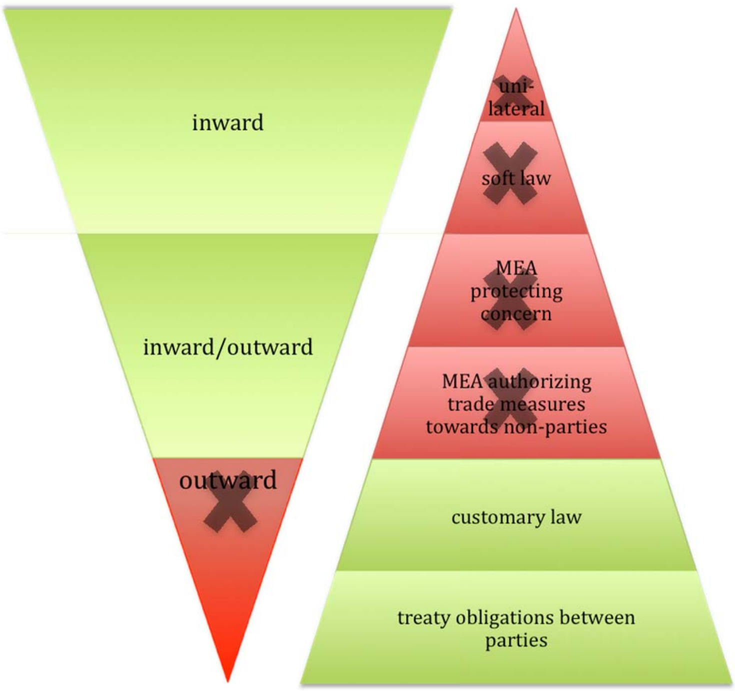
The case studies have demostrated that npr-PPMs have different degrees of international 'back-up', which lead to different degrees of 'regime-generating potential'.[696] That back-up refers both to support for the environmental concern (e.g. climate change) and support for the method of action and protection (e.g. a cap-and-trade-system). While there might, for instance, be international support (through hard or soft law) for a particular environmental *concern*, there might not yet be agreement on a common *method* to address that concern. As a matter relevant to determine the necessity of a measure, the assessment of international support must consider both. With regard to appropriate methods of environmental protection, scientific reports and/or state practice in the absence of international agreement can be considered.

Four categories of regime generators can be distinguished: international norm enforcement, third country norm enforcement, norm furtherance and norm creation. While the latter three can only be permitted in the form of process-based npr-PPMs (targeting the specific production process), international norm enforcement may also be permitted in the form of country-based measures, under which npr-PPMs do not only target the specific production process, but make market access conditional on the country of origin. Country-based measures are more restrictive because products that are produced in accordance with the PPM will not be accepted on the market as long as the country of origin does not comply with the prescribed measure (e.g. adopt measure to protect sea turtles comparable to the US TED requirement). Country-based measures are furthermore more intrusive on the sovereignty of the country of production, as they coerce that state into adopting a policy that it otherwise might not have. The following models demonstrate the acceptable scope of action for each type of regime generator. Whereas the decision tree as proposed in chapter 6 is conceptualized as an *ex-post* tool for adjudicators, this further subdivision is equally useful for legislators *ex-ante* by outlining the available scope of action.

696 See chapter 7.6.2.

8.6.1 International norm enforcement

8.6.1.1 International norm enforcement: country-based measure



1. LOCATION OF CONCERN 2. NATURE OF CONCERN

Figure 20. International norm enforcement: country-based measure

International norm enforcement through country-based measures, targeting the country of origin rather than only the specific production process, can only be permitted when binding international obligations exist (either through treaties that bind the affected parties or customary law) for the country of production. In case of direct and substantial environmental effects within the regulating state, the highest level of support through international obligations leads to acceptance of the extraterritorial effect. The coercive effect on other countries can be accepted because those countries are already bound by their international obligations and the targeted state is thus not coerced into adopting rules it does not deem appropriate. Rather, what is required is compliance with its international obligations. If the treaty in question does not foresee in hard enforcement options, a trade measure by a treaty party can create an incentive for compliance – as long as the npr-PPM does not contravene the treaty in question. When the extraterritoriality threshold is passed, a trade measure will still need to comply with the conditions of the chapeau of Article XX GATT, which can be interpreted as a good faith obligation. For instance, country-based measures combined with technical assistance in order to help the country reaching the prescribed requirements can increase acceptance by the targeted states.

8.6.1.2 International norm enforcement: process-based measure

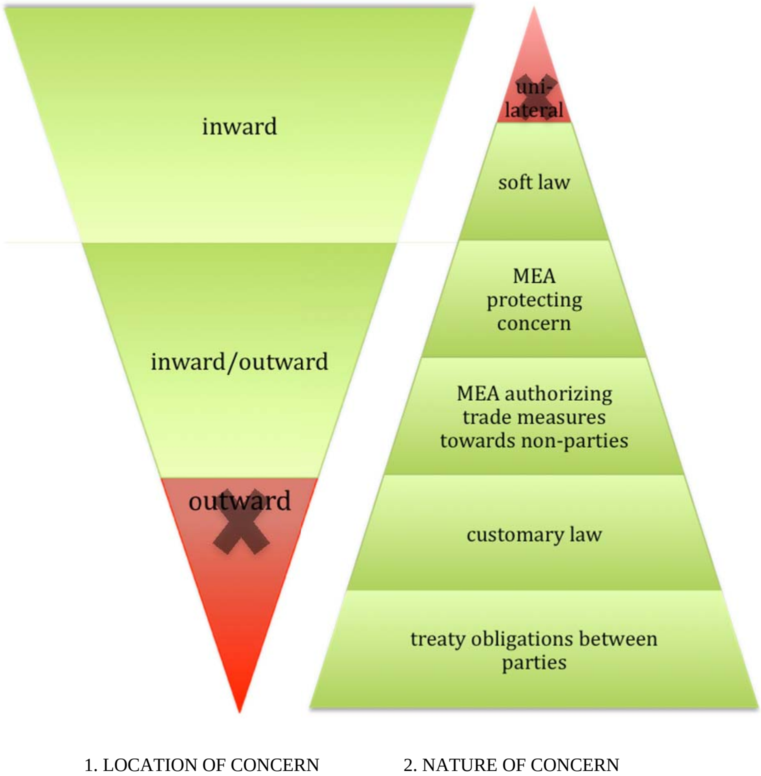


Figure 21. International norm enforcement: process-based measure

Measures of international norm enforcement targeting the specific production process rather than the country are less intrusive than country-based measures and could be accepted even in case of widespread support of the norm through soft law (rather than only through hard law). International norm enforcement implies that a more binding obligation exists that can be enforced, but if it could be demonstrated through an assessment of the international framework on the concern at issue that the soft law framework is widely supported and is recognized by a large number of states as an 'unwritten rule', such a soft law norm could in principle also be 'enforced'. An assessment of the soft law norm should consider the membership, reasons for failure to conclude a binding agreement and ongoing negotiations. International norm enforcement of soft law is only acceptable when states can demonstrate direct and substantial effects within their territory (inward or inward/outward-looking measures). If there are no or only weak or indirect effects (outward-looking measure), and there are no binding international obligations, then less-trade restrictive measures need to be applied, such as for instance labeling (market incentives rather than market bans).

8.6.2 Third-country norm enforcement

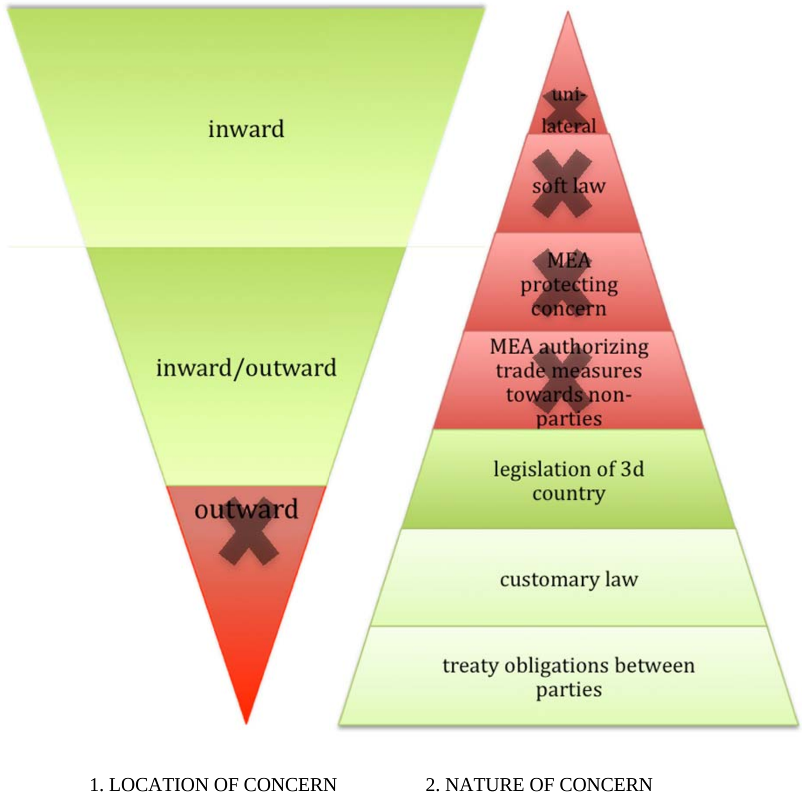


Figure 22. Third-country norm enforcement

Third-country norm enforcement through process-based measures can be accepted when the importing state conditions market access on compliance with the legislation of the country of export, and can thus be seen as ‘enforcing’ the legislation of the country of export. When the requirements of the importing country do not conflict with the requirements of the exporting country, no further international support is needed to impose such measure (e.g. prohibition to be placed on the market in both countries). However, if the enforcement measure in the importing country goes beyond what is required in the country of export, additional international support is needed for that part of the measure. That part of the measure will then either be seen as norm furtherance, or possibly even norm creation.

8.6.3 Norm furtherance

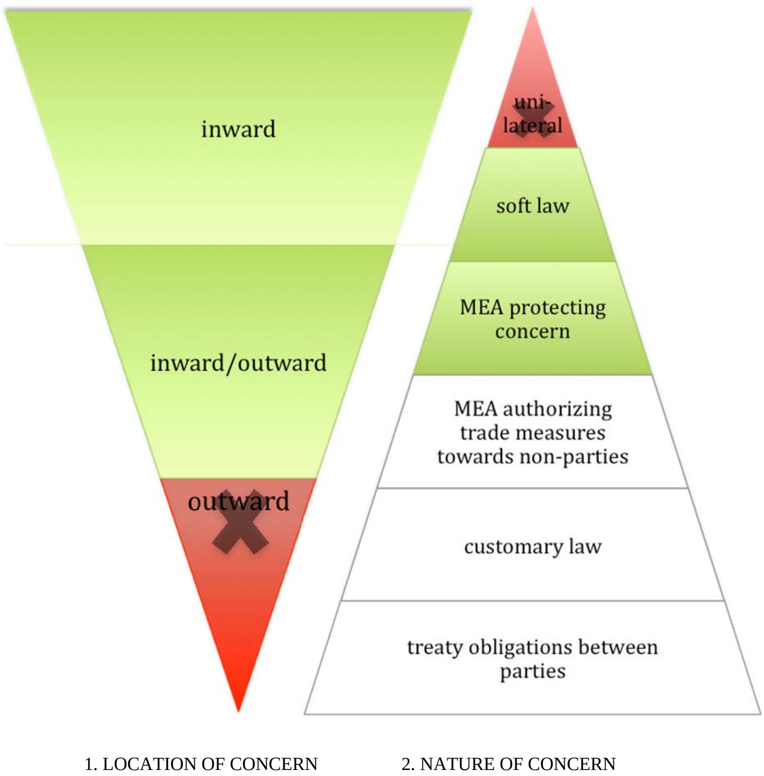


Figure 23. Norm furtherance

Process-based trade measures with the purpose of international norm furtherance can be accepted if the measure is either inward-looking or direct, substantial and foreseeable environmental effects on the territory can be discerned; and if there is sufficient international support for a concern. As international obligations do not yet exist, support needs to be assessed through soft law means. An assessment of that support, taking into account the membership, reasons for failure to conclude a binding agreement, and ongoing negotiations, needs to be conducted. There can be (dis)agreement on the concern itself, or on the appropriate method to protect that concern. If states agree that an environmental concern needs to be protected, but there is no scientific consensus on how to reach that goal, it is proposed that as long as there is plausible/acceptable scientific support to act in a certain way, measures protecting that goal could be accepted. This can be read into the necessity test, whereby states need to show that the measures they are taking are indeed necessary and proportionate. The burden of proof is on the complaining party to suggest less-trade restrictive alternatives, and thus also alternatives that might rebut the credibility and appropriateness of the scientific method.

8.6.4 Norm creation

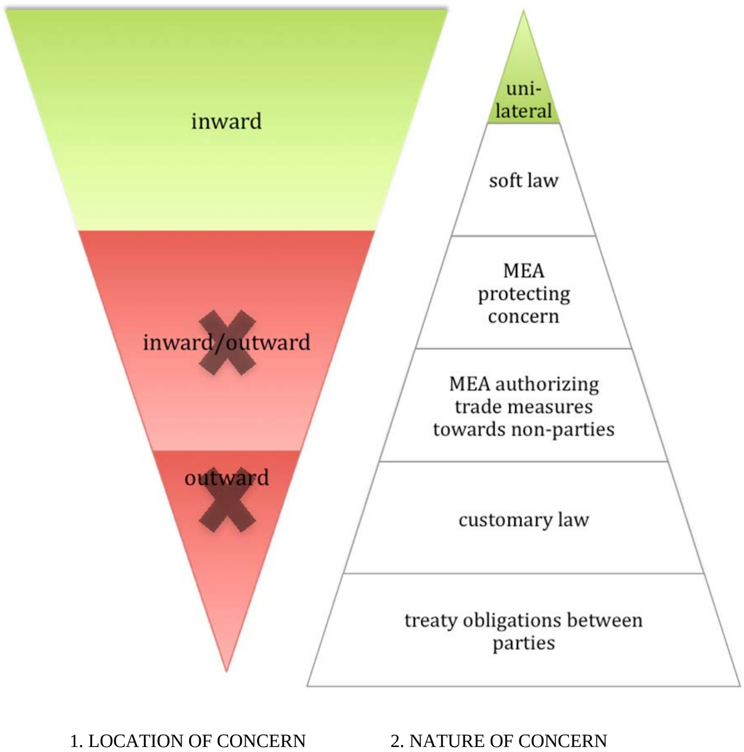


Figure 24. Norm creation

Norm creation would occur in case of unknown or little-known concerns, upon which states would like to act and create incentives for others to act. Unless a measure is strictly inward-looking, states cannot impose trade measures with an extraterritorial effect in the absence of international agreement. Even if there are direct environmental effects within the territory, when the measure is also outward-looking and affecting other states, states should have recourse to multilateral action rather than unilateral action by raising international awareness and focusing on international negotiations. If such negotiations would not work, then depending on the reason for failure (no recognition of the specific concern, or no agreement on the appropriate method to tackle the concern), measures of norm creation could become of norm furtherance, for which the (newly-found) support at that stage needs to be assessed. Even though arguably this is the situation where PPMs might be needed the most, these unilateral measures both in form and in substance should be avoided within the multilateral trading system. States should commit to multilateralism, and at least attempt to involve other states before imposing trade measures that will affect countries and their producers. Furthermore, if states and/or their consumers are genuinely concerned about a (partly) outward-looking concern, an alternative path of action could be to seek justification under the exception for moral concern, Article XX(a).[697]

8.7 Conclusion

The examples discussed above have illustrated the application of the decision tree. All four measures are npr-PPMs with an environmental objective taken in the absence of a well-functioning international regime governing the concern in question – substantive norms are either lacking, not binding, incomplete, or unenforceable. While they are all regime generators, they can be distinguished based on the degree of available international support for and recognition of the norm imposed by the npr-PPM. The IUU Fishing Directive is an example of 'international norm enforcement', the Timber Regulation is an example of 'third country norm enforcement', and both the US TED measure and the Aviation Directive are examples of 'norm furtherance'. A fourth category of which no example has been discussed would be 'norm creation', whereby no international support for a certain concern yet exists, and for which further support is required before npr-PPMs with an extraterritorial effect can be accepted. Whereas the latter category requires the most stringent application of the decision-tree, the former category of 'international norm enforcement' allows for the most leeway for unilateral action.

The following observations on the extraterritoriality decision tree can be made. First of all, before the analysis - including the extraterritoriality question - turns to Article XX GATT, a trade measure needs to violate substantive WTO obligations. As long as a measure is designed in a manner consistent with WTO obligations, that measure is allowed under WTO law irrespective of its extraterritorial effects. Any controversy about possible extraterritorial effects would

697 See chapter 6.3 on moral concerns.

then need to be dealt with outside the ambits of WTO. The Timber Regulation and the Aviation Directive have for instance demonstrated that a violation is anything but obvious. The question under Article XX is then whether a measure can be justified when a state is addressing an environmental concern that is at least partly located outside its territory.

Secondly, states adopting npr-PPMs must be affected by the environmental concern, and must seek international support for the concern at issue through international environmental legal instruments. Due to this combination of environmental effects and international recognition of a particular concern, WTO Members are granted a wider scope for extraterritorial action than would normally be permitted under public international law or competition law: even where effects are weaer or more indirect, npr-PPMs with an extraterritorial effect could still be justified under Article XX GATT. The considerations of effects and international support can be seen as communicating vessels: stronger effects require less international support in order to be justified, weaker effects need more international support and vice versa. States cannot impose extraterritorial npr-PPMs when they are either not affected by the environmental concern, or when there is no international support yet recognizing the concern at issue. Where effects are uncertain in light of long-term effects and the available knowledge of environmental risks, reliance on the precautionary principle should not be opposed.

Thirdly, the decision tree systematizes and substantiates the AB's sufficient nexus test as developed in *US-Shrimp:* while intuitively correct, the AB did not expound why it implicitly accepted a weaker territorial link than normally required under public international law, neither did it elaborate on the impact of the migrating sea turtles on the US by the mere act of swimming through US waters. Through a rigorous assessment of a npr-PPM and its context, the decision tree confirms the AB's (implied) position that WTO law, as it stands, leaves a wide scope for environmental trade measures.

Lastly, the extraterritoriality framework is embedded in Article XX GATT, which includes checks to balance the right of members to regulate with the right of other members to free trade, through e.g. the necessity test with respect to the design of the measure[698] and the *chapeau*. There is no one-size-fits-all solution for environmental trade measures and contextual assessment is key, both in the assessment of the extraterritoriality decision tree, as the further justification of a measure.

698 See for instance the incentivizing measures taken regarding biofuels: all biofuels are accepted on the market, but if not produced according to EU sustainability standards, those fuels cannot count toward Member States' renewable energy targets.

9 Concluding chapter: Outlook and final remarks

9.1 A wide scope to address global environmental concerns through trade measures

This thesis has sought to answer whether states, in the absence of international environmental action, can unilaterally impose trade measures targeting foreign production processes (PPMs) in order to protect transboundary environmental resources. Does WTO law allow for 'extraterritorial' trade measures addressing these concerns? Or does it act as a stumbling block for alternative solutions to global environmental challenges? There has been a long-standing perception that PPMs that do not leave a final trace in the imported product (npr-PPMs) cannot be accepted under the existing trade rules because of their extraterritorial character. However, that perception does not correspond to reality. Whereas current WTO law does not include an explicit jurisdictional limitation, it is submitted that the rules can be interpreted rigorously to allow a wide scope for environmental npr-PPMs, while still safeguarding against overreach. In that light, environmentalists should not fear that trade rules will impede environmental protection, and trade advocates should not fear that allowing environmental protection through npr-PPMs will undermine the global trading system. Trade measures can contribute to progress on global environmental priorities, rather than complicate or impede it. Unilateral trade measures can be a much-needed alternative when multilateral or concerted environmental solutions are missing.

