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

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7 The proposal of a WTO extraterritoriality decision tree

7.1 Introduction

Protecting environmental concerns through npr-PPMs raises two distinct but related extraterritoriality questions. Firstly, extraterritoriality related to the location of the activity that has detrimental effects on the environment, i.e. the location of the 'production' abroad, e.g. the fishing of tuna in foreign waters: can states 'regulate' foreign production activities, by conditioning market access on whether foreign producers comply with prescribed rules? Secondly, extraterritoriality related to the location of the concern that a measure aims to protect, e.g. dolphins or migratory sea turtles, clean air or biodiversity: can states use trade measures to protect transboundary environmental concerns or concerns located outside the territory of the regulating state? The previous chapters have analysed the application of extraterritoriality in different fields of international law, such as public international law, competition law and international human rights law. Due to the lack of guidance on jurisdictional issues and extraterritoriality in the WTO agreements and in case law, and because the WTO agreements should not be interpreted in clinical isolation of public international law,[1] the lessons learned from the analysis of those other fields will now be applied to a WTO context.

Public international law is relevant to the first question. As was demonstrated in chapter 4, npr-PPMs should not be seen as extraterritorial measures *stricto sensu*. 'Extraterritorial' trade measures *affect* or *incentivize* conduct abroad, rather than *regulating* that conduct. The measure is only activated once access to the market is sought. Npr-PPMs should instead be qualified as measures with an extraterritorial effect or measures of territorial extension.[2] Enforcement of trade measures is territorial as it occurs within the territory of the imposing member, likely at the border. In contrast to the fields of law examined in the previous chapters, the extraterritorial nature of npr-PPMs does not trigger a jurisdictional question, but is assessed as a merits question under WTO law. Nonetheless, a substantive assessment of extraterritorial effects can still build upon the practice developed on the tenet of extraterritoriality elsewhere. Despite the more limited form of extraterritoriality, extraterritorial effects

1 AB Report *US-Gasoline* 1996, 17.
2 Scott (2014), 90. See also Zleptnig(2010), 308; Vranes(2009), 174.

similarly raise controversy and would need to be justified in some way. Even when not unlawful from a general international law perspective, npr-PPMs still raise questions concerning their legality and acceptability under WTO law, due to their potential impact on foreign producers and/or policy makers.

This leads to the second question: whether WTO law, and in particular the GATT, allows states to use trade measures to address environmental concerns that may be located outside the territory of the regulating state or whether it acts as a stumbling block. WTO law is concerned with the observance of the multilaterally agreed trading rules. Where an inconsistency with the substantive rules is established, WTO Members can turn to the general exceptions in order to seek justification for a measure. As has been discussed in chapter 2, there has been much debate on whether PPMs should be addressed under Article III GATT or Article XI GATT. While that choice is of importance for the determination of infringements,[3] neither provision *de lege lata* takes into account the objective of a measure, nor do they contain any reference to a jurisdictional limitation. The possible extraterritorial nature of the objective that a npr-PPM aims to protect is thus not considered at this stage. In other words, even if npr-PPMs have the objective to protect 'extraterritorial' environmental concerns, as long as a npr-PPM is not inconsistent with substantive GATT or other WTO obligations, that extraterritorial element is not relevant for the WTO analysis.

However, a npr-PPM in violation with substantive obligations can be justified under Article XX GATT, at which point the objective of the measure will be assessed. Article XX has so far been the principal battlefield for PPM regulations, and will most likely remain so. Similar to the rest of the GATT, Article XX does not contain any reference to jurisdiction. In *US-Shrimp,* in answer to the question whether the US could only act to protect a concern within its jurisdiction, the AB referred to a 'sufficient nexus' between the migratory sea turtles and the US, without defining the required nexus. In *EC-Seal Products,* the AB emphasized the systemic importance of determining the jurisdictional limitations of Article XX GATT, but did not explore the issue further due to a lack of arguments made by the parties.[4] The question thus remains whether trade measures that aim to protect an environmental concern located outside the territory of the regulating state can be accepted.

