



Universiteit  
Leiden  
The Netherlands

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

Cooreman, B.E.E.M.

**Citation**

Cooreman, B. E. E. M. (2016, June 14). *Addressing global environmental concerns through trade: extraterritoriality under WTO law from a comparative perspective*. Meijers Research Institute and Graduate School of the Leiden Law School of Leiden University, Leiden. Retrieved from <https://hdl.handle.net/1887/40164>

Version: Not Applicable (or Unknown)

License: [Licence agreement concerning inclusion of doctoral thesis in the Institutional Repository of the University of Leiden](#)

Downloaded from: <https://hdl.handle.net/1887/40164>

**Note:** To cite this publication please use the final published version (if applicable).

Cover Page



Universiteit Leiden



The handle <http://hdl.handle.net/1887/40164> holds various files of this Leiden University dissertation

**Author:** Cooreman, B.E.E.M.

**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*

Barbara Elisabeth Etienne Marie Cooreman

geboren te Dendermonde, België

in 1985

Promotor: prof. dr. M.C.E.J. Bronckers

Co-promotor: dr. F. Baetens LLM

Promotiecommissie: prof. dr. N.M. Blokker  
prof. dr. P. Van den Bossche (Maastricht University  
and WTO Appellate Body)  
prof. dr. C.M.J. Ryngaert (Utrecht University)  
prof. J. Scott (University College London, UK)

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

Printed by CPI-Koninklijke Wöhrmann – Zutphen

© 2016 B.E.E.M. Cooreman

*Behoudens de in of krachtens de Auteurswet van 1912 gestelde uitzonderingen mag niets uit deze uitgave worden vervoelvoudigd, opgeslagen in een geautomatiseerd gegevensbestand, of openbaar gemaakt, in enige vorm of op enige wijze, hetzij elektronisch, mechanisch, door fotokopieën, opnamen of enig andere manier, zonder voorafgaande schriftelijke toestemming van de auteur.*

*Voor zover het maken van kopieën uit deze uitgave is toegestaan op grond van artikel 16h Auteurswet 1912, dient men de daarvoor wettelijk verschuldigde vergoedingen te voldoen aan de Stichting Reprorecht te Hoofddorp (postbus 3060, 2130 KB, [www.reprorecht.nl](http://www.reprorecht.nl)). Voor het overnemen van gedeelte(n) uit deze uitgave in bloemlezingen, readers en andere compilatiewerken (artikel 16, Auteurswet 1912) kan men zich wenden tot de Stichting PRO (Stichting Publicatie- en Reproductierechten Organisatie, postbus 3060, 2130 KB Hoofddorp).*

*No part of this book may be reproduced in any form, by print, photoprint, microfilm or any other means without the written permission of the author.*

*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, Hannelte, 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 paronyms: 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.

## Short table of contents

LIST OF ABBREVIATIONS	XVII
1 Introduction	1
PART I – INTRODUCING ENVIRONMENTAL TRADE MEASURES	23
2 Product or process – Outlining the scope of trade law	25
3 The (extra)territorial reach of national measures under WTO law	63
PART II – ZOOMING OUT – EXTRATERRITORIALITY BEYOND WTO LAW	93
4 Jurisdiction and extraterritoriality: A theoretical framework	95
5 Extraterritoriality under competition law	129
6 Extraterritoriality under international human rights law	165
PART III – ZOOMING IN – A WTO EXTRATERRITORIALITY DECISION TREE	209
7 The proposal of a WTO extraterritoriality decision tree	211
8 The application of the extraterritoriality decision tree: Case studies of environmental trade measures	275
9 Concluding chapter: Outlook and final remarks	367
SAMENVATTING (SUMMARY IN DUTCH)	381
BIBLIOGRAPHY	389
CASE LAW	413
INDEX	419
CURRICULUM VITAE	423