This thesis has demonstrated that WTO law, as it stands, leaves considerable scope for states to impose npr-PPMs addressing transboundary environmental concerns. By looking at WTO law from the perspective of other fields of law where an extraterritorial application of laws is accepted practice, an extraterritoriality decision tree has been proposed to assess extraterritoriality claims under WTO law, and more particularly under Article XX GATT. In trade law, extraterritoriality is not as much a question of *jurisdiction*, but of *justification*. Trade measures only apply to products that access the market of the regulating country: due to this territorial trigger, npr-PPMs can better be defined as measures with an *extraterritorial effect,* rather than as 'full' extraterritorial measures.[1] Can that effect be justified when a measure is targeting an environmental concern (partly) located outside the territory of the regulating state? It is submitted that states can impose environmental npr-PPMs when, firstly, the regulating state is affected by the concern at issue,[2] and, secondly, where that concern is recognized as such in international environmental law.[3] In the landmark case *US-Shrimp* the AB found a 'sufficient nexus' between the US and the threatened sea turtles to justify the extraterritorial reach of the US measure. The AB did not require an explicit or strong territorial link as per general international law principles, but applied a less stringent test. While intuitively correct, the AB's nexus test was unsatisfactory in its wording and implementation. The extraterritoriality decision tree as proposed in this thesis systematizes and substantiates the assessment of trade measures addressing transboundary environmental concerns under Article XX GATT. Considering environmental effects on the territory of the regulating state in combination with support for the concern in international environmental law enables a robust review of trade measures with an extraterritorial effect. This two-tier test warrants a wider scope for states to address extra-territorial concerns under Article XX GATT than would be permitted under public international law or competition law.[4]

As the text of Article XX GATT (as well as its context) is silent on its scope, any interpretation such as the one proposed in this thesis could be disputed. In order to settle all discussion on persistent uncertainties, such as the acceptability of npr-PPMs and the scope of the WTO agreements, WTO Members must opt to clarify or change the law. Amendments to Article XX GATT, adopting an interpretative understanding to clarify the meaning of existing obligations, adopting a plurilateral agreement on the interpretation of WTO rules or even a moratorium on dispute settlement in the area of clean energy were some of the policy options proposed by experts in the recent ICTSD and World Economic Forum E15 Initiative on Trade and Sustainable Development.[5] However, this thesis contends that, before going down the long and challenging road of treaty amendments, much can be done *de lege lata*. It has been demonstrated that the WTO legal framework that states can and must work

1 See chapter 4 for a distinction between extraterritorial measures and measures with an extraterritorial effect under public international law.
2 See chapter 5 for a study on the effects doctrine in the field of competition law.
3 See chapter 6 for a study on the extraterritorial application of regional and international human rights treaties.
4 See chapters 3 and 4 for a study on extraterritoriality under public international law and competition law.
5 Ricardo Melendez-Ortiz, *Enabling the Energy Transition and Scale-Up of Clean Energy Technologies: Options for the Global Trade System – E15 Expert Group on Clean Energy Technologies and the Trade System* (2016) 17; Bacchus (2016), 17; Ricardo Melendez-Ortiz and Richard Samans, *Strenghtening the Global Trade and Investment System in the 21st Century: Synthesis Report* (The E15 Initiative: Strengthening the Global Trade and Investment System for Sustainable Development, 2016) 91.

with today is not as limited or controversial as often assumed. Rather, WTO law leaves quite some scope to the Members to make use of trade measures to further global environmental protection.

This concluding chapter first gives an overview of the research leading to the extraterritoriality decision tree under WTO law, followed by a short discussion of its challenges. Next, some observations are made with respect to concept of territoriality, questioning whether it is still a useful concept in a globalized world. Lastly, the thesis is concluded with some final remarks on this study and its implications.

9.2 An inclusive perspective rather than 'in clinical isolation': building a decision tree

This thesis focuses on the extraterritorial reach of npr-PPMs, which may refer to two notions of extraterritoriality. Firstly, can states regulate foreign production processes through trade measures? And secondly, can states through such measures aim at the protection of non-trade concerns located outside their territory? In other words, is extraterritoriality a matter of jurisdiction (can states prescribe behaviour abroad), or a matter of justification (can states justify a measure based on a concern outside their territory)? As the first part of the research has shown, WTO law is silent on its jurisdictional scope, and jurisprudence on extraterritorial trade measures has been scarce (chapter 3). With regard to the first question, the AB found in *US-Shrimp* that in principle, states can regulate foreign production processes through trade measures, when they comply with the conditions of the general exceptions clause, Article XX GATT. Extraterritoriality under WTO law is thus a question of justification rather than of establishing jurisdiction. With regard to the second question, the AB referred to a 'sufficient nexus' between the regulating state and the environmental concern addressed through the disputed measure. Without further clarification of the required nexus in *US-Shrimp* or later case law, the scope of Article XX GATT has remained uncertain. In order to develop a more systematic and robust approach to assessing extraterritoriality claims under WTO law, the second part of the thesis has made an excursion to other areas of law where the extraterritorial application of laws is an accepted practice. This 'zooming out of WTO law' is in keeping with the AB's findings that the WTO agreements are not to be read 'in clinical isolation' from public international law;[6] and that the exceptions of Article XX GATT should be interpreted in light of contemporary concerns, as evidenced by international instruments of environmental law.[7]

6 AB Report *US-Gasoline* 1996, p.17.
7 AB Report *US-Shrimp* 1998, paras.129.

Even though npr-PPMs explicitly target foreign production, a measure will only be 'activated' when access is sought to the market of the regulating country. Producers abroad are still free to produce in whatever preferred or locally regulated way, and will only need to comply with the PPM-imposed rules once they have opted to export to the market of the regulating state. Enforcement of these rules only occurs within the territory of the importing state (including border controls). Npr-PPMs can hence not be considered 'full' extraterritorial measures: because of the territorial connection through market access, they are better designated as measures with an extraterritorial effect (chapter 4). The question whether that effect can be permitted relates to the second notion of extraterritoriality in this context: can npr-PPMs aim to protect environmental resources (partly) located abroad, i.e. do these 'extraterritorial' concerns fall within the scope of the general exceptions of Article XX GATT?

Through the analysis of the jurisdictional principles of public international law permitting extraterritorial prescriptive jurisdiction, the objective territoriality principle – i.e. the effects doctrine as commonly applied in competition law – has been identified as most relevant to the analysis and justification of npr-PPMs (chapter 5). States may act when their environment is affected by foreign production activities. Measures that are either inward-looking (environmental harm fully within the territory of the regulating state), or partly outward-looking (concerns of a transboundary or global nature that can lead to environmental effects both within and outside the regulating state) may be permissible under Article XX GATT. States cannot act extraterritorially when they cannot demonstrate environmental effects on their territory, i.e. when a measure is only outward-looking. By analogy with the application of the effects doctrine in competition law, environmental effects should be direct, substantial and foreseeable. However, whereas national competition rules are applied extraterritorially in the absence of relevant international rules, the situation differs in an environmental context. There is a body of international environmental law that could be taken into account – in addition to considering environmental effects on the territory -, and which could possibly justify a more lenient approach to the required effects: even effects that are less direct or less substantial could then nonetheless justify state action when support for the concern is found in international environmental law. For example, when the threat to sea turtles is recognized as an important concern in an MEA, states could be permitted to act to protect sea turtles even when the environmental effects of a decreased sea turtle population upon their territory would be weaker, i.e. less present. The binding nature and the membership of the MEA are elements to be taken into account to assess the international support for the action taken.

The analysis of the extraterritorial application of international and regional human rights treaties (chapter 6) has demonstrated that states may indeed be more willing to accept an extension of jurisdictional boundaries when common norms are at issue. By focusing on a factual assessment of a state's control over territory and/or persons, the human rights bodies have shown that, when shared values and global concerns so demand, the notions of jurisdiction and sovereignty can be elastic. Such extraterritorial application enshrines the 'normative basis for the protection of fundamental rights as rights of human beings rather than as rights of citizens'.[8] Even though the concept of extraterritoriality in a human rights context – referring to an extension of a state's own obligations – differs from the extraterritorial effect of npr-PPMs – imposing obligations on foreign producers –, the human rights perspective still offers valuable insights into the flexibility of jurisdictional boundaries (even though the analysis of Article XX GATT is concerned with justification rather than jurisdiction). In addition to effects on the territory, international environmental law – as evidence of common concerns and global environmental priorities – can strengthen the justification of npr-PPMs with an extraterritorial reach.

In the third and final part the extraterritoriality decision tree has been proposed and applied to several case studies. The proposal of the tree builds upon the lessons learned from the analysis of these other fields of law as well as the AB's jurisprudence (chapter 7). As discussed in chapter 1, the core of the substantive legal analysis of npr-PPMs takes place under Article XX GATT. The extraterritoriality decision tree is embedded within the paragraphs (paragraphs (b) and (g)) of Article XX – does the environmental concern fall within the scope of the paragraphs, and is the measure necessary/related to the concern – and functions as an extraterritoriality threshold question before the measure can be examined further under Article XX's paragraphs and *chapeau* in light of good faith. The first step of the decision tree looks at the environmental effects on the territory, and the second step looks at the international support for the concern at issue. The scope of Article XX is thus limited by two requirements: a link between the regulating state and the environmental concern must be established through environmental effects on the territory; and a measure will qualify more easily as necessary when the substantive norm that it promotes finds international support in hard and/or soft environmental law. These requirements of effects and international support can be seen as communicating vessels: stronger effects require less international support in order to be justified, while weaker effects need more international support, and vice versa. Through the combined consideration of both effects and international support, trade measures with an extraterritorial effect could be justified even in those instances where that would not be evident from a general international law perspective. Nevertheless, there has to be some environmental effect on the territory: when states are not, or only very indirectly, affected by the environmental concern at issue, they cannot impose npr-PPMs addressing that concern, irrespective of the degree of international support.

8 Gardbaum(2009), 233.

Neither can they do so when there is no international support yet for an environmental concern that also affects other states. In those cases, justification may be sought under the public morals exception of Article XX(a), of which it has been argued that there is no jurisdictional limitation, but where a thorough assessment of the actual existence (evidence) of the public moral is required.

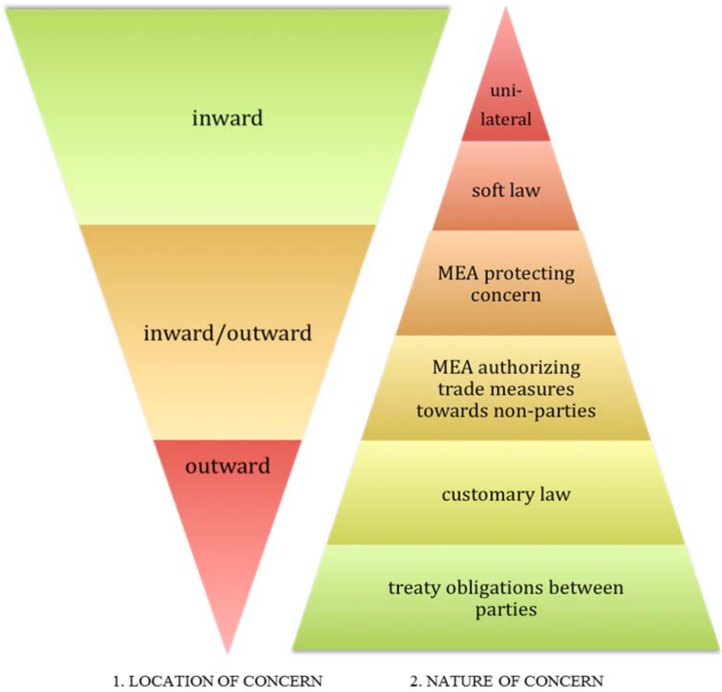


Figure 25. Extraterritoriality decision tree

Lastly, the proposed extraterritoriality decision tree has been applied to the landmark case of *US-Shrimp* and to different examples within EU environmental law: the Illegal, Unreported and Unregulated Fishing (IUU Fishing) Regulation, the aviation measures in light of the European Emission Trading System (EU ETS), and the Timber Regulation as part of the EU's Forest Law Enforcement, Governance and Trade (FLEGT) Action Plan (chapter 8). The analyzed measures are all taken in the absence of a well-functioning international regime governing the concern in question– substantive norms are either lacking, not binding, incomplete, or unenforceable. The case studies have demonstrated that first, a violation of a substantive WTO obligation needs to be established before the extraterritoriality question even arises; and second, Article XX GATT as it stands can accommodate npr-PPMs with an extraterritorial effect through the systematic assessment as proposed by the decision tree, albeit with different degrees of stringency. The analyzed examples all serve a purpose as a regime generator: they create an incentive for increased collective or multilateral decision-making. Different types of regime generators can be identified based on the objective of the measure: npr-PPMs can have as their objective the enforcement of international obligations, the enforcement of third country legislation or the furtherance of existing norms. While there is ample room under WTO law for these types of generators, the extraterritorial effect of npr-PPMs cannot be permitted where the measure aims at *norm creation* by imposing a norm that does not yet find any international legal support (in either soft or hard law). Neither can trade measures be used as regime generators where no effect on the regulating state's territory underlies the measure.

9.3 Challenges and dilemmas

The decision tree proposes a systematic approach to assess the extraterritorial effect of environmental measures under Article XX GATT. While the appeal of the model lies in its simplicity, relevant challenges and dilemmas have been identified, both of a conceptual and practical nature, to which there is no conclusive answer yet within WTO law. These points are worth noting, because of their importance for the drafting and effective functioning of environmental legislation and environmental trade measures. They show in particular the interplay between law, politics and science: the international community of state and non-state actors will need to engage to build a comprehensive framework for environmental protection, where the needs and capabilities of all involved are respected.

9.3.1 The principle of common but differentiated responsibilities and respective capabilities

Even though not explicitly mentioned in the decision tree, it is important to implement the principle of common but differentiated responsibilities and respective capabilities (CBDRRC) into environmental policy.[9] At the international level, when drafting international agreements, the principle should be taken into account in the division of states' environmental action burden. At a national level and through unilateral trade measures, it is more difficult to operationalize the principle when there is no international agreement on how that burden should be divided. A unilaterally determined division of burden can hardly be reconciled with international decision-making. Rather, the principle of CBDR-RC can manifest itself in unilateral npr-PPMs through for

9 See also chapter 7.1 and chapter 8.4.

instance the implementation of structural assistance for countries with limited capacities, lower standards or longer transition periods. In other words, developed countries have to take the needs of developing countries into account to the extent possible when designing their policy. Such an application of the principle of CBDR-RC could also be read in a duty of good faith as expressed in the *chapeau* of Article XX GATT. Even though not a hard, enforceable legal obligation, when developing countries are for instance affected to such an extent that their market access is severely limited by the imposed measures, it is argued CBDR-RC can be an element in the assessment of unjustifiable discrimination.

9.3.2 The inherent uncertainty of environmental science

Scientific evidence is needed not only to determine the existence and degree of environmental effects, but also to determine the appropriateness and effectiveness of the environmental method and the substance of environmental policy. A number of challenges have been identified in relation to the reliance on science: firstly, one can only work with the information and data available. The incredibly complex interaction of different factors and actors, through time and space, complicate any scientific analysis. Environmental scientists have to contend with relatively limited knowledge, with environmental harm or effects or causal links that can take decades or centuries to manifest themselves, with inherent uncertainty about the what, how and when.

Secondly, due to this complexity, diverging opinions will likely each find supporting evidence. Who is then to determine the 'truth'? Who is to determine the most appropriate approach? One of the most significant accomplishments of the climate regime is the development of the Intergovernmental Panel on Climate Change, a cooperation engaging thousands of experts.[10] Where possible, that approach should be extrapolated elsewhere, albeit on a smaller scale. Any assessment of environmental effects should be as objective as possible, outlining different views, and indicating what is known, what is not known, and what is assumed and suspected.

Thirdly, decision-makers must act upon the available scientific evidence, an assessment involving both facts and value.[11] For instance, the Framework Convention on Climate Change has as its objective the stabilization of atmospheric concentrations of greenhouse gases at levels that would prevent 'dangerous' anthropogenic interference with the climate system. However, when do these levels become dangerous? Assessing risk is a scientific task,

10 See for more information and reports, www.ipcc.ch.

11 Daniel Bodansky, 'The Legitimacy of International Governance: A Coming Challenge for International Environmental Law?' 1999, 93 American Journal of International Law 596, 621.

but determining the acceptable level is as much a value judgment and such decisions require inferences, choices, and assumptions that themselves reflect policy preferences.[12] Whether states rely on precautionary measures or undertake a cost-benefit approach to risk is equally a matter of political judgment. Environmental decision-making often raises questions that involve science but cannot be answered in purely scientific terms.[13] With regard to these political judgments, WTO panels and the AB should, where possible, adopt a deferential approach: where WTO members are consistent in their approach (e.g. either adoption of precautionary principle or not; non-discriminatory baseline data for domestic and imported producers; etc.) these policy choices of members should be accepted as such.

9.3.3 The catch 22 of unknown concerns

A state that wants to act upon an 'unknown' (or rather a little-known or newly emerging) concern that finds no support yet internationally can only do so within its own territory. These concerns are defined as unilateral concerns under the decision tree, and cannot be object of an extraterritorial PPM due to the lack of international support and recognition. Efforts must first be made to raise international awareness and instigate international negotiations. This can be criticized, as arguably these newly emerging concerns are most in need of PPMs. However, while those concerns that are not yet supported internationally but may nonetheless have a global impact may indeed in dire need of alternative action, it is nevertheless important to respect the sovereignty of states and the nature of the international community as it stands today. States should commit to multilateralism, and at least attempt to involve other states before imposing trade measures that will affect other countries and their producers. If international negotiations do not result in a multilateral agreement, the reason(s) for failure (e.g. no recognition of the specific concern, or no agreement on the appropriate method to tackle the concern) would need to be assessed to see whether there might be more informal support on the specific concern for instance, including reports and civil society initiatives. If states and/or their consumers are genuinely concerned about a newly emerging concern, an argument for justification of a npr-PPM could possibly be brought under the exception for moral concerns, Article XX(a) GATT.[14]

12 Ibid.
13 Ibid 622.
14 See chapter 7.3.

9.3.4 Towards a duty of market power

Powerful markets are in a stronger position to make use of extraterritorial PPMs and it has been demonstrated that they have no legal excuse not to do so. The power of exclusion will be stronger when exporters have no real choice of targeting another market, and subscribing to the imposed rules is the price of trading with that market. However, does the *legal possibility* to make use of PPMs to protect environmental concerns also entail a legal or moral responsibility or *duty* of indeed making use of PPMs? In other words, do states have a duty not to allow the market to be used for environmental harm? No legal duty can be read in WTO rules or any environmental instrument today. However, states have a moral duty to act in order to protect the environment and ensure sustainable development, as recognized in a number of instruments,[15] including the preamble of the Marrakesh Agreement. The protection of the commons may require leadership and creating an incentive to comply with higher environmental norms can be a tool for such leadership. When an international, multilaterally agreed solution is lacking, when the international system is deadlocked, when progress in environmental protection of the commons fails to materialize, alternatives are required. Those states that are in the position to make effective use of those alternatives should create the much-needed incentives to put a spurt on international progress. A similar duty is suggested with regard to human rights protection through the Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights, as has been discussed in chapter 6.

