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

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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.

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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

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 evenhandedly 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,

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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?

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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.

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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.