This chapter proposes an extraterritoriality decision tree within the framework of Article XX GATT, offering a systematic approach to assess the 'extraterritorial' objectives of npr-PPMs. The model finds its legal basis in the paragraphs of Article XX GATT and functions as an extraterritoriality threshold question before the measure can further be examined under the paragraphs and *chapeau* of Article XX GATT. As a first step it is suggested to consider the location of the concern and to determine to what extent that concern has an environmental impact on the regulating state. The analogous application of

3 See chapter 2.
4 AB Report *EC-Seal Products* 2014, para.5.173.

the effects doctrine in competition law serves as a useful tool to analyse that environmental impact.[5] The second step of the decision tree refers to the international recognition and support for a norm. The analysis of extraterritoriality in the context of human rights law has shown that jurisdictional boundaries can be more elastic when common norms are concerned.[6] In addition to effects, the 'international characterization' of norms[7] serves to strengthen a claim of acceptable 'extraterritorial' objectives under Article XX GATT.

After the proposal of the tree which is embedded in the paragraphs of Article XX GATT, this chapter will address the relation between the environmental exceptions of Article XX(b) and (g) and the moral exception of Article XX(a) GATT. The justification analysis will be completed by briefly discussing the *chapeau* and its relevance for npr-PPMs with extraterritorial effects. Finally, some observations will be made that go beyond the legal framework and the purpose of this thesis, but are worth noting.

7.2 Assessing the extraterritorial effect of environmental NPR-PPMs under Article XX GATT: A decision tree

7.2.1 The environmental exception grounds and necessity

7.2.1.1 Environmental concerns

As has been discussed in chapter 2, if a violation of a substantive GATT obligation has been established, justification can be sought under Article XX GATT. The analysis of the paragraphs of Article XX GATT consists of a two-tier test: firstly, the objective must be covered by one of the listed areas; and secondly, with regard to the relationship between the measure at issue and the societal value pursued, a degree of necessity – depending on the wording of the particular paragraph – must be shown.

Paragraphs (b) and (g) of Article XX GATT allow WTO Members to rely on environmental objectives to justify measures that are inconsistent with the

5 For a full analysis of competition law and the effects doctrine, see chapter 5.

6 A distinction between the human rights context (the extraterritorial application of regional and international human rights treaties) and the trade-environment context is that international human rights obligations will apply when states exercise 'effective control' over territory outside their borders. The actual territorial state is at that point unable to ensure sufficient human rights protection in its territory due to lack of control. In an environmental context, a PPM would apply to all imported goods, without distinguishing between states that are unable to ensure a sufficiently high level of environmental protection, and states that are unwilling to ensure that level of protection. For a full analysis of international human rights law, see chapter 6.

7 Scott (2014), 89.

substantive obligations of GATT. Article XX(b) refers to the protection of human, animal or plant life and health, while Article XX(g) refers to the conservation of exhaustible natural resources. Generally, the concerns at issue relate either to pollution or to resources.[8] Competitiveness concerns and economic motivations related to environmental concerns, such as measures to 'level the playing field' by insisting that foreign producers use the same production practices as domestic producers in order to offset regulatory costs differences, cannot be justified by virtue of Article XX. Mavroidis makes a distinction between the applicable rules in cases of commercial externalities, such as the competitive advantage of the exporter from a country with lax environmental policies; and the applicable rules in cases of physical and possibly (im)moral externalities, such as actual transboundary environmental harm, e.g. acid rain. He argues that the GATT/WTO is an agreement regulating commercial relations between WTO Members, and hence the Members should be assumed to have accepted the resulting commercial externalities from domestic environmental policies, to the extent that they do not violate the non-discrimination provisions.[9] Commercial externalities due to environmental policy differences cannot be accepted as a possible justification ground for PPMs with an extraterritorial effect. Lax environmental policies could, however, also lead to environmental harm, either within the territory of the importing state or transboundary harm or lead to damage to the global commons. These physical environmental externalities are likely to fall within the scope of paragraphs (b) and (g) of Article XX and the economic concerns can very well be intertwined with the environmental concerns. The primary motivation must be environmental, though.[10]

The question at issue is whether there is an implied jurisdictional limitation to Article XX: are paragraphs (b) and (g) limited to concerns within the territory or jurisdiction of the imposing member, or can members also rely on the exceptions to address environmental concerns outside their territory? Under Article 31(1) VCLT, a treaty is to be interpreted in good faith, starting with an examination of the ordinary meaning of the words, read in their context, and in the light of the object and purpose of the treaty involved. When the tools offered by Article 31 VCLT do not resolve a problem of interpretation, Article 32 VCLT allows for supplementary means of interpretation, including the *travaux préparatoires*.[11] Neither paragraph (b) nor (g) of Article XX GATT contain a reference to territory or jurisdiction. Looking beyond the wording, Article