Furthermore, while protection of common environmental concerns must be founded on a practice of burden-sharing justice, where others are not respecting or complying with their burden, it must be complemented with a practice of harm-avoiding justice.[16] Such practice implies that those who can will take an additional burden from those who are not doing their part. This type of responsibility has been described by Caney as second-order responsibilities.[17] Environmental measures with an extraterritorial effect could be described as second-order responsibilities: the imposing state attempts to involve other actors and create incentives for other countries to act. With power comes responsibility, and it could be argued that where a state is capable of using its market power to create incentives to stimulate and encourage environmental protection, it should do so. A duty of good faith as expressed in the chapeau of Article XX GATT could guide such responsibility in order to avoid abuse: PPMs could be complemented with the necessary management and assistance tools to guarantee that other countries, and in particular developing countries, are in a position to comply with the imposed laws.

15 See for instance Paris Agreement, 2015; Agenda 2030.
16 See chapter 8.4.4.
17 Caney (2014).

9.4 Rethinking territoriality in a globalized world

It has been demonstrated throughout this thesis that environmental challenges can have a global impact, and thus require global solutions. The traditional approach to international lawmaking whereby sovereign states agree on common solutions is challenged in the field of environmental law. In a number of areas where environmental action is required, cooperation is stalling for a multiplicity of reasons. Existing environmental cooperation often takes a cautious approach, with few binding commitments, and even less enforcement options. The ongoing debate on environmental npr-PPMs demonstrates that states are seeking alternatives. This thesis has shown that while the extraterritorial reach of npr-PPMs might raise controversy, a convincing argument can be made to permit such a reach under Article XX GATT when a state is affected by an environmental concern and finds support for that concern in international environmental law.[18] Apart from environmental challenges, a number of other areas demand a more flexible approach to territoriality in today's globalized world, such as all cyberspace-related matters, but also fields of law related to an ever-increasing financial and corporate interdependency, including securities, anti-fraud and financial regulation. There is an undeniable connection between the territorial scope of economic and social activities and the territorial scope of legal rules governing such activity. As the former became increasingly global, the latter must follow suit.[19] States are not on the verge of disappearing, but transnational interests and needs increasingly transcend narrow sovereign interests.[20]

In times of globalization, sovereignty as a Westphalian concept is challenged by multilateral and international cooperation and institutionalization processes. This is clearly visible within the EU, but also in a wider context through international organizations such as the UN or the WTO.[21] Global challenges demand cooperative solutions. International cooperation does not necessarily weaken the sovereignty of states, but can arguably even serve to reassert and enhance it, albeit on a different level.[22] International institutions can be seen as vehicles or tools through which sovereignty in an interdependent, globalized world is preserved and realized.[23] 'Power' of states is not lost, but has been allocated upward and it will depend on the institutional set-up of the international organization to what extent traditional state

18 See *supra* at 9.2 for more detail; as well as chapter 7 for an elaborate proposal of the extraterritoriality decision tree and chapter 8 for its application to several case studies.

19 Kal Raustiala, *Does the Constitution Follow the Flag* (Oxford University Press 2009) 118.

20 Betlehem (2014), 15.

21 Jackson (2003), 787; Wenhua Shan, Penelope Simons and Dalvinder Singh (eds), *Redefining Sovereignty in International Economic Law* (Hart Publishing 2008).

22 Kal Raustiala, 'Rethinking the Sovereignty Debate in International Economic law' 2003, 6 Journal of International Economic Law 841.

23 Ibid 857.

power remains with the states through e.g. veto power and opt-out or exit availability. As has been discussed in chapter 3, sovereignty and jurisdiction are closely linked concepts. Where the international processes of global governance are lagging, global challenges – such as wars, migration streams and terrorism, linked to economic growth, sustainable development, human rights protection, and environmental protection – demand alternative action. These challenges affect all states, irrespective of whether they are taking action or not. Since the effects are not limited by territorial boundaries, state action should not be limited by those boundaries either. Ideally, solutions are found through global governance and cooperation. However, in reality there are states that are acting; states that could act but are not willing to do so (free-riders); and states that are not able to do so. If only one group of states can act within their territorial boundaries with respect to for instance environmental concerns, any protection will be sub-optimal. By permitting alternatives, such as for instance npr-PPMs as proposed in this thesis, allowing states to act unilaterally where that action is contingent upon multilateral developments, incentives are created to involve or coerce the free-riders, increasing the potential reach and effectiveness of environmental protection. All states that are capable should offer technical and financial assistance to those states that are not able yet to take the necessary action, which can be coupled with market incentives. The global character of the concerns cannot be ignored: people have the right to environmental protection, even if their government cannot make this a priority.

Sovereignty has always been a supple, multifaceted concept that has been bent to suit political purposes and fit realities.[24] Sovereignty and jurisdiction relate to power, control, and autonomy. While sovereignty and jurisdiction imply that no state can act entirely free of constraints in its relations with other sovereigns, sovereignty is not an absolute value: it can give way to other values, whether of an economic nature, an ethical nature, a moral nature, or an environmental nature.[25] Whether sovereignty will be interpreted in a way to allow an extension of jurisdictional boundaries is as much a matter of political as of legal debate.[26] Within the *political* understanding of sovereignty, the *legal* rights and duties can be determined. The extraterritoriality decision tree shows that an extraterritorial reach can be legally accommodated under existing WTO law. However, the precise determination, a wide or a narrow interpretation of effects, of support, and of necessity, cannot be fully dissociated from political decisions. Tolerating unilateral action as proposed here 'is not to accept an international order that is rooted in state power at the law's

24 Ibid 874; Sir Jennings(2002), 29.

25 Vaughan Lowe, 'Sovereignty and International Economic Law' in Wenhua Shan, Penelope Simons and Dalvinder Singh (eds), *Redefining Sovereignty in International Economic Law* (Hart Publishing 2008) 80.

26 Ibid 84; Paul Schiff Berman, *Global Legal Pluralism: A Jurisprudence of Law Beyond Borders* (Cambridge University Press 2012) 82.

expense. It is to accept that state power can be at times relied on in order to make the law relevant or effective'.[27] It is also not to accept a preference for unilateral action over multilateral action, but to recognise that one can trigger the other. States must seriously engage in setting out common rules and binding commitments on global challenges. However, where states have a good faith obligation to engage in multilateral cooperation in addition to acting unilaterally, they equally have a good faith obligation to not hide behind 'sovereignty' and 'territoriality' in order to escape their responsibilities.

9.5 Final remarks

This thesis has answered in the affirmative the question whether states *could* apply trade measures to address global environmental concerns. However, *should* they do so as well? The objective answer to that question requires a political effectiveness and economic efficiency analysis, which is beyond the scope of this study. Subjectively, the following can be noted. Global environmental threats are a reality, and international action is required in order to slow down further degradation. The international system is lagging and while important – albeit symbolic at times – steps are taken such as the 2015 Paris Agreement on Climate Change, the international community of states is failing to set out concrete and ambitious action. States seek alternatives that can exceed the suboptimal level of environmental protection that is limited to state's boundaries and trade measures offer opportunities. Indeed, there are pitfalls and indeed, there is a risk to abuse and disguised protectionism. As also pointed out by the E15 Expert Group on Trade and Climate Change, the interplay between trade and climate regime is ideally determined in concert by both WTO Members and UNFCCC parties. In the absence of such accord, WTO experts in WTO dispute settlement will draw the line of permissible climate measures.[28] While entrusting WTO experts with that task will not necessarily lead to wrong results, as technical trade experts they might not be sufficiently equipped to make decisions with potentially far-reaching environmental implications. Nonetheless, this research has shown that WTO law provides for protection mechanisms against abusive trade measures and sufficient safeguards against jurisdictional overreach and abuse of power as laid out in the decision tree. The multilateral nature of the trading system and the sovereignty of other states are respected to the extent possible in light of global concerns. Unilateral environmental action can incentivize further international cooperation; hence under the current circumstances the way forward is through such action and there is no good reason to accept the multilateral paralysis.

27 Hakimi (2014), 145.
28 Bacchus (2016), 14.

Sustainable development is one of the core objectives of the WTO. It has often been questioned whether the current WTO treaty obligations do not form an obstacle to achieving this objective. This study's main contention is that this concern is unwarranted. First, there is no reason to think that the WTO legal regime constitutes an impediment to global environmental action. Second, in the absence of global environmental agreements, unilateral trade measures remain a powerful tool to stimulate better environmental protection. It has been demonstrated that current WTO law leaves more room for environmental npr-PPMs with an extraterritorial reach than is often thought. At the same time, WTO law includes disciplines with which abusive measures can be weeded out. In conclusion, governments cannot hide behind the pretext that WTO law prevents them from using their markets, through trade-related measures, for environmental progress: WTO law is no excuse for environmental inaction.

Samenvatting (summary in Dutch)

MONDIALE MILIEUBESCHERMING VIA HANDELSMAATREGELEN
Extraterritorialiteit onder het WTO-recht vanuit een vergelijkend perspectief

Het milieu is een mondiale zorg: de achteruitgang van het milieu en de opwarming van het klimaat treft ons allen. Voor bepaalde landen zijn de fysieke, sociale en economische gevolgen sneller voelbaar en desastreuzer dan voor anderen – door bijvoorbeeld de dreiging van stijgende zeespiegels, door overstromingen en orkanen, door woestijnvorming en periodes van extreme droogte. Het is echter onvermijdelijk dat elk land bij de huidige gang van zaken onherroepelijke schade zal leiden. Het is ondertussen algemeen aanvaard dat menselijke activiteiten mee aan de oorzaak liggen van de huidige deplorabele toestand van het milieu, en dat gezamenlijk optreden noodzakelijk is om verdere aantasting te beperken. Ondanks dit besef is het een enorme uitdaging gebleken om vanuit de internationale gemeenschap juridisch bindende en ambitieuze doelstellingen en milieu-akkoorden op te stellen. Dit is deels te verklaren door een gebrek aan eensgezindheid over de historische verantwoordelijkheid van industrielanden, de lastenverdeling tussen ontwikkelde en ontwikkelingslanden, de meest geschikte methode om specifieke uitdagingen aan te pakken of gepaste sancties voor free-riders. Daarnaast spelen ook economische en politieke overwegingen een rol. Bij gebrek aan een internationaal wettelijk kader ter bescherming van het milieu is er nood aan alternatieven voor landen die wel op effectieve wijze actie willen nemen. Unilaterale handelsmaatregelen zouden zo'n alternatief kunnen vormen, maar kunnen deze ingezet worden als legaal actiemiddel voor mondiale en/of grensoverschrijdende milieuzorgen?

Dit proefschrift behandelt de vraag of handelsmaatregelen die dienen ter bescherming van het mondiale milieu juridisch aanvaardbaar zijn onder het huidige WTO-recht. Met name die maatregelen die zich richten op het (buitenlandse) productieproces, waarbij dat productieproces geen impact heeft op de fysieke eigenschappen van het eindproduct (de zogenaamde niet-productgerelateerde *process and production methods* of PPMs) roepen reeds langere tijd vragen op. Het internationale handelsrecht heeft traditioneel betrekking op het eindproduct en diens positie op de markt. Een onderscheid in behandeling kan bijvoorbeeld gemaakt worden wanneer twee goederen fysiek verschillen en/of wanneer de consument goederen op basis van bepaalde eigenschappen als verschillend beschouwt. Echter, vanuit milieu-oogpunt is – eerder dan het eindproduct zelf – vooral de productie vaak erg schadelijk, door bijvoorbeeld emissie-intensieve industrie, niet-duurzaam vissen, ontbossen etc. De vraag of een land toegang tot zijn markt kan beperken door het stellen van voorwaarden gerelateerd aan het productieproces, i.e. of dit soort PPM-maatregelen aanvaardbaar zijn onder het WTO-recht, is reeds lang gehuld in onduidelijkheid en één van de pijnpunten van het handel-milieu debat.

Een belangrijk vraagstuk hieromtrent ziet toe op het extraterritoriale karakter van deze PPMs: ten eerste, kunnen staten productienormen voorschrijven via handelsmaatregelen waaraan buitenlandse producenten zich moeten houden indien zij toegang tot de markt van het regulerende land verlangen; en ten tweede, kunnen staten zulke handelsmaatregelen opleggen ter bescherming van het milieu buiten de landsgrenzen van het regulerende land? Dit proefschrift beantwoordt de vraag of het huidige WTO-recht ruimte laat voor deze groene 'extraterritoriale' maatregelen, of dat daarentegen het WTO-recht, en meer specifiek Artikel XX GATT, een struikelblok vormt voor staten die op alternatieve wijze het mondiale milieu willen beschermen, wanneer de internationale gemeenschap hier niet in slaagt.

Het proefschrift is onderverdeeld in drie delen. Deel I geeft een overzicht van het juridische kader voor PPMs en extraterritorialiteit onder WTO-recht. Deel II bekijkt extraterritorialiteit vanuit een breder rechtsvergelijkend perspectief en gaat nader in op een extraterritoriale toepassing van wetgeving onder internationaal publiekrecht, mededingingsrecht, en internationale mensenrechten. Deel III stelt een beslissingsladder voor ter beoordeling van extraterritorialiteitsvragen onder WTO-recht, en met name onder Artikel XX GATT, gebaseerd op de lessen die getrokken kunnen worden uit de vergelijkende analyse van Deel II. Enkele voorbeelden van bestaande handelsmaatregelen die milieudoelstellingen beogen, worden tenslotte aan de hand van de beslissingsladder getoetst.

DEEL I: GROENE HANDELSMAATREGELEN EN WTO-RECHT

Deel I bakent het bestek van dit proefschrift af: wat zijn PPMs en welke rol spelen deze maatregelen binnen het bredere handel-milieu debat. Hoofdstuk 2 betreft de vraag welke juridische bepalingen relevant zijn voor het boordelen van PPMs onder WTO-recht, en meer bepaald onder GATT. Het onderscheid tussen Artikel III GATT (beginsel van nationale behandeling) en Artikel XI GATT (verbod op invoerrestricties) wordt behandeld met het oogpunt op het vaststellen van een overtreding van één of beide van deze bepalingen. Daarnaast wordt ook Artikel XX GATT (algemene uitzonderingen) uitgebreid besproken als rechtvaardigingsmogelijkheid na overtreding van een GATT-bepaling.

Hoofdstuk 3 gaat nader in op het extraterritoriale karakter en reikwijdte van niet-product-gerelateerde PPMs. Extraterritorialiteit kan in deze context op twee manieren geïnterpreteerd worden: enerzijds, een PPM richt zich op productie en 'regelt' in dat opzicht activiteiten die buiten de territoriale landsgrenzen plaatsvinden; anderzijds, een PPM kan opgelegd worden met als doel milieuzorgen aan te pakken die van mondiale en/of grensoverschrijdende aard zijn, en dus ook buiten de landsgrenzen kunnen vallen. Het is met name deze laatste interpretatie die problematisch kan zijn in een handelscontext, gezien het reeds inherent is aan handelsmaatregelen dat deze een invloed uitoefenen op buitenlandse (productie) activiteiten. Een onderscheid kan gemaakt worden tussen binnenwaartse en buitenwaartse PPMs: richt de maatregel zich exclusief tot de bescherming van het milieu binnen het territorium van de regulerende staat, richt de maatregel zich exclusief tot de bescherming van het milieu buiten het territorium van de staat, of zal de maatregel een impact hebben op het milieu zowel binnen als buiten het territorium van de staat? Het toepassingsgebied van verschillende WTO akkoorden die relevant kunnen zijn voor PPMs (GATT, TBT, SPS) wordt nader besproken met oog op dit onderscheid, alsook worden de relevante WTO disputen omtrent PPMs en bevoegdheidsvragen bestudeerd.

De conclusie van Deel I luidt dat de WTO akkoorden geen aanwijzing bevatten wat betreft hun toepassingsgebied. Daarnaast ontbreekt in de rechtspraak een systematische benadering van bevoegdheidsvragen en blijft de extraterritorialiteitsvraag tot vandaag grotendeels onbeantwoord.

DEEL II: *ZOOMING OUT*: EXTRATERRITORIALITEIT VANUIT EEN BREDER PERSPECTIEF

Deel II van dit proefschrift gaat dieper in op het concept extraterritorialiteit aan de hand van een analyse van extraterritoriale jurisdictie in het internationale publiekrecht en twee rechtsgebieden waarin rechtsregels met regelmaat extraterritoriaal worden toegepast, namelijk de extraterritoriale toepassing van nationaal mededingingsrecht en de extraterritoriale toepassing van regionale en internationale mensenrechtenverdragen. Deze vergelijkende analyse strekt ertoe een beter begrip te bewerkstelligen van extraterritorialiteit in verschillende contexten, en met name onder welke omstandigheden staten zich bereid hebben getoond extraterritoriale jurisdictie te aanvaarden.

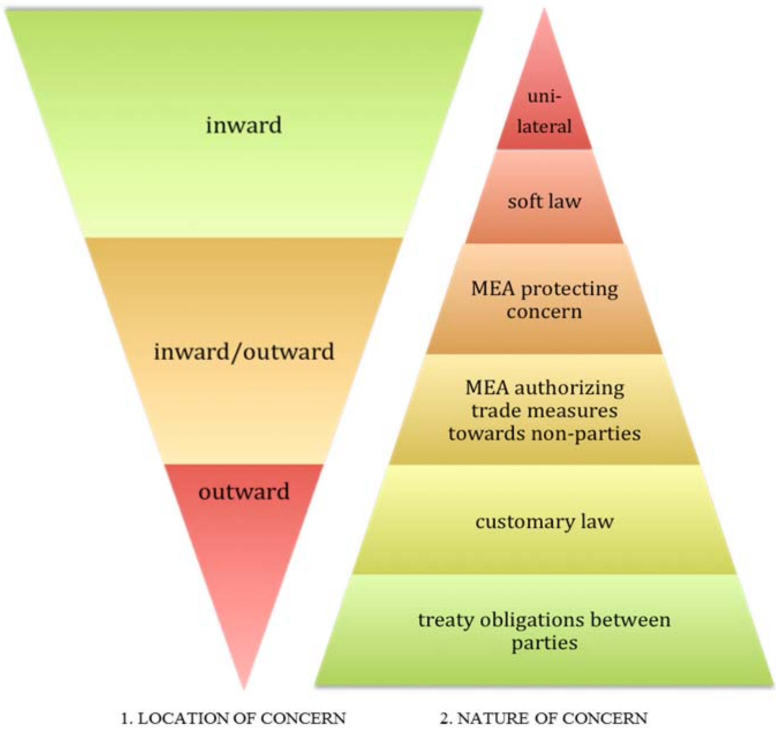
Hoofdstuk 4 behandelt extraterritorialiteit en jurisdictie vanuit een internationaal publiekrechtelijk perspectief, aan de hand van het definiëren van beide begrippen en de te onderscheiden gradaties van extraterritorialiteit op basis van intrusiviteit en connectie met het regulerende land. Een onderscheid wordt gemaakt tussen wetgevende jurisdictie en uitvoerende jurisdictie. Uitvoerende jurisdictie binnen het territorium van een andere staat wordt niet aanvaard onder internationaal recht, tenzij het betreffende land hiertoe toestemming heeft gegeven. Met betrekking tot wetgevende jurisdictie voorziet algemeen internationaal publiekrecht in enkele beginselen op basis waarvan extraterritoriale wetgevende jurisdictie toelaatbaar kan zijn (onder andere het territorialiteitsbeginsel, het nationaliteitsbeginsel en het universaliteitsbeginsel). Extraterritorialiteit in een handelscontext verschilt van extraterritorialiteit in de meer klassieke zin onder internationaal publiekrecht, omdat een handelsmaatregel slechts van toepassing wordt op het moment van markttoegang. De extraterritoriale werking van de maatregel dient dus te worden 'geactiveerd' door een territoriale connectie (de markt). Door deze territoriale link is een PPM niet onwettig onder internationaal recht. Dit soort maatregel wordt dan ook beter gedefinieerd als maatregel met een extraterritoriale werking, eerder dan een extraterritoriale maatregel *per se.* De vraag luidt dan of deze extraterritoriale werking gerechtvaardigd kan worden onder het WTO-recht.