# Table of contents

LIST OF ABBREVIATIONS	XVII
1 INTRODUCTION	1
1.1 Scope of the study	1
1.1.1 Addressing environmental concerns through trade measures	1
1.1.2 Related questions	5
1.1.2.1 Unilateralism	5
1.1.2.2 State sovereignty	7
1.1.2.3 WTO as the appropriate forum	9
1.1.2.4 Powerful markets	10
1.1.3 Aim of study	11
1.2 Structure of analysis	14
1.2.1 Part I: Product or process: Outlining the scope	14
1.2.2 Part II: Zooming out: Extraterritoriality beyond WTO law	15
1.2.3 Part III: Zooming in: A WTO extraterritoriality decision tree	15
1.3 Methodology	16
1.3.1 Interpreting legal clauses	16
1.3.2 Comparative perspective	16
1.3.2.1 The aim of comparative law	18
1.3.2.2 A functionalist approach	18
1.3.2.3 Selection of systems	19
1.3.2.4 Comparative analysis	20
1.3.3 Case studies	21
PART I – Introducing environmental trade measures	23
2 PRODUCT OR PROCESS – OUTLINING THE SCOPE OF TRADE LAW	25
2.1 Introduction	25
2.2 The trade and environment debate	26
2.3 Product or process	30
2.3.1 PPMs defined	30
2.3.2 PPMs as policy tools	32
2.4 Legal analysis of non-product-related PPMs	34
2.4.1 The violation: Article XI v Article III GATT	34
2.4.1.1 Issues under Article XI GATT	36
2.4.1.2 Issues under Article III GATT	37

2.4.1.2.1	Determining likeness	39
2.4.1.2.2	Treatment no less favourable	42
2.4.1.2.3	Aims and effects or the inclusion of regulatory purposes	43
2.4.2	The justification: Article XX GATT	51
2.4.2.1	Article XX(b) and (g) GATT	53
2.4.2.2	The chapeau	56
2.4.3	The TBT Agreement	57
2.5	Conclusion	61
3	THE (EXTRA)TERRITORIAL REACH OF NATIONAL MEASURES UNDER WTO LAW	63
3.1	Introduction	63
3.2	Extraterritoriality and international trade	64
3.2.1	Two notions of extraterritoriality	64
3.2.2	Inward- and outward-looking measures	65
3.3	The (extra)territorial scope of the WTO agreements	67
3.3.1	Extraterritoriality under GATT	67
3.3.2	Extraterritoriality under GATS	69
3.3.3	Extraterritoriality under the TBT Agreement	70
3.3.4	Extraterritoriality under the SPS Agreement	71
3.4	Case law	72
3.4.1	Inward-looking	72
3.4.2	Outward-looking	74
3.4.2.1	Belgian Family Allowances	75
3.4.2.2	GATT US-Tuna (Mexico)	77
3.4.2.3	GATT US-Tuna (EEC)	79
3.4.2.4	US-Shrimp	82
3.4.2.5	US-Tuna II (Mexico)	85
3.4.2.6	EC-Seal Products	86
3.4.2.7	EC-Tariff Preferences	88
3.5	Conclusion	89
PART II – Zooming out – extraterritoriality beyond WTO law		93
4	JURISDICTION AND EXTRATERRITORIALITY: A THEORETICAL FRAMEWORK	95
4.1	Introduction	95
4.2	The development of sovereign states and jurisdiction	96
4.3	Types of jurisdiction	99
4.4	Defining extraterritorial jurisdiction	101
4.5	Principles of extraterritorial jurisdiction	106
4.5.1	Lotus: prohibitive or permissive?	106
4.5.2	Permissive principles governing prescriptive jurisdiction	108
4.5.2.1	Subjective territoriality principle	110
4.5.2.2	Objective territoriality or effects	112
4.5.2.3	Active personality principle	113
4.5.2.4	Passive personality principle	114