8 OECD (1997), 27.
9 Petros C. Mavroidis, 'Reaching Out For Green Policies: National Environmental Policies in the WTO Legal Order' 2014, RSCAS 2014/21 EUI Working Papers, 9.
10 Howse and Regan (2000), 280.
11 While not all WTO Members are parties to the VCLT, the AB has recognized the VCLT's rules on treaty interpretation (Article 31 and 32) as customary international law and its relevance for the interpretation of the WTO Agreements, thereby making them binding on all States. See AB *Japan-Alcoholic Beverages II* 1996, p.10.

XX serves to balance WTO Members' rights to regulatory space and to invoke exceptions with other Members' rights to free trade.[12] WTO Members' trade relations should allow for 'the optimal use of the world's resources in accordance with the objective of sustainable development, seeking both to protect and preserve the environment'.[13] There are no subsequent agreements between the parties on the jurisdictional scope of Article XX, nor do the *travaux* reveal the intent of the parties with respect to the appropriate limitation of Article XX.[14]

Given this lack of direction on a territorial or jurisdictional scope, there is no ground to assume that Members can only protect concerns that are strictly within their territory. Especially in light of the non-territorial nature of environmental challenges, a broader interpretation of the listed environmental objectives, including concerns located outside the territory of the regulating state, seems appropriate. The increasing awareness of the global threats of environmental concerns such as climate change justifies a broad interpretation of Article XX, considering the AB's finding that the WTO agreements should be interpreted in light of contemporary concerns.[15]

Nonetheless, acceptance of environmental objectives without any jurisdictional limitation would also distort the appropriate balance between regulatory space and free trade. In *US-Shrimp*, the AB relied on a 'sufficient nexus' between the concern (sea turtles) and the regulating state (the US), implicitly requiring a territorial link by referring to the turtles swimming through US waters. The AB failed to give further guidance on the requirements of a nexus. In order to approach more systematically the assessment of concerns, the proposed extraterritoriality decision model relies on environmental effects within the territory of the regulating state and distinguishes as a first step between internal or inward-; external or outward-; and inward/outward-looking measures, based on the location of the concern.[16] This distinction will be elaborated on below when discussing the first step of the decision tree.

7.2.1.2 Necessity

The necessity test involves a process of weighing and balancing a series of factors, which results in an ad-hoc, contextual assessment of each measure,

12 AB Report *US-Shrimp* 1998, para.128.

13 Marrakesh Agreement, 1994, preamble.

14 The GATT was drafted by governments at the UN Conference on Trade and Development between 1946-1948. The Conference negotiated a Charter for the International Trade Organization, and the GATT was viewed as an interim agreement pending the implementation of the ITO Charter. The preparatory work of the ITO Charter is thus considered the preparatory work of the GATT. No references are made to a territorial limitation. See also Charnovitz (1998), 700.

15 AB Report *US-Shrimp* 1998, paras.129.

16 Charnovitz introduced this distinction in Charnovitz (1998), 695.

such as the contribution of the measure to the end pursued, the restrictive effect of the measure, and whether a WTO-consistent alternative measure is reasonably available.[17] The necessity standard takes different forms in the different paragraphs of Article XX GATT. Article XX(b) demands that measures are *necessary* to protect the environment, whereas Article XX(g) does not refer to *necessary* but instead requires a measure to be *related to* the protection of an exhaustible resource. Being *related to* is a more lenient standard than *necessity*, where only a reasonably available least-restrictive measure will pass the test, and not merely a measure that indeed relates to the stated objective.

In *Korea-Various Measures on Beef* the AB found that with regard to 'necessary' in Article XX(d), one should

> 'take into account the relative importance of the common interests or values that the law or regulation to be enforced is intended to protect. The more vital or important those common interests or values are, the easier it would be to accept as 'necessary' a measure designed as an enforcement instrument.'[18]

In this light, the seriousness of the concern could be considered: measures taken in light of fairly grave and imminent environmental danger may be more necessary than measures taken in the light of less imminent, less serious types of environmental threats.[19] Necessity furthermore requires taking into account the level of contribution of the measure to the realization of the end pursued.[20] In *Brazil-Tyres,* the AB noted that the fact that the contribution of a law to the protection of an environmental concern is not immediately obvious, because it is part of a broader programme of which the impact can only be evaluated over time, should not prevent a finding of necessity.[21] The 'extent to which the compliance measure produces restrictive effects on international commerce' is another element that can determine the required level of necessity. The broader the impact, the higher the necessity threshold will be[22] so it must be examined whether less-trade restrictive measures could secure the same objective and level of protection.[23]