Hoofdstuk 5 beschrijft de extraterritoriale toepassing van nationale mededingingsrechtsregels in verscheidene rechtsordes (onder andere de praktijk van de Verenigde Staten en de Europese Unie komt uitgebreid aan bod). Een steeds groeiende groep van landen past haar mededingingsregels toe op anticoncurrentiele handelingen in het buitenland wanneer deze een rechtstreeks en substantieel effect hebben op de economie van het regulerende land (objectief territorialiteitsbeginsel of *effects* doctrine). De *effects* doctrine kan naar analogie toegepast worden in een milieu-context: wanneer milieuvervuilende praktijken buiten de landsgrenzen een rechtstreeks en substantieel schadelijk effect hebben op het milieu van het regulerende land kan deze connectie leiden tot een toelaatbare uitoefening van wetgevende jurisdictie.

Hoofdstuk 6 bestudeert de extraterritoriale toepassing van regionale en internationale mensenrechtenverdragen door regionale en internationale mensenrechtentribunalen. Het begrip extraterritorialiteit in een mensenrechtencontext verschilt van extraterritorialiteit in de eerder besproken contexten, omdat het hier gaat om een *extra*-territoriale uitbreiding van verantwoordelijkheden waar landen reeds aan gebonden zijn binnen het eigen territorium, wanneer statelijke vertegenwoordigers buiten dat territorium optreden. Het toepassingsgebied van de mensenrechtenverdragen is door de verschillende tribunalen uitgelegd als niet enkel omvattend het eigen territorium van de verdragspartijen, maar ook dat territorium waar door vertegenwoordigers van de staat op zulke wijze effectieve controle wordt uitgeoefend dat dit kan leiden tot een schending van de verdragen (zoals bijvoorbeeld een gevangenis in Irak onder controle van Britse strijdmachten waar gevangenen mensonterend behandeld worden). Ondanks de verschillende concepties van extraterritorialiteit is de praktijk van de mensenrechtentribunalen relevant voor de onderzoeksvraag rond mondiale milieuzorgen: wanneer gedeelde en gemeenschappelijke waarden bedreigd worden, lijkt een ruime interpretatie van bevoegdheidsgrenzen breed aanvaard te worden door staten. Het geheel aan bindende en niet-bindende regels in het internationale milieurecht is de basis om het gedeelde en gemeenschappelijke karakter van milieuzorgen te beoordelen.

DEEL III: ZOOMING IN: EEN WTO BESLISSINGSMODEL VOOR EXTRATERRITORIALITEITS-VRAGEN

Deel III stelt een WTO beslissingsmodel voor ter beoordeling van extraterritorialiteitsvragen, gebaseerd op de bevindingen van Deel II. Het model vindt haar rechtsbasis in Artikel XX GATT (de milieu-uitzonderingsgronden in paragrafen (b) en (g)). Hoofdstuk 7 werkt het beslissingsmodel uit. De extraterritorialiteitsvraag geldt als drempelvraag bij de rechtvaardiging voor handelsmaatregelen die in strijd zijn met GATT rechtsregels (bijvoorbeeld het beginsel van nationale behandeling in Artikel III GATT en/of verbod op invoerrestricties in Artikel XI GATT), waarna de andere elementen van Artikel XX GATT getoetst kunnen worden.



Figuur 26. Extraterritorialiteitsbeslissingsmodel

Bij de eerste stap van het beslissingsmodel wordt gekeken of de maatregel binnenwaarts en/of buitenwaarts is, i.e. of het milieu van het regulerende land rechtstreeks geraakt wordt door de activiteit in kwestie. Wanneer een land geen milieu-effecten ondervindt van de activiteiten in kwestie, is er geen voldoende sterke territoriale link om de extraterritoriale werking van de handelsmaatregel te rechtvaardigen. De tweede stap beoordeelt de internationale erkenning en steun voor de beoogde milieuzorg. Hoe groter de rechtskracht van de relevante rechtsinstrumenten (bindend of niet-bindend, groot of klein lidmaatschap van verdragen), hoe meer steun voor rechtvaardiging van de extraterritoriale PPM. De impact op het milieu van het regulerende land en de internationale erkenning van het beoogde doel dienen gezamenlijk beoordeeld te worden en functioneren als het ware als communicerende vaten: wanneer een bepaald doel in bindend en breed gedragen recht als zodanig wordt erkend, kan ook een land wiens milieu minder rechtstreeks of substantieel getroffen wordt, gebruikmaken van handelsmaatregelen gericht op het productieproces. Zo vereist een milieudoel dat enkel door een kleine groep landen en/of in niet-bindend recht als zodanig erkend wordt, duidelijkere effecten op het territorium van het regulerende land. Handelsmaatregelen die enkel buitenwaarts zijn, of die (nog) geen enkele internationale erkenning vinden, kunnen niet aanvaard worden onder het beslissingsmodel.

Hoofdstuk 7 bespreekt verder de verhouding tussen die uitzonderingsgronden van Artikel XX GATT die expliciet milieudoelstellingen waarborgen (paragrafen (b) en (g)) en de uitzondering voor openbare zedelijkheden (paragraaf (a)). Daarbij wordt gesteld dat geen beroep gedaan kan worden op openbare zedelijkheden om een milieumaatregel te rechtvaardigen, tenzij het zou gaan om een buitenwaartse maatregel waar geen rechtvaardiging voor mogelijk is als extraterritoriale milieumaatregel. Sowieso dient een strikte bewijslast te worden gehanteerd voor beroepen op openbare zedelijkheden onder Artikel XX(a) GATT.

Hoofdstuk 8 geeft een toepassing van het beslissingsmodel op vier testcases. Als eerste wordt het mijlpaal arrest *US-Shrimp* besproken. In dit arrest werd de vraag gesteld aan het WTO Appellate Body of de Verenigde Staten een importverbod op garnalen konden handhaven wanneer (buitenlandse) garnalenvissers geen gebruik maakten van speciale apparatuur ter bescherming van zeeschildpadden. De bevoegdheidsvraag werd grotendeels vermeden door het Appellate Body, dat slechts aangaf dat het feit dat sommige zeeschildpadden Amerikaanse territoriale wateren doorkruisen, gold als een voldoende sterke nexus tussen de schildpadden en de VS om deze maatregel te rechtvaardigen – zonder echter verder te duiden wanneer de vereiste nexus voldoende sterk zou zijn. De toepassing van de beslissingsladder op deze zaak bevestigt het Appellate Body's oordeel, maar dit op meer systematische en onderbouwde wijze. In tegenstelling tot de *ad hoc* aanpak van het Appellate Body, laat dit model toe eenzelfde redenering te volgen in andere milieuzaken, ook wanneer er een minder duidelijke tastbare link is.

Naast deze zaak wordt het beslissingsmodel toegepast op drie recente EU handelsmaatregelen aangenomen binnen het kader van illegale visserij (IUU-visserij), illegale houtkap (onder het FLEGT-actieplan rond wetshandhaving en handel in de bosbouw), en emissies van luchtvaart binnen het Europees Emissiehandelssysteem. Aan de hand van deze testcases worden de uitdagingen en dilemma's rond het beslissingsmodel benoemd en besproken, voor zover deze van juridische aard zijn. De niet-juridische vragen (milieu-wetenschappelijk, politiek, economisch en sociaal) die deze problematiek oproept, worden aangestipt.

CONCLUSIES

Het afsluitende hoofdstuk 9 bevat een synthese van het proefschrift en rondt af met de belangrijkste bevindingen. Ondanks de perceptie die vaak lijkt te heersen dat groene handelsmaatregelen die zich richten op het productieproces (zonder fysieke impact op het eindproduct) niet verenigbaar zijn met handelsregels, wordt uit deze studie duidelijk dat het WTO-recht substantiële ruimte laat aan landen om dit soort maatregelen te treffen. In eerste instantie moet de handelsmaatregel voldoen aan de relevante bepalingen van de WTO akkoorden. Slechts wanneer een inbreuk vastgesteld is, wordt gekeken of deze inbreuk gerechtvaardigd kan worden. Het is binnen het kader van de rechtvaardiging (Artikel XX GATT) dat een beslissingsmodel is voorgesteld om de aanvaardbaarheid van de extraterritoriale reikwijdte van de maatregel te toetsen. Wanneer aan de voorwaarden van het model voldaan is, dient de rechtvaardigingsvraag vervolledigd te worden aan de hand van de overige elementen van Artikel XX GATT. Het beslissingsmodel, dat zowel de impact op het milieu van het regulerende land alsook internationale erkenning voor het beoogde milieudoel in overweging neemt, vormt een robuuste toetsing van de toegestane extraterritoriale werking van handelsmaatregelen. Dankzij deze unieke combinatie van elementen, eigen aan de context van handel en milieu, kan een ruime invulling van de bevoegdheidskwestie onder WTO-recht gerechtvaardigd worden: ten eerste voorziet het WTO-recht reeds in waarborgen om abusieve maatregelen vast te stellen; ten tweede zijn handelsmaatregelen niet extraterritoriaal *per se*, gezien de territoriale trigger via markttoegang, en dus niet onwettig vanuit internationaalrechtelijk perspectief; ten derde zorgt het effect-vereiste voor een bijkomende territoriale link; en tenslotte waarborgt het vereiste van internationale steun tot op zekere hoogte respect voor het multilaterale karakter van de WTO en de internationale gemeenschap, evenals voor de soevereiniteit van andere staten.

Echter, waar de internationale gemeenschap er niet in slaagt haar verantwoordelijkheid op te nemen en de nodige ambitieuze afspraken te maken, kunnen noties als soevereiniteit, territorialiteit en multilateralisme niet als excuus gebruikt worden voor multilaterale verlamming. Groene unilaterale handelsmaatregelen met internationale steun voor de beoogde milieudoelen kunnen een bijdrage leveren als alternatief voor deze verlamming – het WTO-recht vormt dan ook geen obstakel voor legitieme milieumaatregelen.

Bibliography

Ahner N, 'Final Instance: World Trade Organization – Unilateral Trade Measures in EU Climate Change Legislation' EUI Working Papers 2009/58

Akehurst M, 'Jurisdiction in International Law' British Yearbook of International Law (1972-1973) 46: 145

Ali Khan L, *The Extinction of Nation-States: A World Without Borders*, vol 21 (Kluwer Law International 1996)

Amnesty International, *Universal Jurisdiction: A Preliminary Survey of Legislation Around the World* (2011)

Anderson K, 'Environmental and Labor Standards: What Role for WTO?' in Anderson K and Hoekman B (eds), *The Global Trading System, Vol 4: New Issues for the WTO* (IB Tauris 2002)

Ankersmit L and Lawrence J, 'The Future of Environmental Labelling: *US-Tuna II* and the Scope of the TBT' Legal Issues of Economic Integration (2012) 39:1 127

Ankersmit L, Lawrence J and Davies G, 'Diverging EU and WTO Perspectives on Extraterritorial Process Regulation' Minnesota Journal of International Law (2012) 21:1 14

Association IB, *Report of the Task Force on Extraterritorial Jurisdiction* (2009)

Association IL, *Final Report on the Exercise of Universal Jurisdiction in Respect of Gross Human Rights Offences* (2000)

Baade H, 'The Eichmann Trial: Some Legal Aspects' Duke Law Journal (1961) 10:3 400

Bacchus J, *Global Rules for Mutually Supportive and Reinforcing Trade and Climate Regimes – E15 Expert Group on Measures to Address Climate Change and the Trade System* (2016)

Baker DI, 'Extraterritorialiy and the Rule of Law: Why Friendly Foreign Democracies Oppose Novel, Expansive US Jurisdiction Claims by Non-Resident Aliens Under the Alien Tort Statute' Maryland Journal of International Law (2013) 28:1 42

Bal S, 'International Free Trade Agreements and Human Rights: Reinterpreting Article XX of the GATT' Minnesota Journal of International Law (2001) 10:1 62

Bartels L, 'Article XX of GATT and the Problem of Extraterritorial Jurisdiction: The Case of Trade Measures for the Protection of Human Rights' Journal of World Trade (2002) 36:2 353

Bartels L, 'The Chapeau of the General Exceptions in the WTO GATT and GATS Agreements: A Reconstruction' American Journal of International Law (2015) 109:1 95

Bartels L, 'The Inclusion of Aviation in the EU ETS: WTO Law Considerations' ICTSD Programme on Trade and EnvironmentApril 2012

Bartels L, 'The WTO Legality of the Application of the EU's Emissions Trading System to Aviation' in Lim C and Mercurio B (eds), *International Economic Law After the Global Crisis: A Tale of Fragmented Disciplines* (Cambridge University Press 2015)

Basedow J, 'International Antitrust: From Extraterritorial Application to Harmonization' Louisiana Law Review (2000) 60:4 1037

Bastos Lima MG and Gupta J, 'The Extraterritorial Dimensions of Biofuels Policies and the Politics of Scale: Live and Let Die?' Third World Quarterly (2014) 35:3 391

Berkowitz D, Pistor K and Richard J-F, 'The Transplant Effect' The American Journal of Comparative Law (2003) 51:1 163

Bernie P, Boyle A and Redgwell C, *International Law and the Environment* (3d ed. edn, Oxford University Press 2009)

Besson S, 'The Extraterritoriality of the European Convention on Human Rights: Why Human Rights Depend on Jurisdiction and What Jurisdiction Amounts to' Leiden Journal of International Law (2012) 25: 857

Betlehem D, 'The End of Geography: The Changing Nature of the International System and the Challenge to International Law' European Journal of International Law (2014) 25:1 9

Bhagwati J and Mavroidis PC, 'Is Action Against US Exports for Failure to Sign Kyoto Protocol WTO-legal?' World Trade Review (2007) 6:2 299

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

Bilder RB, 'The Role of Unilateral State Action in Preventing International Environmental Injury' Vanderbilt Journal of Transnational Law (1981) 14:1 51

Bodansky D, 'The Legitimacy of International Governance: A Coming Challenge for International Environmental Law?' American Journal of International Law (1999) 93:3 596

Bodansky D, 'What's So Bad about Unilateral Action to Protect the Environment?' European Journal of International Law (2000) 11:2 339

Bogojevic S, 'Legalising Environmental Leadership: A Comment on the CJEU's Ruling in C-366/10 on the Inclusion of Aviation in the EU Emissions Trading Scheme' Journal of Environmental Law (2012) 24:2 345

Boisson de Chazournes L, 'Unilateralism and Environmental Protection: Issues of Perception and Reality of Issues' European Journal of International Law (2000) 11:2 315

Bossuyt M, 'The Direct Applicability of International Instruments on Human Rights' Revue belge de droit international (1980) 15: 317

Botteman Y and Patsa A, 'The Jurisdictional Reach of EU Anti-Cartel Rules: Unmuddling the Limits' European Competition Journal (2012) 8:2 365

Bows A and Barrett J, 'Cumulative emission scenarios using a consumption-based approach: a glimmer of hope?' Carbon Management (2010) 1:1 161

Brack D and Gray K, *Multilateral Environmental Agreements and the WTO* (2003)

Brack D, Chandra A and Kinasih H, *The Australian Government's Illegal Logging Prohibition Bill: WTO Implications* (2012)

Bradford A, 'International Antitrust Cooperation and the Preference for Non Binding Regimes' in Guzman AT (ed), *Cooperation, Comity and Competition Policy* (Oxford University Press 2011)
Bradford A, 'The Brussels Effect' Northwestern University Law Review (2012) 107:1 1
Brewer D and others, 'The Impact of Turtle Excluder Devices and Bycatch Reduction Devices on Diverse Tropical Marine Communities in Australia's Northern Prawn Trawl Fishery' Fisheries Research (2006) 81:2-3 176
Brill CA and Carlson BA, 'US and Japanese Antimonopoly Policy and the Extraterritorial Enforcement of Competition Laws' The International Lawyer (1999) 33:1
Bronckers MCEJ and Larouche P, 'A Review of the WTO Regime for Telecommunications Services' in Alexander K and Andenas M (eds), *The World Trade Organisation and Trade in Services* (Martinus Nijhoff Publishers 2008)
Bronckers MCEJ and Larouche P, 'Telecommunications Services and the World Trade Organization' Journal of World Trade (1997) 31:3 5
Bronckers MCEJ and McNelis N, 'Rethinking the 'Like Product' Definition in GATT 1994: Anti-Dumping and Environmental Protection' in Bronckers MCEJ (ed), *A Cross-Section of WTO Law* (Cameron May 2000)
Broude T and Levy PI, 'Do You Mind If I Don't Smoke? Products, Purpose and Indeterminacy in *US-Measures Affecting The Production And Sale of Clove Cigarettes*' World Trade Review (2014) 13:2 357
Brown Weiss E, 'Environment and Trade as Partners in Sustainable Development: A Commentary' American Journal of International Law (1992) 86: 728
Bulto TS, 'Patching the 'Legal Black Hole': The Extraterritorial Reach of States' Human Rights Duties in the African Human Rights System' South African Journal on Human Rights (2011) 27:2 249
Buxbaum HL, 'Territory, Territoriality, and the Resolution of Jurisdictional Conflict' American Journal of Comparative Law (2009) 57: 631

Cameron H, 'The Evolution of the Trade and Environment Debate at the WTO' in Najam A, Halle M and Melendez-Ortiz R (eds), *Trade and Environment: A Resource Book* (International Institute for Sustainable Development, International Centre for Trade and Sustainable Development, The Regional and International Networking Group 2007)
Cameron J, Demaret P and Geradin D (eds), *Trade and the Environment: The Search for Balance* (Cameron May 1994)
Cameron J and Gray K, 'Principles of International Law in the WTO Dispute Settlement Body', International and Comparative Law Quarterly (2001) 50:2 248
Caney S, 'Two Kinds of Climate Justice: Avoiding Harm and Sharing Burdens' Journal of Political Philosophy (2014) 22:2 125
Cassel D, 'Extraterritorial Application of Inter-American Human Rights Instruments' in Coomans F and Kamminga MT (eds), *Extraterritorial Application of Human Rights Treaties* (Intersentia 2004)
Cerna CM, 'Extraterritorial Application of the Human Rights Instruments of the Inter-American System' in Coomans F and Kamminga MT (eds), *Extraterritorial Application of Human Rights Treaties* (Intersentia 2004)
Chang H, 'An Economic Analysis of Trade Measures to Protect the Global Environment' Georgetown Law Journal (1995) 83:6 2131

