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

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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

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 Vidigal, '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

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

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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.