Article XX(g) does not refer to 'necessary' but requires that measures are 'related to' the conservation of exhaustible natural resources. In *US-Gasoline*, the AB noted that 'related to' does not mean that a measure must be 'primarily

17 See AB Report *Korea-Various Measures on Beef* 2000, para.161-164; AB Report *EC-Asbestos* 2001, para.170-172; AB Report *Brazil – Retreaded Tyres* 2007, para.141-144.
18 AB Report *Korea-Various Measures on Beef* 2000, para.162.
19 Richard B. Bilder, 'The Role of Unilateral State Action in Preventing International Environmental Injury' 1981, 14 Vanderbilt Journal of Transnational Law 51, 61.
20 AB Report *Korea-Various Measures on Beef* 2000, para.163.
21 AB Report *Brazil – Retreaded Tyres* 2007, para.151.
22 AB Report *Korea-Various Measures on Beef* 2000, para.163.
23 AB Report *Brazil – Retreaded Tyres* 2007, para.178.

aimed at'.[24] Rather the AB examined whether 'the means are, in principle, reasonably related to the ends'.[25] In *US-Shrimp*, the AB examined 'the relationship between the general structure and design of the measure here at stake, and the policy goal it purports to serve'.[26] The AB furthermore emphasized the wide support for the concern at issue when discussing whether the measure at stake was related to the legitimate policy concern.[27]

In view of a possible jurisdictional limitation of Article XX and the required balance between the WTO Members' rights, the necessity test allows to further qualify which concerns could be reasonably accepted. The more common and important the interest, the more easily a measure will be deemed necessary. Whereas it is important how to take into account how the regulating state values the concern at issue, an analysis should equally consider how a concern is of importance to the broader WTO membership, especially where the environmental concern is (partly) located outside the jurisdiction of the regulating state.[28] The threatened harm must be important enough to justify a violation of the substantive obligations of GATT.[29] Determining the degree of necessity then forms the basis for the second step of the extraterritoriality decision model, to be further elaborated below: assessing the international recognition and support for a norm. According to the AB, a treaty should be interpreted in light of contemporary concerns, which can be evidenced by international instruments of environmental law.[30] Taking into consideration international environmental law in order to assess necessity is also supported by the AB's finding that the WTO agreements are not to be read 'in clinical isolation' from public international law.[31] The more international support for an environ-

24 AB Report *US-Gasoline* 1996, 17.
25 Ibid 20.
26 AB Report *US-Shrimp* 1998, paras.156.
27 Ibid para.135.
28 The AB's statement in *US-Shrimp* can be read in this light: 'It is well to bear in mind that the policy of protecting and conserving the endangered sea turtles here involved is shared by all participants and third participants in this appeal, indeed, by the vast majority of the nations of the world.' (AB Report *US-Shrimp* 1998, para.135).
29 Robert E. Hudec, 'GATT Legal Restraints on the Use of Trade Measures Against Foreign Environmental Practices' in Jagdish Bhagwati and Robert E. Hudec (eds), *Fair Trade and Harmonization: Prerequisites for Free Trade?*, vol 2 (The MIT Press 1996) 127. However, international recognition of a norm and the importance of a norm does not necessarily equal the seriousness of possible environmental harm. I do not propose to include graduations of seriousness in the determination of an acceptable extraterritorial effect, as was suggested by Esty: major harm *v* narrower harm; rapid harm *v* less *v* least rapid harm; certain harm *v* less certain harm; irreversible harm *v* reversible harm. (*See* Esty(1994), 283.) It is likely that more serious harm will be a stronger incentive for states to cooperate internationally and seek agreement, however, lacking both textual support as well as support in practice of international law, the seriousness of harm is not an explicit factor to be taken into account in addition to the proposed elements of location and nature of the concern.
30 AB Report *US-Shrimp* 1998, paras.129ff.
31 AB Report *US-Gasoline* 1996, p.17.

mental concern, the easier a measure will be considered 'necessary' to that policy objective.[32] Where less international support exists for an objective or method to reach that objective, the threshold for proving there are no less trade restrictive alternatives (with less extraterritorial effects) will become higher. Equally, if a PPM is enforcing a treaty obligation, then that measure will most likely be considered appropriate and not more trade-restrictive than necessary. Broader acceptance of a norm also reduces potential trade barriers for producers: having to comply with a multilaterally supported norm or standard is less of a burden than having to comply with an infinite number of different norms or standards.