Change IPoC, *IPCC Fifth Assessment Report* (2013-2014)
Charney J, 'The Persistent Objector Rule and the Development of Customary International Law' British Yearbook of International Law (1985) 56:1 1
Charnovitz S, 'A Taxonomy of Environmental Trade Measures' Georgetown International Environmental Law Review (1993) 6:1 1
Charnovitz S, '*Belgian Family Allowances* and the challenge of origin-based discrimination' World Trade Review (2005) 4:1 7
Charnovitz S, 'GATT and the Environment: Examining the Issues' International Environmental Affairs (1992) 4:3 203
Charnovitz S, 'The Law of Environmental "PPMs" in the WTO: Debunking the Myth of Illegality' Yale Journal of International Law (2002) 27:1 59
Charnovitz S, 'The Moral Exception in Trade Policy' Virginia Journal of International Law (1998) 38: 689
Chaves L, *Illegal, Unreported and Unregulated Fishing: WTO-Consistent Trade Related Measures to Address IUU Fishing* (2000)
Cheyne I, 'Environmental Unilateralism and the WTO/GATT System' Georgia Journal of International and Comparative Law (1995) 24:3 433
Cheyne I, 'The Use of the Precautionary Principle in WTO Law and EC Law' (European Union Studies Association Biennial Conference 2005)
Choi W-M, *'Like Products' in International Trade law. Towards a Consistent GATT/WTO Jurisprudence* (Oxford University Press 2003)
Chuang S-C and others, 'The Effect of Incomplete Information on the Compromise Effect' Judgment and Decision Making (2012) 7:2 196
Colangelo AJ, 'A Unified Approach to Extraterritoriality' Virginia Law Review (2011) 97:5 1019
Colangelo AJ, '*Kiobel*: Muddling the Distinction Between Prescriptive and Adjudicative Jurisdiction' Maryland Journal of International Law (2013) 28:1 65
Commission E, *Analysis of Options to Move Beyond 20% Greenhouse Gas Emission Reductions and Assessing the Risk of Carbon Leakage* (2010)
Conconi P and Voon T, '*EC-Seal Products*: The Tension Between Public Morals and International Trade Agreements' World Trade Review (2016) 15:2 211
Conrad CR, *Processes and Production Methods (PPMs) in WTO Law: Interfacing Trade and Social Goals* (Cambridge University Press 2011)
Coomans F and Künneman R (eds), *Cases and Concepts on Extraterritorial Obligations in the Area of Economic, Social and Cultural Rights* (Intersentia 2012)
Coomans F, 'The Extraterritorial Scope of the International Covenant on Economic, Social and Cultural Rights in the Work of the United Nations Committee on Economic, Social and Cultural Rights' Human Rights Law Review (2011) 11:1 1
Cooney R and Lang ATF, 'Taking Uncertainty Seriously: Adaptive Governance and International Trade' European Journal of International Law (2007) 18:3 523
Cooreman B, 'Testing the Limits of Article XX(a) GATT after *Seals*' Journal of International Trade and Arbitration Law (2016) 5 519
Coppel J, 'A Hard Look At The Effects Doctrine of Jurisdiction in Public International Law' Leiden Journal of International Law (1993) 6:1 73
Cottier T, Delimatsis P and Diebold N, 'Article XIV GATS: General Exceptions' in Wolfrum R, Stoll P-T and Feinäugle C (eds), *WTO-Trade in Services* (Martinus Nijhoff Publishers 2008)

Cottier T, *Renewable Energy and Process and Production Methods* (The E15 Initiative: Strengthening the Global Trade and Investment System for Sustainable Development, 2015)

Craig P, 'EU Accession to the ECHR: Competence, Procedure and Substance' Fordham International Law Journal (2013) 36:5 1114

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

Cremona M, 'Coherence and EU Environmental Policy' in Morgera E (ed), *The External Environmental Policy of the European Union* (Cambridge University Press 2012)

Crowder LB and others, 'Predicting the Impact of Turtle Excluder Devices on Loggerhead Sea Turtle Populations' Ecological Applications (1994) 4:3 437

Crowley MA and Howse R, '*Tuna-Dolphin II*: A Legal and Economic Analysis Of The Appellate Body Report' World Trade Review (2014) 13:2 321

Crutchfield-George B, Dymally LV and Lacey KA, 'Increasing Extraterritorial Intrusion of European Union Authority into US Business Mergers and Competition Practices: US Multinational Businesses Underestimate the Strength of the European Commission From *GE-Honeywell* to *Microsoft*' Connecticut Journal of International Law (2004) 19:3 571

Cuyvers L, 'The Sustainable Development Clauses in Free Trade Agreements: An EU Perspective for ASEAN?' UNU-CRIS Working Papers W-2013/10

Da Costa K, *The Extraterritorial Application of Selected Human Rights Treaties*, vol 11 (Martinus Nijhoff Publishers 2013)

Dabbah M, 'Future Directions in Bilateral Cooperation: A Policy Perspective' in Guzman AT (ed), *Cooperation, Comity and Competition Policy* (Oxford University Press 2011)

Dale G, 'The European Union's Steel Leghold Trap Ban: Animal Cruelty Legislation in Conflict with International Trade' Colorado Journal of International Environmental Law and Policy (1996) 7: 441

Dannenmaier E, 'Constructing Transnational Climate Regimes' in Handl G, Zekoll J and Zumbansen P (eds), *Beyond Territoriality: Transnational Legal Authority in an Age of Globalization* (Martinus Nijhoff 2012)

Davey WJ and Maskus KE, '*Thailand-Cigarettes (Philippines)*: A More Serious Role for the 'Less Favourable Treatment' Standard of Article III:4' World Trade Review (2013) 12:2 163

Davidow J, 'Extraterritorial Antitrust and the Concept of Comity' Journal of World Trade (1981) 15:6 500

Davidson Ladly S, 'Border Carbon Adjustments, WTO-Law and the Principle of Common but Differentiated Responsibilities' International Environmental Agreements (2012) 12: 63

de Boer TM, 'Living Apart Together: The Relationship Between Public and Private International Law' Netherlands International Law Review (2010) 57:2 183

de Cendra J, 'Can Emissions Trading Schemes be Coupled with Border Tax Adjustments? An Analysis vis-a-vis WTO Law' Review of European Community & International Environmental Law (2006) 15:2 131

De Cruz P, *A Modern Approach to Comparative Law* (Kluwer Law International 1993)

De Cruz P, *Comparative Law in a Changing World* (3d edn, Routledge-Cavendish 2007)

De S.-O.-L'E Lasser M, *Judicial Deliberations: A Comparative Analysis of Judicial Transparency and Legitimacy* (Oxford University Press 2004)

De Schutter O and others, 'Commentary to the Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights' Human Rights Quarterly (2012) 34: 1084

De Schutter O, 'Globalization and Jurisdiction: Lessons from the European Convention on Human Rights' Baltic Yearbook on International Law (2006) 6: 185

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

Deane F, 'The WTO, the National Security Exception and Climate Change' Carbon & Climate Law Review (2012) 2 149

Desai N, *Competition Law in India: A Report on Jurisprudential Trends* (June 2015)

Diamond LS, '*Empagran*, The FTAIA and Extraterritorial Effects: Guidance to Courts Facing Questions of Antitrust Jurisdiction Still Lacking' Brooklyn Journal of International Law (2006) 31:3 805

DiClemente D and Hantula D, 'Applied Behavorial Economics and Consumer Choice' Journal of Economic Psychology (2003) 24: 589

Diebold N, 'The Morals and Order Exceptions in WTO Law: Balancing the Toothless Tiger and the Undermining mole' Journal of International Economic Law (2008) 11:1 43

Dodge WS, 'Extraterritoriality and Conflict-of-Laws Theory: An Argument for Judicial Unilateralism' Harvard International Law Journal (1998) 39:1 101

Dodge WS, '*Morrison*'s Effects Test' Southwestern Law Review (2011) 40: 687

Donovan DF and Roberts A, 'The Emerging Recognition of Universal Civil Jurisdiction' American Journal of International Law (2006) 100:1 142

Doughty CE and others, 'Global Nutrient Transport in a World of Giants' Proceedings of the National Academy of Sciences of the United States (PNAS) (2015) 112

Doyle C, 'Gimme Shelter: The "Necessary" Element of GATT Article XX in the Context of the *China-Audiovisual Products* Case' Boston University International Law Journal (2011) 29: 143

Dupuy P-M and Vinuales JE, *International Environmental Law* (Cambridge University Press 2015)

Duttwiler M, 'Authority, Control and Jurisdiction in the Extraterritorial Application of the European Convention on Human Rights' Netherlands Quarterly of Human Rights (2012) 30:2 137

Eberle EJ, 'The Method and Role of Comparative Law' Washington University Global Studies Law Review (2009) 8:3 451

Ehring L, '*De Facto* Discrimination in World Trade Law: National and Most-Favoured-Nation Treatment – or Equal Treatment?' Journal of World Trade (2002) 36:5 921

Ellerman AD and Joskow PL, *The European Union's Emissions Trading System in Perspective* (2008)

English R, 'Law of armed conflict means that anti-detention provision in ECHR may be disapplied by Iraqi detainee' UK Human Rights Blog, 16 September 2014

Esty CD, 'Bridging the Trade-Environment Divide' Journal of Economic Perspectives (2001) 15:3 113

Esty DC, *Greening the GATT: Trade, Environment and the Future* (Peterson Institute 1994)
Etsuko K, *Competition Law and Policy in Japan and the EU* (Edward Elgar Publishing 2014)
Europe Economics E, *An Analysis of the Issue of Consumer Detriment and The Most Appropriate Methodologies to Estimate It.* (2007)
European Commission, *Brief of the European Commission on Behalf of the EU as Amicus Curiae in Support of Neither Party in Kiobel v Royal Dutch Petroleum Co.* (2012)
European Commission, *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: Integrating Maritime Transport Emissions in the EU's Greenhouse Gas Reduction Policies* (2013)

FAO, *The State of World Fisheries and Aquaculture: Opportunities and Challenges* (2014)
Faure M and Zhang X, 'Towards an Extraterritorial Application of the Chinese Anti-Monopoly Law that Avoids Trade Conflicts' George Washington International Law Review (2013) 45: 101
Fishman A and Obidzinski K, 'European Union Timber Regulation: Is It Legal?' Review of European Community & International Environmental Law (2014) 23:2 258
Flett J, 'WTO Space for National Regulation: Requiem for a Diagonal Vector Test' Journal of International Economic Law (2013) 16:1 37
Forest Trends, *European Trade Flows and Risks* (2013)
Foure J, Guimbard H and Monjon S, 'Border Carbon Ajustment in Europe and Trade Retaliation: What would be the Cost for European Union?' CEPII Working Paper (2013) 34
Fowler MR and Bunck JM, *Law, Power and the Sovereign State: The Evolution and Application of the Concept of Sovereignty* (Pennsylvania State University Press 1995)
Fox EM, 'Antitrust Without Borders: From Roots to Codes to Networks' in Guzman AT (ed), *Cooperation, Comity and Competition policy* (Oxford University Press 2011)
Fox EM, 'Modernization of Effects Jurisdiction: From Hands-Off to Hands-Linked' International Law and Politics (2009) 42: 159
Francioni F, 'Environment, Human Rights and the Limits of Free Trade' in Francioni F (ed), *Evironment, Human Rights and International Trade* (Hart Publishing 2001)
Francioni F, 'Extraterritorial Application of Environmental Law' in Meessen KM (ed), *Extraterritorial Jurisdiction in Theory and Practice* (Kluwer 1996)
Frank T, 'The Emerging Right to Democratic Governance' American Journal of International Law (1992) 86:1 46
Friedberg JJ, 'The Convergence of Law in an Era of Political Integration: The Wood Pulp Case and the Alcoa Effects Doctrine' University of Pittsburgh Law Review (1991) 52:2 289
Friends of the Earth Europe, *The EU Emissions Trading System: Failing to Deliver* (2010)

Gaines SE, 'Processes and Production Methods: How to Produce Sound Policy for Environmental PPM-Based Trade Measures?' Columbia Journal of Environmental Law (2002) 27:2 383

Gal M, 'Extraterritorial application of antitrust – the case of a small economy (Israel)' NYU Center for Law, Economics and Organization, Law and Economics Research paper Series Working Paper 09-03

Ganesh A, 'Understanding the EU Missionary Principle' (2014) Available at SSRN

Gardbaum S, 'Human Rights and International Constitutionalism' in Dunoff JL and Trachtman JP (eds), *Ruling The World? Constitutionalism, International Law, and Global Governance* (Cambridge University Press 2009)

Gemkow T, 'The International Law(s) of Regulatory Extraterritoriality: Causes and Consequences of Rule Variations' Paper at SGIR 7th Pan-European Conference on International Relations (2010)

Geradin D, Reysen M and Henry D, 'Extraterritoriality, Comity and Cooperation in EU Competition Law' in Guzman AT (ed), *Cooperation, Comity and Competition Policy* (Oxford University Press 2011)

Geraets D and Natens B, 'The WTO Consistency of the European Union Timber Regulation' Journal of World Trade (2014) 48:2 433

Gerber DJ, 'Prescriptive authority: Global Markets as a Challenge to National Regulatory Systems' Houston Journal of International Law (2014) 26:2

Glendon MA, Carozza PG and Picker CB, *Comparative Legal Traditions* (3d edn, Thomson West 2008)

Gordley J, 'Extra-Territorial Legal Problems In A World Without Nations: What The Medieval Jurists Could Teach Us' in Handl G, Zekoll J and Zumbansen P (eds), *Beyond Territoriality: Transnational Legal Authority in an Age of Globalization* (Martinus Nijhoff 2012)

Graves CT, 'Extraterritoriality and its Limits: The Iran and Libya Sanctions Act of 1996' Hastings International and Comparative Law Review (1998) 21:3 715

Green A, 'Climate Change, Regulatory Policy and the WTO: How Constraining are Trade Rules?' Journal of International Economic Law (2005) 8:1 143

Grewal DS, 'Network Power and Globalization' Ethics & International Affairs (2006) 17:2 89

Grewal DS, *Network Power: The Social Dynamics of Globalization* (Yale University Press 2008)

Griffin JP, 'Extraterritoriality in US and EU Antitrust Enforcement' Antitrust Law Journal (1999) 67:1 159

Grosdidier P, 'The French Blocking Statute, The Hague Evidence Convention and the Case Law: Lessons for French Parties Responding to American Discovery' Texas international Law Journal (2014) 50:Forum 11

Grosswald Curran V, 'Cultural Immersion, Difference and Categories in US Comparative Law' American Journal of Comparative Law (1998) 46:1 43

Grote R, 'Article XXIII GATS' in Wolfrum R, Stoll P-T and Feinäugle C (eds), *WTO-Trade in Services* (Martinus Nijhoff Publishers 2008)

Guber D, *The Grassroots of a Green Revolution: Polling America on the Environment* (MIT Press 2002)

Gulbrandsen L, 'Overlapping Public and Private Governance: Can Forest Certification Fill the Gaps in the Global Forest Regime?' Global Environmental Policy (2004) 4

Haas M, *International Human Rights: A Comprehensive Introduction* (2 edn, Routledge 2014)

Hakimi M, 'Unfriendly Unilateralism' Harvard International Law Journal (2014) 55:1 105
Hamner KJ, 'The Globalization of Law: International Merger Control and Competition Law in the United States, the European Union, Latin America and China' Journal of Transnational Law and Policy (2002) 11:2 385
Hampson F, 'The Scope of the Extraterritorial Applicability of International Human Rights Law' in Gilbert G, Hampson F and Sandoval C (eds), *The Delivery of Human Rights: Essays in Honour of Professor Sir Nigel Rodley* (Routledge 2011)
Hertel M, 'Climate-Change-Related Trade Measures and Article XX: Defining Discrimination in Light of the Principle of Common but Differentiated Responsibilities' Journal of World Trade (2011) 45:3 653
Hill-Cawthorne L, 'The Grand Chamber Judgment in Hassan v UK' EJIL Talk, 16 September 2014
Hixson K, 'Extraterritorial Jurisdiction Under the Third Restatement of Foreign Relations Law of the United States' Fordham International Law Journal (1988) 12:1 127
Hock B, 'Intimations of Global Anti-Bribery Regime and the Effectiveness of Extraterritorial Enforcement: From Free-Riders to Protectionism' TILEC Discussion Paper 2014-009
Horn H and Mavroidis PC, 'The Permissible Reach of National Environmental Policies' Journal of World Trade (2008) 42:6 1107
Horn H and Mavroidis PC, 'To B(TA) or not to B(TA)? On the Legality and Desirability of Border Tax Adjustments From a Trade Perspective' The World Economy (2011) 34:11 1911
Howse R and Langille J, 'Permitting Pluralism: The *Seal Products* Dispute and Why the WTO Should Accept Trade Restrictions Justified by Noninstrumental Moral Values' Yale Journal of International Law (2012) 37:2 367
Howse R and Regan D, 'The Product/Process Distinction – An Illusory Basis for Disciplining 'Unilateralism' in Trade Policy' European Journal of International Law (2000) 11:2 249
Howse R, 'Commentary: The Political and Legal Underpinnings of Including Aviation in the EU ETS' ICTSD Programme on Trade and Environment, April 2012
Howse R, 'From Politics to Technocracy – and Back Again: The Fate of the Multilateral Trading Regime' American Journal of International Law (2002) 96: 94
Howse R, Langille J and Sykes K, 'Pluralism in Practice: Moral Legislation and the Law of the WTO after *Seal Products*' New York University Public Law and Legal Theory Working Papers (2015) 506
Huck S, Zhou J and Duke C, *Consumer Behavioural Biases in Competition: A Survey* (2011)
Hudec RE, 'GATT Legal Restraints on the Use of Trade Measures Against Foreign Environmental Practices' in Bhagwati J and Hudec RE (eds), *Fair Trade and Harmonization: Prerequisites for Free Trade?*, vol 2 (The MIT Press 1996)
Hudec RE, 'GATT/WTO Constraints on National Regulation: Requiem for an "Aim and Effects" Test' International Lawyer (1998) 32:3 619

International Commission of Jurists, *The Arab Court of Human Rights: A Flawed Statute for an Ineffective Court* (2015)

International Law Commission, *Report on the work of the fifty-eighth session – Annex V: Extraterritorial Jurisdiction* (2006)

Ireland-Piper D, 'Prosecutions of Extraterritorial Criminal Conduct and the Abuse of Rights Doctrine' Utrecht Law Review (2013) 9:4 68

Ismer R and Neuhoff K, 'Border Tax Adjustment: A Feasible Way to Support Stringent Emission Trading' European Journal of Law and Economics (2007) 24:2 137

Jackson JH, 'Sovereignty-Modern: A New Approach to an Outdated Concept' American Journal of International Law (2003) 97:4 782

Jackson JH, 'World Trade Rules and Environmental Policies: Congruence or Conflict?' Washington and Lee Law Review (1992) 49:4 1227

Jackson T, *Motivating Sustainable Consumption: A Review of Evidence on Consumer Behaviour and Behavioural Change* (2005)

Jansen B and Lugard M, 'Some Considerations on Trade Barriers Erected for Non-Economic Reasons and WTO Obligations' Journal of International Economic Law (1999) 2:3 530

Jansen B, 'The Limits of Unilateralism from a European Perspective' European Journal of International Law (2000) 11:2 309

Jennings RY, 'Extraterritorial Jurisdiction and the United States Antitrust Laws' British Yearbook of International Law (1957) 33: 146

Kadelbach S, 'The Territoriality and Migration of Fundamental Rights' in Handl G, Zekoll J and Zumbansen P (eds), *Beyond Territoriality: Transnational Legal Authority in an Age of Globalization* (Martinus Nijhoff 2012)