---

4.5.2.5	Protective principle	115
4.5.2.6	Universality principle	118
4.5.3	Comity, reasonableness and effective connection	123
4.6	Conclusion	127
5	EXTRATERRITORIALITY UNDER COMPETITION LAW	129
5.1	Introduction	129
5.2	The effects doctrine and competition law	130
5.2.1	The legal basis of the effects doctrine	130
5.2.2	Extraterritorial enforcement	133
5.2.3	A combination of approaches	134
5.3	State practice illustrations	139
5.3.1	The US	139
5.3.1.1	<i>American Banana</i> and a territorial approach	140
5.3.1.2	<i>Alcoa</i> and effects	140
5.3.1.3	Seeking a balance: tempering the effects doctrine?	144
5.3.2	The EU	147
5.3.2.1	<i>Dyestuffs</i> and the economic entity theory	148
5.3.2.2	<i>Wood Pulp</i> and the implementation theory	149
5.3.2.3	<i>Gencor</i> and the effects doctrine	153
5.3.3	Extraterritoriality beyond the US and the EU	156
5.3.3.1	Japan	156
5.3.3.2	Israel	157
5.3.3.3	Brazil	158
5.3.3.4	China	158
5.3.3.5	Singapore	158
5.3.3.6	India	159
5.4	The effects doctrine and environmental effects	159
5.5	Conclusion	162
6	EXTRATERRITORIALITY UNDER INTERNATIONAL HUMAN RIGHTS LAW	165
6.1	Introduction	165
6.2	States protecting individuals' rights	166
6.3	Legal framework	171
6.3.1	International human rights treaties	171
6.3.2	Regional human rights treaties	172
6.3.2.1	Europe	172
6.3.2.2	Americas	173
6.3.2.3	Africa	174
6.3.2.4	Middle East	174
6.3.2.5	Asia	174
6.4	Jurisdictional scope	175
6.4.1	The concept of jurisdiction in a human rights context	175
6.4.2	Jurisdictional treaty clauses	179
6.4.3	Jurisdictional grounds for extraterritoriality	182

6.4.3.1	Spatial Jurisdiction: Effective control over an area	182
6.4.3.1.1	Effective control and public powers	182
6.4.3.1.2	Loss of <i>de facto</i> control over <i>de jure</i> territory	184
6.4.3.2	Personal Jurisdiction: Authority and control by state agents	186
6.4.3.3	Effects of state acts	190
6.4.4	A normative perspective on extraterritorial human rights protection	191
6.4.5	Application of lessons learned to a trade context	193
6.5	The nature of extraterritorial obligations	195
6.5.1	Respect, protect and fulfill?	195
6.5.2	Economic, social and cultural rights	200
6.5.3	Application of lessons learned to a trade context	205
6.6	Conclusion	206
PART III – Zooming in – a WTO extraterritoriality decision tree		209
7	THE PROPOSAL OF A WTO EXTRATERRITORIALITY DECISION TREE	211
7.1	Introduction	211
7.2	Assessing the extraterritorial effect of environmental npr-PPMs under Article XX GATT: A decision tree	213
7.2.1	The environmental exception grounds and necessity	213
7.2.1.1	Environmental concerns	213
7.2.1.2	Necessity	215
7.2.2	Step 1 of the decision tree: Location of the concern	218
7.2.2.1	Inward	220
7.2.2.2	Inward/outward and effects	221
7.2.2.3	Outward	227
7.2.3	Step 2 of the decision tree: Nature of the Concern and Norm Recognition	228
7.2.3.1	Treaty obligations between parties	232
7.2.3.2	Customary international law	233
7.2.3.3	Multilateral treaty authorizing trade measures towards non-parties	234
7.2.3.4	Multilateral treaty aiming at the protection of particular environmental concern	235
7.2.3.5	Soft law	236
7.2.3.6	Unilateral norms	237
7.2.4	The decision tree: the model	240
7.3	Environmental Concerns and Public Morals	240
7.3.1	Territorial scope of Article XX(a) GATT	241
7.3.2	Validity of public morals	244
7.3.3	Evidence of public morals	246
7.3.4	Necessity	250
7.3.5	Morals in relation to the environmental exceptions	252