The structure and design of the measure will determine whether a npr-PPM based upon a unilateral concern is considered to be too trade restrictive: for instance, a full ban will be more difficult to justify than other less trade restrictive measures such as a tax or a label. The second step of the decision tree as outlined below will be of help to the weighing and balancing process of necessity.

7.2.2 Step 1 of the decision tree: Location of the concern

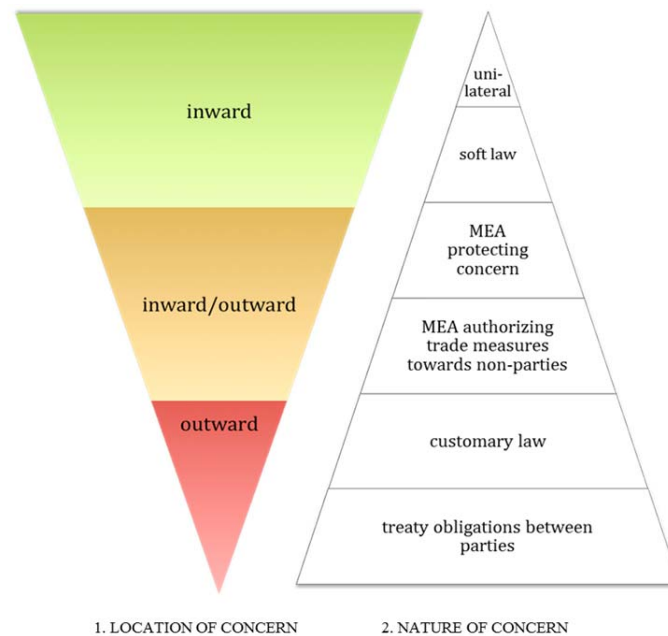

Figure 1. Step 1

32 AB Report *US-Shrimp* 1998, para.135.

The first step of the proposed extraterritoriality analysis refers to the location of the concern.[33] Are the measures aiming at protecting a domestic concern, a non-domestic concern or both, when regulating an extraterritorial activity?[34] Environmental PPMs can be imposed to protect an internal or *inward-looking* concern (e.g. the chemical composition of gasoline can influence pollution levels within the regulating country), or to protect an external or *outward-looking* concern (e.g. pollution of a lake in a foreign country), or both (e.g. climate change, air pollution, the global effects of a preserved rainforest, or sea turtles swimming within and outside territorial waters).[35] In other words, can the foreign production activities lead to environmental harm within or outside the territory of the regulating state? Is there a (physical) link still with the territory (protection of migratory turtles, protection of air) or not at all (protection of a threatened species or polluted lake elsewhere)? Often environmental concerns abroad might be linked to domestic moral concerns (e.g. consumers in country A are morally concerned about the pollution of a lake in country B, which could affect the local supply of drinking water) which could lead to the invocation of the public moral justification under Article XX(a) GATT.[36] The relation between the environmental exceptions and the public morals exception will be discussed in more detail below.[37]

Neither the AB nor any panel have made an explicit distinction between measures with an inward- or outward-looking purpose, but it is submitted that this would allow for a better assessment of the acceptability of npr-PPMs that target foreign production processes. Purely inward-looking measures will have a much stronger territorial connection with the regulating state than

33 The location of the production activity itself is not the determinant factor, as it is a common aspect of any trade measure to have an effect on activities abroad. There is furthermore no discussion that the production of imported products is taking place outside the importing country. Looking at the location of the concern allows to seek a connection with the regulating country of import that will allow that country to indeed exercise jurisdiction in this way. The distinction between inward- and outward-looking concerns is inspired by Charnovitz' distinction in Charnovitz (1998). Robert Hudec refers to the term 'externally-directed' in Hudec(1996).