Kahneman D and Tversky A, 'Choices, Values, and Frames' American Psychologist (1984) 39:4 341

Kälin W and Künzli J, *The Law of International Human Rights Protection* (Oxford University Press 2009)

Kamba WJ, 'Comparative Law: A Theoretical Framework' International and Comparative Law Quarterly (1974) 23:3 485

Kameoka E, *Competition Law and Policy in Japan and the EU* (Edward Elgar Publishing 2014)

Kamminga MT, 'Universal Civil Jurisdiction: Is It Legal? Is It Desirable?' American Society of International Law Proceedings (2005) 99: 123

Keck A and Low P, 'Special and Differential Treatment in the WTO: Why, When and How?' WTO Staff Working Paper ERSD-2004-03

Keitner CI, 'Rights Beyond Borders' Yale Journal of International Law (2011) 36:1 55

Keohane R, Macedo S and Moravcsik A, 'Democracy-Enhancing Multilateralism' International Organization (2009) 63:1 1

Khor M, 'The Climate and Trade Relation: Some Issues' South Centre Research Paper (2009)

Killick J and Burnett C, 'Time to end the EU's needless review of extraterritorial joint ventures' White & Case (2013)

King H, 'The Extraterritorial Human Rights Obligations of States' Human Rights Law Review (2009) 9:4 521

Kivetz R and Simonson I, 'The Effects of Incomplete Information on Consumer Choice' Journal of Marketing Research (2000) 37:4 427

Knox JH, 'A Presumption against Extraterritoriality' American Journal of International Law (2010) 104: 351

Knox JH, 'The Judicial Resolution of Conflicts Between Trade and the Environment' Harvard Environmental Law Review (2004) 28: 1

Kokkini-Iatridou D, 'Some Methodological Aspects of Comparative Law' Netherlands International Law Review (1986) 33:2 143

Kokott J and Sobotta C, 'The Kadi Case – Constitutional Core Values and International Law – Finding the Balance?' European Journal of International Law (2012) 23:4 1015

Kolbert E, *The Weight of the World* (August 24, 2015)

Kontorovich E, 'Kiobel Surprise: Unexpected by Scholars but Consistent with International Trend' Notre Dame Law Review (2014) 89: 1671

Krämer L, 'Environmental Protection and Trade – The Contribution of the European Union' in Wolfrum R (ed), *Enforcing Environmental Standards: Economic Mechanisms as Viable Means?* (Springer 1996)

Kreijen G and others (eds), *State, Sovereignty, and International Governance* (Oxford University Press 2002)

Kreijen G, 'The Transformation of Sovereignty and African Independence: No Shortcuts to Statehood' in Kreijen G and others (eds), *State, Sovereignty, and International Governance* (Oxford University Press 2002)

Kuemlangan B and Press M, 'Preventing, Deterring and Eliminating IUU Fishing: Port State Measures' Environmental Policy and Law (2010) 40:6 262

Kulovesi K, 'Climate Change and Trade: At the Intersection of Two Interacting Legal Regimes' in Hollo E, Kulovesi K and Mehling M (eds), *Climate Change and the Law* (Springer 2013)

Kulovesi K, 'Climate Change in EU External Relations: Please Follow My Example (or I Might Force You)' in Morgera E (ed), *The External Environmental Policy of the European Union* (Cambridge University Press 2012)

Kulovesi K, Morgera E and Munoz M, 'Environmental Integration and Multi-Faceted International Dimensions of EU Law: Unpacking the EU's 2009 Climate and Energy Package' Common Market Law Review (2011) 48: 829

Kuner C, 'Extraterritoriality and Regulation of International Data Transfers in EU Data Protection Law' International Data Privacy Law (2015) 5:4 235

Kuner C, 'Extraterritoriality and the Fundamental Right to Data Protection' EJIL Talk 16 December 2013

Kysar DA, 'Preferences for Processes: The Process/Product Distinction and the Regulation of Consumer Choice' Harvard Law Review (2004) 118:2 526

Laing T and others, *Assessing the Effectiveness of the EU Emissions Trading System* (2013)

Langer M, 'The Diplomacy of Universal Jurisdiction: The Political Branches and the Transnational Prosecution of International Crimes' American Journal of International Law (2011) 105:1 1

Larbprasertporn P, 'The Interaction between WTO Law and the Principle of Common but Differentiated Responsibilities in the Case of Climate-Related Border Tax Adjustments' Goettingen Journal of International Law (2014) 6:1 145

Lawson R, 'Life After Bankovic: On the Extraterritorial Application of the European Convention on Human Rights' in Coomans F and Kamminga MT (eds), *Extraterritorial Application of Human Rights Treaties* (Intersentia 2004)

Lawson R, 'The Concept of Jurisdiction and Extraterritorial Acts of State' in Kreijen G and others (eds), *State, Sovereignty, and International Governance* (Oxford University Press 2002)

Layton A and Parry AM, 'Extraterritorial Jurisdiction – European Responses' Houston Journal of International Law (2004) 26:2 309

Le Prestre P, 'The CBD at ten: the long road to effectiveness' Journal of International Wildlife Law and Policy (2002) 5: 269

Levenstein M and Suslow V, 'The Changing International Status of Export Cartel Exemptions' American University International Law Review (2005) 20:4 785

Levy PI and Regan D, '*EC-Seal Products*: Seals and Sensibilities (TBT Aspects of the Panel and Appellate Body Reports)' World Trade Review (2015) 14:2 337

Lewinsohn-Zamir D, 'Consumer Preferences, Citizen Preferences, and the Provision of Public Goods' Yale Law Journal (1998) 108:2 377

Lewison RL and others, 'Understanding Impact of Fisheries Bycatch on Marine Megafauna' Trends in Ecology & Evolution (2004) 19:11 598

Lin A, 'The Unifying Role of Harm in Environmental Law' Wisconsin Law Review (2006) 3

Lipsky A and Wilmot K, 'The Foreign Trade Antitrust Improvements Act: Did Arbaugh Erase Decades of Consensus Building?' The Antitrust Source (2013) 12:6

Lövin I, *European Parliament Report on Combating Illegal Fishing at the Global Level – The Role of the EU* (2011)

Low P, Marceau G and Reinaud J, 'The Interface between the Trade and Climate Change Regimes: Scoping the Issues' WTO Staff Working PaperERSD-2011-1

Lowe V, 'Sovereignty and International Economic Law' in Shan W, Simons P and Singh D (eds), *Redefining Sovereignty in International Economic Law* (Hart Publishing 2008)

Lowenfeld AF, 'Conflict, Balancing of Interests and the exercise of jurisdiction to prescribe: reflections on the Insurance Antitrust case' American Journal of International Law (1995) 89: 42

Lowenfeld AF, *International Litigation and the Quest for Reasonableness* (Clarendon Press 1996)

Lydgate EB, 'Biofuels, Sustainability, and Trade-related Regulatory Chill' Journal of International Economic Law (2012) 15:1 157

Maheshwari K and Reis S, 'Extraterritorial Application of the Competition Act and Its Impact' Competition Law Reports January 2012: 144

Maier HG, 'Jurisdictional Rules in Customary International Law' in Meessen KM (ed), *Extraterritorial Jurisdiction in Theory and Practice* (Kluwer Law International 1996)

Mann FAP, 'The Doctrine of International Jurisdiction Revisited After Twenty Years' Recueil des Cours of The Hague Academy of International Law (1984) 186: 9

Mann FAP, 'The Doctrine of Jurisdiction in International Law' Recueil des Cours of The Hague Academy of International Law (1964) 111: 1

Mann H and Apea Y, 'Issues and Debates: Dispute Resolution' in Najam A, Halle M and Melendez-Ortiz R (eds), *Trade and Environment: A Resource Book* (International Institute for Sustainable Development, International Centre for Trade and Sustainable Development, The Regional and International Networking Group 2007)

Manners I, 'The Normative Ethics of the European Union' International Affairs (2008) 84:1 45

Marceau G and Trachtman JP, 'The Technical Barriers to Trade Agreement, the Sanitary and Phytosanitary Measures Agreement, and the General Agreement on Tariffs and Trade: *A Map of the World Trade Organization Law of Domestic Regulation of Goods*.' Journal of World Trade (2002) 36:5 811

Marceau G, 'A Call for Coherence in International Law: Praises for the Prohibitino Against 'Clinical Isolation' in WTO Dispute Settlement' Journal of World Trade (1999) 33:5 87

Marceau G, 'A Comment on the Appellate Body Report in *EC-Seal Products* in the Context of the Trade and Environment Debate' RECIEL (2014) 23:3 318

Marin Duran G and Morgera E, 'Case Note: WTO India-EC GSP Dispute: The Future of Unilateral Trade Incentives Linked to Multilateral Environmental Agreements' Review of European Community & International Environmental Law (2005) 14:2 173

Marin Duran G and Morgera E, *Environmental Integration in the EUs External Relations: Beyond Multilateral Dimensions* (Hart Publishing 2012)

Markesinis BS, 'Richter, Rechtswissenschaftler und das Studium und die Anwendung Ausländischen Rechts' in Markesinis BS (ed), *Foreign Law and Comparative Methodology: A Subject and A Thesis* (Hart Publishing 1997)

Marwell J, 'Trade and Morality: The WTO Public Morals Exception After *Gambling*' New York University Law Review (2006) 81: 802

Mathis J, 'WTO Appellate Body, *Peru-Additional Duty on Imports of Certain Agricultural Products*, WT/DS457/AB/R, 20 July 2015' Legal Issues of Economic Integration (2016) 43:1 97

Mavroidis PC and Saggi K, 'What Is Not So Cool About *US-Cool* Regulations? A Critical Analysis Of The Appellate Body's Rulings on *US-Cool*' World Trade Review (2014) 13:2 299

Mavroidis PC, 'Driftin' too far from shore – Why the Test for Compliance with the TBT Agreement Developed by the WTO Appellate Body is Wrong, and What Should the AB Have Done Instead' World Trade Review (2013) 12:3 509

Mavroidis PC, 'Reaching Out For Green Policies: National Environmental Policies in the WTO Legal Order' EUI Working Papers RSCAS 2014/21

Mavroidis PC, 'Trade and Environment after the *Shrimps-Turtles* Litigation' Journal of World Trade (2000) 34:1 73

Mavroidis PC, *Trade in Goods: The GATT and the Other WTO Agreements Regulating Trade in Goods* (2nd edn, Oxfor University Press 2012)

McLachlan C, 'The Principle of Systemic Integration and Article 31(3)(c) of the Vienna Convention ' International and Comparative Law Quarterly (2005) 54:2 279

McNelis N, 'What Obligations Are Created by WTO Dispute Settlement Reports?' Journal of World Trade (2003) 37:3 647

Melendez-Ortiz R and Samans R, *Strenghtening the Global Trade and Investment System in the 21st Century: Synthesis Report* (The E15 Initiative: Strengthening the Global Trade and Investment System for Sustainable Development, 2016)

Melendez-Ortiz R, *Enabling the Energy Transition and Scale-Up of Clean Energy Technologies: Options for the Global Trade System – E15 Expert Group on Clean Energy Technologies and the Trade System* (2016)

Meltzer J, 'Climate Change and Trade – The EU Aviation Directive and the WTO' Journal of International Economic Law (2012) 15:1 111

Meng W, 'Extraterritorial Effects of Legislative, Judicial and Administrative Acts' in Bernhardt R (ed), *Encyclopedia of Public International Law*, vol 2 (Elsevier 1995)

Meng W, *Extraterritoriale Jurisdiktion im öffentlichen Wirtschaftsrecht* (Springer 1994)

Meunier S and Nicolaidis K, 'The European Union as a Conflicted Trade Power' Journal of European Public Policy (2006) 13:6 906

Michaels R, 'The Functional Method of Comparative Law' in Reimann M and Zimmermann R (eds), *The Oxford Handbook of Comparative Law* (Oxford University Press 2006)

Milanovic M, 'Al-Skeini and Al-Jedda in Strasbourg' European Journal of International Law (2012) 23:1 121

Milanovic M, *Extraterritorial Application of Human Rights Treaties: Law, Principles and Policy* (Oxford University Press 2011)

Miller DJ and Davidow J, 'Antitrust at the United Nations: A Tale of Two Codes' Stanford Journal of International Law (1982) 18 347

Miller S, 'Revisiting Extraterritorial Jurisdiction: A Territorial Justification for Extraterritorial Jurisdiction under the European Convention' European Journal of International Law (2009) 20:4 1223

Miltner B, 'Revisiting Extraterritoriality After *Al-Skeini*: The ECHR and Its Lessons' Michigan Journal of International Law (2012) 33:4 693

Ming Du M, 'The Rise of National Regulatory Autonomy in the GATT/WTO Regime' Journal of International Economic Law (2011) 14:3 639

Ming Du M, ''Treatment No Less Favourable' and the Future of National Treatment Obligation in GATT Article III:4 after *EC-Seal Products*' World Trade Review (2016) 15:1 139

Mitchell A and Ayres G, 'Out of Crooked Timber: The Consistency of Australia's Illegal Logging Prohibition Bill with the WTO Agreement' Environmental and Planning Law Journal (2012) 29:6 462

Morgera E (ed) *The External Environmental Policy of the European Union: EU and International Law Perspectives* (Cambridge University Press 2012)

Morgera E, 'Ambition, Complexity and Legitimacy of Pursuing Mutual Supportiveness through the EU's External Environmental Action' Edinburgh School of Law Research Papers 2012/02

Morgera E, 'The EU and Environmental Multilateralism: The Case of Access and Benefit-Sharing and the Need for a Good-Faith Test' Cambridge Yearbook of European Legal Studies (2013) 16: 109

Morosini F, 'Trade and Climate Change: Unveiling the Principle of Common but Differentiated Responsibilities from the WTO Agreements' George Washington International Law Review (2010) 42: 714

Najam A, Halle M and Melendez-Ortiz R (eds), *Trade and Environment: A Resource Book* (International Institute for Sustainable Development, International Centre for Trade and Sustainable Development, The Regional and International Networking Group 2007)

Nash JR, 'The Curious Legal Landscape of the Extra-Territoriality of US Environmental Laws' in Handl G, Zekoll J and Zumbansen P (eds), *Beyond Territoriality: Transnational Legal Authority in an Age of Globalization* (Martinus Nijhoff 2012)

Netherlands and the United Kingdom, *Brief of the Governments of the United Kingdom of Great Britain and Northern Ireland and the Kingdom of the Netherlands as Amici Curiae in Support of the Respondents in Kiobel v Royal Dutch Petroleum Co.* (2012)

Neumayer E, 'WTO Rules and Multilateral Environmental Agreements' in *The Earthscan Reader on International Trade and Sustainable Development* (Earthscan Publications Ltd 2002)

Neumayer E, *Greening Trade and Investment: Environmental Protection Without Protectionism* (Earthscan 2001)

Nicolaidis K and Howse R, ''This Is My EUtopia...': Narrative as Power' Journal of Common Market Studies (2002) 40:4 767

Nicolaidis K and Shaffer G, 'Transnational Mutual Recognition Regimes: Governance Without Global Government' Law and Contemporary Problems (2005) 68: 263

Nollkaemper A, 'The Legality of Moral Crusades Disguised in Trade Laws: An Analysis of the EC 'Ban' on Furs From Animals Taken by Leghold Traps' Journal of Environmental Law (1996) 8:2 237

Norpoth J, 'Mysteries of the TBT Agreement Resolved? Lessons to Learn for Climate Policies and Developing Country Exporters from Recent TBT Disputes' Journal of World Trade (2013) 47:3 575

Note, 'Reassessment of International Application of Antitrust Laws: Blocking Statutes, Balancing Tests and Treble Damages' Law and Contemporary Problems (1984) 50:3 197

Notes, 'Predictability and Comity: Toward Common Principles of Extraterritorial Jurisdiction' Harvard Law Review (1985) 98: 1310

Nyst C, 'Interference-based Jurisdiction over Violations of the Right to Privacy' EJIL Talk 21 November 2013

Oderkerk M, 'The Importance of Context: Selecting Legal Systems in Comparative Legal Research' Netherlands International Law Review (2001) 48:3 293

OECD, *Challenges of International Cooperation in Competition Law Enforcement* (2014)

OECD, *International Enforcement Cooperation: Secretariat Report on the OECD/ICN Survey on International Enforcement Cooperation* (2013)

OECD, *Processes and Production Methods (PPMs): Conceptual Framework and Considerations On Use of PPM-based Trade Measures* (1997)

OECD, *Report on Trade and Environment to the OECD Council at Ministerial level* (1995)

Oreskes N and Conway EM, *Merchants of Doubt* (Bloomsbury Press 2010)

O'Riordan T, Cameron J and Jordan A (eds), *Reinterpreting The Precautionary Principle* (Cameron May 2001)

Ortino F, 'From 'Non-Discrimination' to 'Reasonableness': A Paradigm Shift in International Economic Law?' Jean Monnet Working Paper NYU School of Law 01/05 (2004)

Overdevest C and Zeitlin J, 'Assembling an Experimentalist Regime: Transnational Governance Interactions in the Forest Sector Revisited' in Bruszt L and McDermott GA (eds), *Leveling the Playing Field: Transnational Regulatory Integration and Development* (Oxford University Press 2014)

Palma MA, Tsamenyi M and Edeson W, *Promoting Sustainable Fisheries: The International Legal and Policy Framework to Combat Illegal, Unreported and Unregulated Fishing* (Brill/Nijhoff 2010)

Palmeter D and Mavroidis PC, *Dispute Settlement in the World Trade Organization Practice and Procedure* (2nd edn, Cambridge University Press 2004)

Parker RW, 'The Use and Abuse of Trade Leverage to Protect the Global Commons: What We Can Learn From the Tuna-Dolphin Conflict' Georgetown International Environmental Law Review (1999) 12:1 1

Parrish LA, 'Evading Legislative Jurisdiction' Notre Dame Law Review (2012) 87:4 1673

Parrish LA, '*Kiobel*, Unilateralism, and the Retreat from Extraterritoriality' Maryland Journal of International Law (2013) 28:1 208

Parrish LA, 'The Effects Test: Extraterritoriality's Fifth Business' Vanderbilt Law Review (2008) 61:5 1455

Partiti E, 'The Appellate Body Report in *US-Tuna II* and Its Impact on Eco-Labelling and Standardization' Legal Issues of Economic Integration (2013) 40:1 73

Paul JR, 'The Transformation of International Comity' Law and Contemporary Problems (2008) 71:3 19

Paust JJ, 'The Bush-Cheney Legacy: Serial Torture and Forced Disappearance in Manifest Violation of Global Human Rights Law.' Barry Law Review (2012) 18:1 61

Pauw P and others, 'Different Perspectives on Differentiated Responsibilities: A State-of-the-Art Review of the Notion of Common but Differentiated Responsibilities in International Negotiations' Deutsches Institut für Entwicklungspolitik Discussion Paper 6/2014 (2014)

Pauwelyn J, 'Carbon Leakage Measures and Border Tax Adjustments under WTO Law' in Prevost D and Van Calster G (eds), *Research Handbook on Environment, Health and the WTO* (Edward Elgar 2012)

Pauwelyn J, 'Comment: The Unbearable Lightness of Likeness' in Panizzon M, Pohl N and Sauvé P (eds), *GATS and the Regulation of International Trade in Services* (Cambridge University Press 2008)