---

7.4	The chapeau of Article XX GATT	253
7.4.1	Countries where the same conditions prevail	254
7.4.2	Coercive effect	256
7.4.3	Good faith and international contingency	259
7.5	The decision tree outside of Article XX GATT	261
7.5.1	The TBT Agreement	261
7.5.2	Article III GATT	264
7.6	The dilemmas of trade leverage for environmental protection	266
7.6.1	Market power and the unfairness of PPMs	266
7.6.2	The necessity of environmental trade leverage	269
7.7	Conclusion	272
8	THE APPLICATION OF THE EXTRATERRITORIALITY DECISION TREE: CASE STUDIES OF ENVIRONMENTAL TRADE MEASURES	275
8.1	Introduction	275
8.2	US-Shrimp revisited	276
8.2.1	Measure and context	276
8.2.2	Extraterritorial effect	279
8.2.3	The decision tree applied	279
8.2.3.1	Inconsistency with substantive obligations under GATT	280
8.2.3.2	Environmental objective and location of the concern	281
8.2.3.3	Necessity and recognition of the concern	286
8.2.3.4	Chapeau	292
8.2.4	Challenges	294
8.3	Illegal, Unreported and Unregulated Fishing	296
8.3.1	Measure and Context	296
8.3.2	Extraterritorial effect	300
8.3.3	The decision tree applied	300
8.3.3.1	Inconsistency with substantive obligations under GATT	300
8.3.3.2	Environmental objective and location of the concern	303
8.3.3.3	Necessity and recognition of the concern	305
8.3.3.4	Chapeau	311
8.3.4	Challenges	312
8.4	Aviation in the European emission trading system	314
8.4.1	Measure and context	314
8.4.2	Extraterritorial effect	322
8.4.3	The decision tree applied	323
8.4.3.1	Inconsistency with substantive obligations under GATT and GATS	323
8.4.3.2	Environmental objective and location of the concern	327
8.4.3.3	Necessity and recognition of the concern	330
8.4.3.4	Chapeau	337
8.4.4	Challenges	339
8.5	Timber and forest law enforcement, governance and trade	342
8.5.1	Measure and context	342
8.5.2	Extraterritorial effect	345

---

8.5.3	The decision tree applied	346
8.5.3.1	Inconsistency with substantive obligations under GATT	346
8.5.3.2	Environmental objective and location of the concern	349
8.5.3.3	Necessity and recognition of the concern	351
8.5.3.4	Chapeau	355
8.5.4	Challenges	357
8.6	Regime generators: An ex-ante approach to the decision tree	359
8.6.1	International norm enforcement	360
8.6.1.1	International norm enforcement: country-based measure	360
8.6.1.2	International norm enforcement: process-based measure	361
8.6.2	Third-country norm enforcement	362
8.6.3	Norm furtherance	363
8.6.4	Norm creation	364
8.7	Conclusion	365
9	CONCLUDING CHAPTER: OUTLOOK AND FINAL REMARKS	367
9.1	A wide scope to address global environmental concerns through trade measures	367
9.2	An inclusive perspective rather than 'in clinical isolation': building a decision tree	369
9.3	Challenges and dilemmas	373
9.3.1	The principle of common but differentiated responsibilities and respective capabilities	373
9.3.2	The inherent uncertainty of environmental science	374
9.3.3	The catch 22 of unknown concerns	375
9.3.4	Towards a duty of market power	376
9.4	Rethinking territoriality in a globalized world	377
9.5	Final remarks	379
	SAMENVATTING (SUMMARY IN DUTCH)	381
	BIBLIOGRAPHY	389
	CASE LAW	413
	INDEX	419
	CURRICULUM VITAE	423

## 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
CBDTRC	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 Rights
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