34 See chapter 3.

35 Inspired by the distinction of inward- and outward-looking introduced by Charnovitz (1998). Robert Hudec refers to the term "externally-directed" in Hudec(1996), 116. Where a measure has separate inward and outward-looking objectives, arguably the domestic concern suffices to accept the full measure, including the extraterritorial aspect of it. For instance, in the *Tuna II* case on labeling of tuna, the domestic concern was related to consumer information, whereas the well-being of dolphins in foreign waters were the outward-looking concern. In *Seals* because of the public morals of EU citizens (inward) neither the Panel nor the AB paid much attention to the fact that many of the seals that the EU Regulation sought to protect did not live within the territory of the EU. Thus, even though there is still an outward-looking element, a separate inward-looking element can suffice to preliminarily accept the partly extraterritorial measure and continue with the analysis of Article XX.

36 See AB Report *EC-Seal Products* 2014.

37 See infra at 7.3. Environmental Concerns and Public Morals.

purely outward-looking measures: looking beyond WTO law, there is little doubt that states can take action to address environmental harm within their territory.[38] However, a territorial connection could still be demonstrated in case of partly outward-looking measures if the environment of the regulating state is substantially affected. Without environmental effects on the territory, it is submitted that fully outward-looking concerns will not pass the extraterritoriality threshold and cannot be justified under Artice XX GATT.

7.2.2.1 *Inward*

Inward-looking measures are measures that aim at protecting legitimate concerns within the domestic territory of the importing Member by regulating production activities abroad that have either an impact on the physical characteristics of the imported end product (product-related PPMs) such as a ban on products containing asbestos, a ban on hormones-injected beef or prescriptions for the chemical composition of gasoline;[39] or where the production activities have direct environmental effects on the territory, such as industry in a neighbouring country polluting a transboundary river.[40] In the disputes with inward-looking concerns that have been brought before a panel or the AB, no party has made a claim regarding jurisdiction, nor has the issue been addressed *ex officio* by a panel or the AB.[41] It follows that states can impose PPMs when the production activity that is being regulated can or will lead to environmental harm within the territory of the importing state. This position finds support under the jurisdictional principles of international law as well, as harm within the territory allows the state in question to exercise prescriptive

38 See Albert Lin, 'The Unifying Role of Harm in Environmental Law' 2006, Wisconsin Law Review; Horn and Mavroidis (2008), 1133; Jansen (2000), 312. See also International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts, 2001. Environmental damage can lead to state responsibility. During the drafting of the ARSIWA, there was some discussion to include massive environmental pollution among the provisions that would call for universal jurisdiction as violations of *jus cogens*. Such reference was nevertheless not included in the final draft.

39 AB Report *EC-Asbestos* 2001; WTO, *European Communities – Measures Concerning Meat and Meat Products (Hormones)* AB Report 1998, WT/DS26/AB/R; AB Report *US-Gasoline* 1996. In *US-Gasoline* the US Clean Air Act was adopted to improve air quality in the most polluted areas of the country by controlling toxic and other pollution caused by the combustion of gasoline manufactured in or imported into the US. See also AB Report *Brazil – Retreaded Tyres* 2007. Brazil imposed an import embargo on retreated tyres. They have a shorter lifespan than new tyres, and more import would lead to a faster accumulation of waste tyres, thereby providing breeding grounds for mosquito-borne diseases and causing difficult-to-control fires. Disposing of waste tyres furthermore had negative environmental consequences within Brazil's territory.

40 See chapter 3.

41 AB Report *Brazil – Retreaded Tyres* 2007; AB Report *EC-Asbestos* 2001; AB Report *EC-Hormones* 1998; AB Report *US-Gasoline* 1996. For a discussion of the cases, see chapter 3.

jurisdiction over the matter.[42] Jurisprudence has emphasized that states are free and sovereign to determine their own level of environmental protection within their territory.[43]

7.2.2.2 Inward/outward and effects

Most environmental npr-PPMs have both an inward- and outward-directed purpose. The objective they are aiming to protect is of a transboundary nature, such as air pollution, protection of biodiversity or animal species, like the migratory sea turtles in *US-Shrimp*. Transboundary concerns can even take the form of global concerns, where every state is affected by it, such as climate change. The classification of inward- and outward-looking concerns only refers to 'physical' environmental concerns, rather than moral concerns. A measure can address an outward-looking physical environmental concern, combined with an inward-looking moral concern, for instance, concerns by consumers in country A about a polluted lake in country B that local villagers depend on for drinking water, or moral concerns by European consumers about the threatened extinction of pandas. Environmental concerns should first be addressed under the environmental exceptions, before turning to Article XX(a), if environmental protection is the main objective. This relation between the environmental exceptions and moral exception will be further discussed in more detail in section 2.3 of this chapter.[44]