Pauwelyn J, 'Recent Books on Trade and Environment: GATT Phantoms Still Haunt the WTO' European Journal of International Law (2004) 15:3 575

Pauwelyn J, 'The Role of Public International Law in the WTO: how far can we go?' American Journal of International Law (2001) 95:3 535

Pauwelyn J, *Conflict of Norms in Public International Law: How WTO Law Relates to Other Rules of International Law* (Cambridge University Press 2009)

Pelkmans J and Correia de Brito A, *Transatlantic MRAs: Lessons for TTIP?* (CEPS Special Report, 2015)

Perisin T, 'Is the EU Seal Products Regulation A Sealed Deal? EU and WTO Challenges' International and Comparative Law Quarterly (2013) 62:2 373

Peters A, 'Surveillance Without Borders? The Unlawfulness of the NSA-Panopticon, Part I' EJIL Talk 1 November 2013

Picker CB, 'Comparative Legal Cultural Analyses of International Economic Law: A New Methodological Approach' Chinese Journal of Comparative Law (2013) 1:1 1

Pieth M, Low L and Cullen P, *The OECD Convention on Bribery: A Commentary* (Cambridge University Press 2007)

Pogge T, 'Severe Poverty as a Human Rights Violation' UNESCO Poverty Portal (2004)

Puth S, *WTO und Umwelt: Die Produkt-Prozess-Doktrin* (Duncker & Humblot 2003)

Qin J, 'Accomodating Divergent Policy Objectives under WTO Law: Reflections on EC-Seal Products' AJIL Unbound Symposium on the WTO EC-Seal Products Case (2015)

Qin J, 'Defining Nondiscrimination under the Law of the World Trade Organization' Boston University International Law Journal (2005) 23: 215

Quick R and Lau C, 'Environmentally Motivated Tax Distinctions and WTO Law: The European Commission's Green Paper on Integrated Product Policy in Light of the 'Like Product-' and 'PPM-' Debates' Journal of International Economic Law (2003) 6:2 419

Quick R, 'The Debate Continues: Are Border Adjustments of Emission Trading Schemes a Means to Protect the Climate or Are They 'Naked' Protectionism?' in Govaere I, Quick R and Bronckers MCEJ (eds), *Trade and Competition Law in the EU and Beyond* (Edward Elgar 2011)

Raustiala K, 'Form and Substance in International Agreements' American Journal of International Law (2005) 99:3 581

Raustiala K, 'NGOs in International Treatymaking' in Hollis DB (ed), *The Oxford Guide to Treaties* (Oxford University Press 2012)

Raustiala K, 'Rethinking the Sovereignty Debate in International Economic law' Journal of International Economic Law (2003) 6:4 841

Raustiala K, *Does the Constitution Follow the Flag* (Oxford University Press 2009)

Rayner J, Buck A and Katila P, *Embracing Complexity in International Forest Governance: A Way Forward* (2010)

Read R, 'Process and Production Methods and the Regulation of International Trade' in Read R and Perdikis N (eds), *The WTO and the Regulation of International Trade: Recent Trade Disputes Between the European Union and the United States* (Edward Elgar 2005)

Regan D, 'Measures with Multiple Purposes: Puzzles from EC-Seal Products' AJIL Unbound Symposium on the WTO EC-Seal Products Case (2015)

Regan D, 'Regulatory Purpose and 'Like Products' in Article III:4 of the GATT (With Additional Remarks on Article III:2)' Journal of World Trade (2002) 36:3 443

Regan DH, 'Further Thoughts on the Role of Regulatory Purpose under Article III of the General Agreement on Tariffs and Trade' Journal of World Trade (2003) 37:4 737

Rehbinder E, 'Extra-Territoriality of Pollution Control Laws From a European Perspective' in Handl G, Zekoll J and Zumbansen P (eds), *Beyond Territoriality: Transnational Legal Authority in an Age of Globalization* (Martinus Nijhoff 2012)

Reid E, *Balancing Human Rights, Environmental Protection and International Trade* (Hart Publishing 2015)

Reisman M, 'Unilateral Action and the Transformation of the World Constitutive Process: The Special Problem of Humanitarian Intervention' European Journal of International Law (2000) 11:3

Reuven A-Y, 'National Regulation of Multinational Enterprises: An Essay on Comity, Extraterritoriality and Harmonization' Columbia Journal of Transnational Law (2003) 42:1 5

Rotherham T, 'Issues and Debates: Standards and Labelling' in Najam A, Halle M and Melendez-Ortiz R (eds), *Trade and Environment: A Resource Book* (International Institute for Sustainable Development, International Centre for Trade and Sustainable Development, The Regional and International Networking Group 2007)

Roxstrom E, Gibney M and Einarsen T, 'The NATO Bombing Case (*Bankovic et al v Belgium et al*) and The Limits of Western Human Rights Protection' Boston University International Law Journal (2005) 23: 55

Ryngaert C, 'Universal Tort Jurisdiction over Gross Human Rights Violations' Netherlands Yearbook of International Law (2007) 38:3 3

Ryngaert C, *Jurisdiction in International Law* (Lowe V ed, Oxford University Press 2008)

Ryngaert C, *Jurisdiction in Interntational Law* (2nd edn, Oxford University Press 2015)

Sands P, 'Treaty, Custom and the Cross-Fertilization of International Law' Yale Human Rights & Development Law Journal (1998) 1:1 85

Sands P, *Principles of International Environmental Law* (CUP 2003)

Sari A, 'Jaloud v Netherlands: New Directions in Extra-Territorial Military Operations' EJIL Talk, 24 November 2014

Sato C, 'Extraterritorial Application of EU Competition Law: Is It Possible for Japanese Companies to Steer Clear of EU Competition Laws?' Journal of Political Science and Sociology (2010) 11 23

Savaresi A, 'EU External Action on forests: FLEGT and the development of international law' in Morgera E (ed), *External Environmental Policy of the European Union* (Cambridge University Press 2012)

Scassa T and Currie RJ, 'New First Principles? Assessing The Internet's Challenges To Jurisdiction' Georgetown Journal of International Law (2011) 42:4 1017

Schiano di Pepe L, 'European Union Climate Law and Practice at the End of the Kyoto Era: Unilateralism, Extraterritoriality and the Future of Global Climate Law Governance' in Percival R, Lin J and Piermattei W (eds), *Global Environmental Law at a Crossroads* (Edward Elgar 2014)

Schiff Berman P, *Global Legal Pluralism: A Jurisprudence of Law Beyond Borders* (Cambridge University Press 2012)

Schoenbaum TJ, 'International Trade and Protection of the Environment: The Continuing Search for Reconciliation' American Journal of International Law (1997) 91:2 268

Schreuer C, 'The Waning of the Sovereign State: Towards a New Paradigm for International Law?' European Journal of International Law (1993) 4: 447
Schwarz-Liebermann von Wahlendorf HA, *Droit Comparé: Théorie Générale et Principes* (LGDJ 1978)
Schwenkenbecher A, 'Bridging the Emissions Gap: A Plea for Taking Up the Slack' Philosophy and Public Issues (2013) 3:2 271
Scott J and Rajamani L, 'Contingent Unilateralism: International Aviation in the European Emissions Trading Scheme' in Van Vooren B, Blockmans S and Wouters J (eds), *The EU's Role in Global Governance: the Legal Dimension* (Oxford University Press 2013)
Scott J and Rajamani L, 'EU Climate Change Unilateralism' The European Journal of International Law (2012) 23:2 469
Scott J, 'Extraterritoriality and Territorial Extension in EU Law' American Journal of Comparative Law (2014) 62: 87
Scott J, 'The Geographical Scope of the EU's First-Order and Second-Order Climate Responsibilities: An Exploration' Cambridge Yearbook of European Legal Studies (2015) 17: 92
Scott J, 'The New EU "Extraterritoriality"' Common Market Law Review (2014) 51: 1
Secretary-General U, *The Scope and Application of the Principle of Universal Jurisdiction: Report of the Secretary-General* (2011)
Seibert-Fohr A, 'United States Alien Tort Statute' Max Planck Encyclopedia of Public International Law (2008)
Shaffer G and Bodansky D, 'Transnationalism, Unilateralism and International Law' Legal Studies Research Paper Series Research Paper No. 11-34 (2011)
Shaffer G and Trachtman JP, 'Interpretation and Institutional Choice at the WTO' Virginia Journal of International Law (2011) 52:1 103
Shaffer G, 'WTO Blue-Green Blues: The Impact of US Domestic Politics on Trade-Labor, Trade-Environment Linkages for the WTO's future' Fordham International Law Journal (2000) 24:1 607
Shan W, Simons P and Singh D (eds), *Redefining Sovereignty in International Economic Law* (Hart Publishing 2008)
Shaw MN, *International Law* (6th edn, Cambridge University Press 2008)
Sir Jennings R, 'Sovereignty and International Law' in Kreijen G and others (eds), *State, Sovereignty, and International Governance* (Oxford University Press 2002)
Skinner J, 'A Green Road to Development: Environmental Regulations and Developing Countries in the WTO' Duke Environmental Law & Policy Forum (2010) 20:1 245
Sokol D, 'International Antitrust Institutions' in Guzman AT (ed), *Cooperation, Comity and Competition Policy* (Oxford University Press 2011)
Spar DL, 'Developments in the law: Extraterritoriality' Harvard Law Review (2011) 124:5 1226
Spassov Y, 'EU ETS: Upholding the Carbon Price Without Incidence of Carbon Leakage' Journal of Environmental Law (2012) 24:2 311
Steinberg W, 'Mannington Mills, Inc v Congoleum Corp: A Further Step Toward a Complete Subject Matter Jurisdiction Test' Northwestern Journal of International Law & Business (1980) 2:1 241
Stephens B, 'Extraterritoriality and Human Rights After Kiobel' Maryland Journal of International Law (2013) 28:1 256

Stern B, 'Can the United States set rules for the world? A French view.' Journal of World Trad (1997) 31:4 5

Stevens M, 'The Precautionary Principle in the International Arena' Sustainable Development Law & Policy (2002) 2:2 13

Stevens S, 'The Increased Aggression of the EC Commission in Extraterritorial Enforcement of the Merger Regulation and Its Impact on Transatalantic Cooperation in Antitrust' Syracuse Journal of International Law and Commerce (2002) 29: 263

Stigall DE, 'International Law and Limitations on the Exercise of Extraterritorial Jurisdiction in US Domestic Law' Hastings International and Comparative Law Review (2012) 35:2 323

Stokke OS, 'Trade Measures and the Combat of IUU Fishing: Institutional Interplay and Effective Governance in the Northeast Atlantic' Marine Policy (2009) 33: 339

Stoll P-T and Vöneky S, 'The Swordfish Case: Law of the Sea v Trade' Zeitschrift für Ausländisches Öffentliches Recht und Völkerrecht (2002) 65: 21

Sumaila R, *Trade Policy Options for Sustainable Oceans and Fisheries* (The E15 Initiative: Strengthening the Global Trade and Investment System for Sustainable Development, 2016)

Sunstein C, 'Endogenous Preferences, Environmental Law' Journal of Legal Studies (1993) 22:2 217

Svantesson D, 'Extraterritoriality and Targeting in EU Data Privacy Law: The Weak Spot Undermining the Regulation' International Data Privacy Law (2015) 5:4 226

Swaine E, 'Cooperation, Comity and Competition Policy: United States' in Guzman AT (ed), *Cooperation, Comity and Competition Policy* (Oxford University Press 2011)

Swan AC, 'The Hartford Insurance Company Case: Antitrust in the Global Economy – Welfare Effects and Sovereignty' in Bhandari JS and Sykes AO (eds), *Economic Dimensions in International Law: Comparative and Empirical Perspectives* (Cambridge University Press 1997)

Sweeney B, 'International Governance of Competition and the Problem of Extraterritorial Jurisdiction' in Duns J, Duke A and Sweeney B (eds), *Comparative Competition Law* (Edward Elgar Publishing 2015)

Swinbank A and Daugbjerg C, 'Improving EU Biofuels Policy? Greenhouse Gas Emissions, Policy Efficiency, and WTO Compatibility' Journal of World Trade (2013) 47:4 813

Sykes AO, 'Domestic Regulation, Sovereignty and Scientific Evidence Requirements: A Pessimistic View' Chicago Journal of International Law (2002) 3:2 353

Tams C, *Enforcing Obligations Erga Omnes in International Law* (Cambridge University Press 2005)

Tapia J and Ditzel Faraco A, 'Latin American Antitrust Law and Policy: An Overview of Three Jurisdictions – Brazil, Chile and Colombia' in Duns J, Duke A and Sweeney B (eds), *Comparative Competition Law* (Edward Elgar Publishing 2015)

Theilen J, 'What's in a Name? The Illegality of Illegal, Unreported and Unregulated Fishing' International Journal of Marine and Coastal Law (2013) 28 533

Thomas C, 'Should the World Trade Organization Incorporate Labor and Environmental Standards?' Washington and Lee Law Review (2004) 61 347

Trachtman JP, 'Persistent Objectors, Cooperation, and the Utility of Customary International Law' Duke Journal of Comparative & International Law (2010) 21 221

Trachtman JP, 'Regulatory Jurisdiction and the WTO' Journal of International Economic Law (2007) 10:3 631

Trimble P, 'The Supreme Court and International Law: The demise of Restatement Section 403' American Journal of International Law (1995) 85 53

Truxal S, 'The ICAO Assembly Resolutions on International Aviation and Climate Change: an Historic Agreement, a Breakthrough Deal and the Cancun Effect' Air and Space Law (2011) 36:3 217

Tsamenyi M and others, *Fairer Fishing: The Impact on Developing Countries of the European Community Regulation on Illegal, Unreported and Unregulated Fisheries* (Commonwealth Secretariat 2009)

Tucker KL, 'In the Wake of *Empagran* – Lights Out On Foreign Activity Falling Under Sherman Act Jurisdiction? Courts Carve Out a Prevailing Standard' Fordham Journal of Corporate and Financial Law (2010) 15: 807

Uhkubo N and Shishido Z, 'Cooperation, Comity and Competition Policy: Japan' in Guzman AT (ed), *Cooperation, Comity and Competition Policy* (Oxford University Press 2011)

UNCTAD, *The Green Economy: Trade and Sustainable Development Implications* (2011)

UNCTAD, *Trade and Environment Review* (2006)

UNEP and WTO, *Trade and Climate Change: WTO-UNEP Report* (2009)

Van Alebeek R and Nollkaemper A, 'The Legal Status of Decisions by Human Rights Treaty Bodies in National Law' in Keller H and Ulfstein G (eds), *Human Rights Treaty Bodies: Law and Legitimacy* (Cambridge University Press 2011)

Van Asselt H, 'Managing the Fragmentation of International Environmental Law: Forests at the Intersection of the climate and Biodiversity Regime' NYU Journal of International Law (2012) 44:1205-1278

Van Calster G, *International & EU Trade Law: The Environmental Challenge* (Cameron May Publishing 2000)

Van Damme I, 'Inherent Powers of and for the WTO Appellate Body' Graduate Institute Geneve CTEI Working Paper 102 (2008)

Van Damme I., 'Treaty Interpretation by the WTO Appellate Body', European Journal of International Law (2010) 21:3 605

Van den Bossche P and Werner Z, *The Law and Policy of the World Trade Organization: Text, Cases and Materials.* (3d edn, Cambridge University Press 2008)

Van den Bossche P, Schrijver N and Faber G, *Unilateral Measures Addressing Non-Trade Concerns: A Study on WTO Consistency, Relevance of other International Agreements, Economic Effectiveness and Impact on Developing Countries of Measures concerning Non-Product-Related Processes and Production Methods* (2007)

Van Gerven Y and Hoet L, 'Gencor: Some notes on Transnational Competition Law Issues – *European Court of First Instance 25 March 1999, T-102/96, Gencor Ltd. V Commission*' Legal Issues of Economic Integration (2001) 28:2 195

Van Schaack B, 'The United States' Position on the Extraterritorial Application of Human Rights Obligations: Now is the Time for Change' International Law Studies (2014) 90: 20

Vandenhole W, 'EU and Development: Extraterritorial Obligations under the International Covenant on Economic, Social and Cultural Rights' in Salomon M,

Tostensen A and Vandenhole W (eds), *Casting the Net Wider: Human Rights, Development and New Duty-Bearers* (Intersentia 2007)
Verdonk M and others, *Evaluation of Policy Options to Reform the EU Emissions Trading System: Effects on Carbon Price, Emissions and the Economy* (2013)
Vermulst E and Driessen B, 'The Choice of a Switch: The European Reaction to the Helms-Burton Act' Leiden Journal of International Law (1998) 11:1 81
Vidigal G, 'From Bilateral to Multilateral Law-Making: Legislation, Practice, Evolution and the Future of Inter Se Agreements in the WTO' European Journal of International Law (2013) 24:4 1027
Vogel D, *Trading up: Consumer and Environmental Regulation in a Global Economy* (Harvard University Press 1997)
Voigt C, 'Up in the Air: Aviation, the EU Emissions Trading Scheme and the Question of Jurisdiction' Cambridge Yearbook of European Legal Studies (2011-2012) 14: 475
von Bernstorff J, Jacob M and Dingfelder Stone J, 'The Alien Tort Statute before the US Supreme Court in the *Kiobel* Case: Does International Law Prohibit US Cours to Exercise Extraterritorial Civil Jurisdiction over Human Rights Abuses Committed Outside of the US?' Zeitschrift für Ausländisches Öffentliches Recht und Völkerrecht (2012) 72:3 579
Voon T, 'Sizing Up the WTO: Trade-Environment Conflict and the Kyoto Protocol' Journal of Transnational Law and Policy (2000) 10:1 71
Vranes E, *Trade and the Environment: Fundamental Issues in International Law, WTO Law and Legal Theory* (Oxford University Press 2009)

Wagner-von Papp F, 'Competition Law and Extraterritoriality' in Ezrachi A (ed), *Research Handbook on International Competition Law* (Edward Elgar Publishing 2012)
Wallace BP and others, 'Global Patterns of Marine Turtle Bycatch' Conservation Letters (2010) 3: 131
Wallace BP and others, 'Impacts of Fisheries Bycatch on Marine Turtle Populations Worldwide: Toward Conservation and Research Priorities' Ecosphere (2013) 4:3 40
Weishaar S, *Emissions Trading Design: A Critical Overview* (Edward Elgar Publishing Ltd 2014)
Weiss F, 'Extra-Territoriality in the Context of WTO Law' in Handl G, Zekoll J and Zumbansen P (eds), *Beyond Territoriality: Transnational Legal Authority in an Age of Globalization* (Martinus Nijhoff 2012)
Wilde R, 'The 'Legal Space' or 'Espace Juridique' of the European Convention on Human Rights: Is It Relevant for Extraterritorial State Action?' European Human Rights Law Review (2005) 10: 115
Wilson EG and others, *Why Healthy Oceans Need Sea Turtles: The Importance of Sea Turtles to Marine Ecosystems* (2010)
WTO, *Harnessing Trade for Sustainable Development and a Green Economy'* (2011)
Wu M, 'Free Trade and the Protection of Public Morals: An Analysis of the Newly Emerging Public Morals Clause Doctrine' Yale Journal of International Law (2008) 33: 215
WWF and London ZSo, *Living Blue Planet Report: Species, Habitats and Human Well-Being* (2015)