With regard to physical environmental inward-and-outward-looking concerns, the question is how the ratio of inward and outward effects can be determined. In *US-Shrimp*, the AB required a 'sufficient nexus' between the regulating country and the concern to be protected, without clarifying what that nexus could consist of: it sufficed for *some of the turtles* to traverse US waters *some of the time*.[45] A territorial connection was implied by the AB, but

42 Lin (2006). States should furthermore avoid through their actions or emissions the causation of environmental harm in other states. See e.g. *Institut de droit International* (IDI) in its 1987 Resolution on Transboundary Air Pollution (62 AIDI (1987-II), Article 2); Schoenbaum (1997), 300. The legal elements of this duty are unclear, however, and there is no real forum to adjudicate these questions. If environmental pollution is caused, states and/or private actors can incur *ex-post* environmental liability. From a legal procedural point of view, it could be argued that if there is transboundary pollution of a certain activity, this should be addressed through domestic public or private enforcement channels, rather than through trade measures. From a policy point of view on the other hand, it definitely makes sense to use trade measures as a tool to prevent or to limit further environmental damage by targeting the polluting or environmental-unfriendly activities themselves *ex-ante* (after negative effects have been noted within the territory of the importing state, or by relying on the precautionary principle for yet uncertain effects.

43 AB Report *EC-Asbestos* 2001, para.168; AB Report *EC-Hormones* 1998, para.77. See also John H. Knox, 'The Judicial Resolution of Conflicts Between Trade and the Environment' 2004, 28 Harvard Environmental Law Review 1, 54.

44 See infra at 7.3 on environmental concerns and public morals.

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

the question is how such connection must be established in light of the nature of environmental concerns where there is no immediate tangible territorial nexus, or where that nexus seems rather random, as with migratory sea turtles. In particular, global concerns such as air pollution, climate change or biodiversity disruption challenge the traditional understanding of a territorial connection: a clear causal link cannot easily be established, harm is likely to be caused by multiple actors, the harm is not immediately observable and can have different cross-border impacts. It is clear, though, that these environmental concerns can have widespread effects. For example, unsafe use of chemicals in an industrial plant in country A may cause groundwater pollution, leading to river pollution in country B, which could lead to toxic fish in country C.

In this context, the effects doctrine as relied on to justify the extraterritorial application of competition law can be of help.[46] For lack of relevant international competition law rules, national competition law is being applied extraterritorially by a growing number of states, addressing foreign anti-competitive behaviour that affects domestic economic interests.[47] The marketplace no longer has a territorial base and a global economy increases the level of international economic transactions, transnational firms operate in different countries. This line of reasoning can be transposed to environmental challenges and npr-PPMs.[48] Whereas competition law focuses on the effects that anti-competitive behaviour can have on the domestic market, environmental npr-PPMs focus on the effects that production processes can have on the (domestic) environment. Thus, do production activities abroad contribute to environmental harm internally? The open question is: when can the required nexus or these environmental effects be considered sufficient?

46 See chapter 5 on the effects doctrine and competition law.

47 The EU and the US are best known for their extraterritorial application of competition law. See e.g. EU: General Court *Gencor* 1999; Court of Justice of the European Union *Wood Pulp I* 1998; Court of Justice of the European Union *Dyestuffs* 1972.; US: Sherman Act (1890) 15 U.S.C. §§ 1-7; US v Aluminium Co of America, 148 F.2d 416 (2d Cir. 1945) ('Alcoa'); Hartford Fire Insurance v California, 509 US 764, 796 (1993). Apart from these examples other countries such as Japan, Brazil, Israel, China and India have adopted the effects doctrine in the context of competition law. The effects doctrine was also approved by the International Law Association as a principle of international law at its 55th Conference in 1972 where the effect is a constituent element of the act. L'Institut de Droit International stated during its session in 1977 that the effects doctrine could be applied extraterritorially to anti-competitive behaviour of multinationals where effects where intentional or foreseeable, substantial, direct and immediate.

48 Horn and Mavroidis (2008), 1133. See also Van Calster(2000), 214. See also in this regard a report by the OECD countries, agreeing in 1995 already that they should not use trade measures to pressure other countries to change their policies and practices with respect to environmental problems whose effects are limited to the jurisdiction of those countries (OECD, *Report on Trade and Environment to the OECD Council at Ministerial level* (1995) 6.)