Yearwood RRF, *The Interaction Between World Trade Organisation (WTO) Law and External International Law: The Constrained Openness of WTO Law (A Prologue to a Theory)* (Routledge 2012)
Young MA, 'Trade Measures to Address Environmental Concerns in Faraway Places: Jurisdictional Issues' Review of European Community & International Environmental Law (2014) 23:3 302
Young MA, *Trade-Related Measures to Address Illegal, Unreported and Unregulated Fishing* (The E15 Initiative: Strengthening the Global Trade and Investment System for Sustainable Development, 2015)

Zagel GM, 'WTO & Human Rights: Examining Linkages and Suggesting Convergence' IDLO Voices of Development Jurists Paper Series (2005) 2:2
Zhou W, '*US-Clove Cigarettes* and *US-Tuna II (Mexico)*: Implications for the Role of Regulatory Purpose under Article III:4 of the GATT' Journal of International Economic Law (2012) 15:4 1075
Ziemele I, 'Human Rights Violations by Private Persons and Entities: The Case Law of International Human Rights Courts and Monitoring Bodies' EUI Working Papers 2009/8
Zimmermann A, 'Extraterritorial Application of Human Rights Treaties – The Case of Israel and the Palestinian Territories Revisited.' in Buffard I and others (eds), *International Law Between Universalism and Fragmentation: Festschrift in Honour of Gerhard Hafner* (Martinus Nijhoff 2008)
Zleptnig S, *Non-Economic Objectives in WTO Law: Justification Provisions of GATT, GATS, SPS and TBT Agreements*, vol 1 (Andenas M ed, Martinus Nijhoff Publishers 2010)
Zweigert K and Kötz H, *Introduction to Comparative Law* (3d edn, Oxford University Press 1998)

Case law

Court of justice of the european union

- *Ahlström Osakeyhtiö and Others v Commission (Wood Pulp I),* Joined cases 89, 104, 114, 116, 117, 125-129/85 ECLI:EU:C:1988:447, Court of Justice of the European Union 1998
- *Air Transport Association of America and Others v Secretary of State for Energy and Climate Change,* C-366/10, Grand Chamber (CJEU), 21 December 2011
- *Bureau national interprofesionnel du cognac v Guy Clair* 123/83 [1985] ECR 391, (CJEU), 1985
- *Europemballage Corp and Continental Can Co v European Commission,* 6/72 [1973] ECR 215, (CJEU), 1973
- *Gencor v Commission,* T-102/96 ECLI:EU:T:1999:65, General Court 1999
- *Guardian Industries and Guardian Europe v Commission,* C-580/12P, EU:C:2014:2363, (CJEU), 2014
- *Imperial Chemical Industries Ltd. v Commission (Dyestuffs),* case 48/69 ECLI:EU:C:1972:70, Court of Justice of the European Union 1972
- *InnoLux Corp., formerly Chimei InnoLux Corp. v European Commission,* ECLI:EU:C:2015:451, (CJEU), 9 July 2015
- *Instituto Chemioterapico Italiano and Commercial Solvents Corp v European Commission,* 6/73 and 7/73 [1974] ECR 223, (CJEU), 1974
- *Irish Sugar plc v Commission of the European Communities* T-228/97 [1999] ECR II-2969, (CJEU), 1999
- *Müller International Schallplatten GmbH v Commission of the European Communities* 19/77 [1978] ECR 131, (CJEU), 1978
- *Stichting Sigarettenindustrie and others v Commission of the European Communities,* Joined cases 240, 241, 242, 261, 262, 268, and 269/82; ECLI:EU:C:1985:488, (CJEU), 10 December 1985
- *Zuchtvieh-Export GmbH v Stadt Kempten,* C-424/13, Fifth Chamber (CJEU), 23 April 2015

Human rights courts and tribunals

- *Al-Saadoon and Mufhdi v United Kingdom,* 61498/08, AdmDec (ECHR), 30 June 2009
- *Al-Skeini v UK,* 55721/07, Grand Chamber (ECHR), 7 July 2011
- *Armando Alejandro Jr. and others v Cuba (Brothers to the rescue),* IACHR Report no 86/99, Case no 11.589, (IACHR), 29 September 1999

- *Association Pour la Sauvegarde de la Paix au Burundi v Tanzania, Kenya, Uganda, Rwanda, Zaire and Zambia,* Communication 157/96 – 17th Annual Activity Report (2004), (African Commission), 2004
- *Azemi v Serbia,* 11209/09, (ECHR), 5 November 2013
- *Bankovic et al v Belgium et al,* 52207/99, Grand Chamber (Adm Dec) (ECHR), 12 December 2001
- *Behrami and Behrami v France* 71412/01, AdmDec (ECHR), 2007
- *Catan and others v Moldova and Russia,* 43370/04, 8252/05 and 18454/06, Grand Chamber (ECHR), 19 October 2012
- *Coard et al v the United States,* Report No 109/99, Case No 10.951, (IACHR), 29 September 1999
- *Cyprus v Turkey* 25781/94, Grand Chamber (ECHR), 10 May 2001
- *Cyprus v Turkey,* 6780/74 and 6950/75, Adm Dec (ECHR), 1975
- *Djokabi Lambi Longa v the Netherlands* 33917/12, AdmDec (ECHR), 2012
- *Gentilhomme, Schaff-Benhadji et Zerouki v France,* 48205/99, 48207/99 and 48209/99, (ECHR), 14 May 2002
- *Hassan v UK,* 29750/09, Grand Chamber (ECHR), 16 September 2014
- *Ilascu and others v Moldova and Russia* 48787/99, Grand Chamber (ECHR), 8 July 2004
- *Isaak v Turkey,* 44587/98, AdmDec (ECHR), 28 September 2006
- *Issa and others v Turkey,* 31821/96, (ECHR), 16 November 2004
- *Jaloud v Netherlands,* 47708/08, Grand Chamber (ECHR), 20 November 2014
- *Loizidou v Turkey,* 15318/89, Grand Chamber (ECHR), 23 March 1995
- *Lopez Burgos v Uruguay,* Communication No 52/1979, UN Doc CCPR/C/13/D/52/1979, IHRL 2796 (UNHRC 1981), (Human Rights Committee), 29 July 1981
- *Medvedyev and others v France,* 3394/03, Grand Chamber (ECHR), 29 March 2010
- *Mohamed Ben Al Mahi v Denmark* 5853/06, AdmDec (ECHR), 2006
- *Öcalan v. Turkey 46221/99, (ECHR), 12 March 2003*
- *Osman v United Kingdom, 23452/94, (ECHR), 28 October 1998*
- *Ramirez Sanchez v France,* 28780/95, Adm Dec (ECHR), 1996
- *Request for Precautionary Measures Concerning the Detainees at Guantanamo Bay, Cuba,* 41 ILM (2002) 532, (IACHR), 12 March 2002
- *US Military Intervention in Panama,* IACHR Report No 31/93, case No 10.573, (IACHR), 14 October 1993
- *Victor Saldano v Argentina,* IACHR Report No 38/99, Petition (IACHR), 11 March 1999

International court of justice

- *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda),* (ICJ), 19 December 2005
- *Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v Belgium),* ICR Rep. 2002, (International Court of Justice), 2002
- *Barcelona Traction, Light and Power Company Lth (Belgium v Spain),* Rep3, 105, (International Court of Justice), 1970

- *Legal Consequences of the construction of a wall in the occupied Palestinian territory,* ICJ Reports 2004, 136, Advisory Opinion (ICJ), 2004
- *Questions Concerning the Obligation to Prosecute or Extradite (Belgium v. Senegal),* (International Court of Justice), 2012

PERMANENT COURT OF INTERNATIONAL JUSTICE

- *S.S. Lotus,* series A, no.10, (Permanent Court of International Justice), 7 September 1927

United kingdom

- *Al-Skeini and others v Secretary of State for Defence,* [2007] UKHL 26, (House of Lords, Great Britain (UK)), 13 June 2007

United States

- *Animal Science Products, Inc. v China Minmetals Corp.,* 654 F.3d 462 (3d Cir.), 2011
- *Arbaugh v. Y & H Corp.,* 546 US 500; 126 S. Ct. 1235, (US Supreme Court), 2006
- *Boumedienne v Bush,* 553 US 723; 128 S Ct 2229, (US Supreme Court), 12 June 2008
- *Empagran SA v F. Hoffman-LaRoche Ltd (Empagran II),* 417 F.3 1267, 1270 (DC Cir), 2005
- *F. Hoffmann-La Roche Ltd. v. Empagran S.A.,* 542 US 155 (US Supreme Court), 2004
- *Hartford Fire Insurance v California,* 509 US 764, 796; 113 S.Ct. 2891, (US Supreme Court), 1993
- *Kiobel v. Royal Dutch Petroleum Co.,* 133 S.Ct. 1659, US Supreme Court (US Supreme Court), 2013
- *Lotes Co. v Hon Hai Precision Indus.,* 753 F.3d 395, 410 (2d. Cir.), 2014
- *Mannington Mills v Congoleum Corp.,* 595 F.2d 1287, 1301 (3d Cir.), 1979
- *Minn-Chem Inc. v Agrium Inc.,* 683 F.3d 845, 856-57 (7th Cir.), 2012
- *Morrison v National Australia Bank Ltd.* , 130 S. Ct. 2869, (US Supreme Court), 2010
- *Motorola Mobility LLC v. AU Optronics Corp.,* 775 F.3d 816 (US Court of Appeals, 7th Cir.), 26 November 2014
- *Timberlane Lumber Co. v Bank of America,* 549 F.2d 597, 613, (9th Cir.), 1977
- *United States of America v AU Optronics Corp et al,* 12-10492 F.3d, (9th Cir.), 10 July 2014
- *United States v LSL Biotechnologies,* 379 F.3d 672, 680 (9th Cir.), 2004
- *US v Aluminium Co of America (Alcoa),* 148 F.2d 416 (2d Cir.), 1945

WTO PANELS AND AB

- *Argentina-Measures Affecting the Export of Bovine Hides and the Import of Finished Leather,* WT/DS155/R, Panel Report (WTO), 2000

- *Argentina-Measures Relating to Trade in Goods and Services*, WT/DS453/AB/R, AB Report (WTO), 2016
- *Argentina-Measures Relating to Trade in Goods and Services,* WT/DS453/AB/R, Panel Report (WTO), 2015
- *Belgium – Family Allowances,* G/32 – BISD 1S/59, GATT Panel Report (GATT), 1952
- *Brazil – Measures Affecting Import of Retreaded Tyres,* WT/DS332/AB/R, AB Report (WTO), 2007
- *Brazil – Measures Affecting Import of Retreaded Tyres,* WT/DS332/R, Panel Report (WTO), 2007
- *Canada – Measures Affecting Exports of Unprocessed Herring and Salmon,* BISD 35S/98, GATT Panel Report (GATT), 1988
- *Canada-Certain Measures Affecting the Automotive Industry*, WT/DS139/AB/R, AB Report (WTO), 2000
- *Chile – Measures Affecting the Transit and Importing of Swordfish,* WT/DS193, (WTO), withdrawn
- *China- Measures Affecting Imports of Automobile Parts,* WT/DS339/AB/R, AB Report (WTO), 2008
- *China-Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment,* WT/DS363/R, Panel Report (WTO), 2009
- *China-Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment*, WT/DS363/AB/R, AB Report (WTO), 2009
- *China-Measures Related to the Exportation of Various Raw Materials,* WT/DS394/AB/R, AB Report (WTO), 2012
- *Colombia-Ports of Entry,* WT/DS366/R, Panel Report (WTO), 2009
- *Dominican Republic – Measures Affecting the Importation and Internal Sale of Cigarettes,* WT/DS302/AB/R, AB (WTO), 2005
- *European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries,* WT/DS246/R, Panel Report (WTO), 2003
- *European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries,* WT/DS246/AB/R, AB Report (WTO), 2004
- *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products,* WT/DS135/AB/R, AB Report (WTO), 2001
- *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products,* WT/DS135/R, Panel Report (WTO), 2001
- *European Communities – Measures Affecting Importation of Certain Poultry Products,* WT/DS69/AB/R, AB Report (WTO), 1998
- *European Communities – Measures Affecting the Approval and Marketing of Biotech Products,* WT/DS291/R, Panel report (WTO), 2006
- *European Communities – Measures Affecting Trade in Large Civil Aircraft,* WTO/DS316/AB/R, AB Report (WTO), 2011
- *European Communities – Measures Concerning Meat and Meat Products (Hormones),* WT/DS26/AB/R, AB Report (WTO), 1998
- *European Communities – Measures Prohibiting the Importation and Marketing of Seal Products,* WT/DS401/R, Panel Report (WTO), 2013
- *European Communities – Measures Prohibiting the Importation and Marketing of Seal Products,* WT/DS401/AB/R, AB Report (WTO), 2014

- *European Communities – Regime for the Importation, Sale and Distribution of Bananas III,* WT/DS27/AB/R, AB (WTO), 1997
- *European Communities -Customs Classification of Certain Computer Equipment,* WTO/DS62/AB/R, AB Report (WTO), 1998
- *India – Measures Affecting the Automotive Sector,* WT/DS146/R, Panel Report (WTO), 2001
- *India – Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products,* WT/DS90/R, Panel Report (WTO), 1999
- *Italian Discrimination Against Imported Agricultural Machinery,* BISD 7S/60, GATT Panel Report (GATT), 1958
- *Japan-Measures Affecting the Importation of Apples*, WT/DS245/AB/R, AB Report (WTO), 2003
- *Japan – Taxes on Alcoholic Beverages II,* WT/DS8/AB/R, AB Report (WTO), 1996
- *Japan – Taxes on Alcoholic Beverages II,* WT/DS8/R, Panel Report (WTO), 1996
- *Korea – Taxes on Alcoholic Beverages*, WT/DS75/AB/R, AB Report (WTO), 1999
- *Korea-Measures Affecting Imports of Fresh, Chilled and Frozen Beef,* WT/DS161/AB/R, AB Report (WTO), 2000
- *Mexico – Anti-Dumping Investigation of High-Fructose Corn Syrup (HFCS) from the United States,* WT/DS132/AB/RW, AB Report (WTO), 2001
- *Mexico – Tax Measures on Soft Drinks and Other Beverages*, WT/DS308/AB/R, AB Report (WTO), 2006
- *Peru – Additional Duty on Imports of Certain Agricultural Products,* WT/DS457/AB/R, AB Report (WTO), 2015
- *Spain – Tariff Treatment of Unroasted Coffee,* BISD 28S/102, GATT Panel Report (GATT), 1981
- *Thailand – Customs and Fiscal Measures on Cigarettes from the Philippines,* WT/DS371/R, Panel Report (WTO), 2010
- *Thailand – Customs and Fiscal Measures on Cigarettes from the Philippines,* WT/DS371/AB/R, AB Report (WTO), 2011
- *United States – Certain Country of Origin Labelling (COOL) Requirements,* WT/DS384/AB/R, AB Report (WTO), 2012
- *United States – Import Prohibition of Certain Shrimp and Shrimp Products,* WT/DS58/AB/R, AB Report (WTO), 1998
- *United States – Import Prohibition of Certain Shrimp and Shrimp Products, Recourse to Article 21.5 of the DSU by Malaysia,* WT/DS58/AB/RW, AB Report (WTO), 2001
- *United States – Import Prohibition of Certain Shrimp and Shrimp Products, Recourse to Article 21.5 of the DSU by Malaysia,* WT/DS58/RW, Panel Report (WTO), 2001
- *United States – Import Prohibitions of Certain Shrimp and Shrimp Products,* WT/DS58/R, Panel report (WTO), 1998
- *United States – Measures Affecting Alcoholic and Malt Beverages,* DS23/R – 39S/206, GATT Panel 1992
- *United States – Measures Affecting Imports of Woven Wool Shirts and Blouses from India,* WT/DS33/AB/R, AB Report (WTO), 1997
- *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services,* WT/DS285/R, Panel Report (WTO), 2004
- *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services,* WT/DS285/AB/R, AB Report (WTO), 2005

- *United States – Measures Affecting the Production and Sale of Clove Cigarettes,* WT/DS406/AB/R, AB Report (WTO), 2012
- *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products,* WT/DS381/R, Panel Report (WTO), 2011
- *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products,* WT/DS381/AB/R, AB Report (WTO), 2012
- *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products, Recourse to Article 21.5 DSU by Mexico*, WT/DS381/AB/RW, AB Report (WTO), 2015
- *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products, Recourse to Article 21.5 DSU by Mexico*, WT/DS381/RW, Panel Report (WTO), 2015
- *United States – Restrictions on Imports of Tuna (EEC),* DS29/R, GATT panel (GATT), 1994
- *United States – Restrictions on Imports of Tuna (Mexico),* DS21/R, GATT Panel (GATT), 1991
- *United States – Section 337 of the Tariff Act of 1930,* L/6439, GATT Panel Report, 1989
- *United States – Standards for Reformulated and Conventional Gasoline,* WT/DS2/AB/R, AB Report (WTO), 1996
- *United States – Taxes on Automobiles,* DS31/R, GATT Panel 1994
- *United States – The Cuban Liberty and Democratic Solidarity Act*, WT/DS38 (*authority for panel lapsed in 1998)*
- *United States – Standards for Reformulated and Conventional Gasoline,* WT/DS2/AB/R, AB Report (WTO), 1996
- *United States – Standards for Reformulated and Conventional Gasoline,* WT/DS2/R, Panel Report (WTO), 1996

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US-Shrimp 2.2; 3.4.2.4; 5.4; 8.2; 9.1
*US-Tuna (EEC)*2.2; 3.4.2.2
*US-Tuna (Mexico)*2.2; 3.4.2.3
US-Tuna II (Mexico) 2.4.1.2.3; 3.4.2.5

V
VCLT 1.3.2; 3.4.2; 3.4.2.3; 7.2.1.1

W
Wood Pulp 5.3.2.2

Curriculum vitae

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2002	Gymnasium, Heilig Hartinstituut Heverlee (BE)
2003	Art School, Hagaskolan Borlänge (SV)
2006	BA in Applied Linguistics, Erasmus University College Brussels (BE)
2006	Erasmusprogram, Ruhruniversität Bochum (DE)
2007	MA Interpretation German/Spanish, Erasmus University College Brussels (BE)
2010	LLB European Law School, Maastricht University (NL) (*Honours*)
2011	LLM Globalisation and Law, Maastricht University (NL)
2011	MA European Politics and Administration, College of Europe, Bruges (BE)
2014	LLB/LLM Belgian Law, University of Antwerp (BE)
2011-2012	Docent at Europa Institute, Leiden Law School, Leiden University (NL)
2012-2016	PhD-fellow/Docent at Europa Institute, Leiden Law School, Leiden University (NL)

In the range of books published by the Meijers Research Institute and Graduate School of Leiden Law School, Leiden University, the following titles were published in 2015 and 2016

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MI-246 C. Vernooij, *Levenslang en de strafrechter. Een onderzoek naar de invloed van het Nederlandse gratiebeleid op de oplegging van de levenslange gevangenisstraf door de strafrechter* (Jongbloed scriptieprijs 2014), Den Haag: Jongbloed 2015, ISBN 979 70 9001 563 2
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MI-253 O.A. Haazen, *Between a Right and a Wrong. Ordinary Cases, Civil Procedure, and Democracy,* (oratie Leiden), Amsterdam: Amsterdam University Press 2015, ISBN 978 90 8555 099 0
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MI-255 M. Dubelaar, R. van Leusden, J. ten Voorde & S. van Wingerden, *Alleen voor de vorm? Frequentie, organisatie en praktijk van pro-formazittingen,* Den Haag: Boom Juridische uitgevers 2015, ISBN 978 94 6290 156 8.
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