The competition law effects doctrine requires effects to be direct, substantial and foreseeable.[49] It is not always clear what the thresholds for these criteria are, as they are not defined anywhere and often are assessed together without making a clear distinction between, for instance, what is 'direct' and what is 'substantial'.[50] Direct and substantial effects will likely be considered together in some environmental contexts as well, as it can be challenging to distinguish between direct and indirect effects, especially with regard to pollution concerns, threats to biodiversity or climate change.[51] Weiss suggested a 'proximity of interest to the subject matter being protected', whereby the greater the impact of the problem on the state applying the measure, the greater the proximity of interest.[52] While substantial effects might be easier to assess than the directness of environmental effects, a threshold would still need to be determined. Antitrust law often makes use of economic *de minimis* thresholds before domestic law will be applied to foreign anticompetitive conduct,[53] but establishing similar environmental *de minimis* thresholds is difficult, as it is almost impossible to estimate the effect of e.g. one ton of CO_2 emissions by a certain activity in a certain location on EU air quality. A requirement of substantial effects raises furthermore challenging questions related to the choice of scientific standards and measurement methods. By whom and how will such threshold be determined? Is a substantial effect an *appreciable* effect? Can *potential* effects be sufficient?[54] What about effects that are not yet observable, but likely to manifest themselves in the future? In *Brazil-Tyres*, the AB stated in the context of the necessity test that, even where the contribution of a law to protecting an environmental concern such as climate change is not immediately obvious because it is part of a broader programme of which the impact can only be evaluated over time, it should not prevent a finding that measure is necessary.[55] It is inherent to environmental harm that the effects will only materialize over time, and a requirement of observable effects in order to determine necessity would indeed be untenable.

49 See 1986. See §402 on general principles for extraterritorial jurisdiction and §415 on antitrust law.

50 See chapter 5.

51 Note in this regard that environmental harm with a direct causal link can also be addressed through different means, such as national law procedures or through state responsibility.

52 Friedl Weiss, 'Extra-Territoriality in the Context of WTO Law' in Günther Handl, Joachim Zekoll and Peer Zumbansen (eds), *Beyond Territoriality: Transnational Legal Authority in an Age of Globalization* (Martinus Nijhoff 2012) 479.

53 See for Instance Commission *De Minimis* Notice (Notice on Agreements of Minor Importance), 25 June 2014.

54 In *Alcoa* (US v Aluminium Co of America, 148 F.2d 416 (2d Cir. 1945) ('Alcoa')) the potential effects were sufficient, as long as the absence of actual effect was not shown. The US Department of Justice/Federal Trade Commission Guidelines also considers that potential harm can qualify as substantial effects in an antitrust context (Antitrust Enforcement Guidelines for International Operations, April 1995, Section 3.121).

55 AB Report *Brazil – Retreaded Tyres* 2007, para.151.

Future harm and long-term effects pose a challenge to the requirement of the foreseeability of effects. Environmental risks can be very difficult to predict and can often not be specified by a few precisely determined variables, but may instead be driven by the interaction of changes taking place at very different temporal and/or spatial scales.[56] Slow changes that have been taking place over decades or centuries can accumulate with human influences and lead to abrupt changes for instance. Also ecological threats are influenced by natural and human factors, so any prediction requires a thorough understanding of the behaviour of a system including these factors.[57] Determining the existence of environmental effects will thus very much depend on the scientific knowledge and available data with regard to a particular concern. It may very well be the case that certain risks are still uncertain. Would it be possible in these cases to adopt a precautionary approach in light of uncertainty?

The precautionary approach refers to action that can be taken with respect to threats of serious or irreversible environmental damage, where there is no full scientific certainty.[58] GATT does not make any explicit reference to precaution. A limited recognition of the precautionary principle can be found in Article 5.7 of the SPS Agreement, where Members may act on the basis of available information and where they need to seek additional information for a more objective assessment of risk within a reasonable period of time. The AB in *EC-Hormones* and the panel in *EC-Biotech* referred to the unclear status of the precautionary principle in international law (and the different positions taken in literature) and left the question whether the principle had crystallized to become a general principle of law unsettled.[59] In addition to Article 5.7 SPS, the AB found the precautionary principle reflected in Article 3.3 SPS that explicitly recognizes the right of Members to establish their own level of protection, which may be more stringent than that required by existing international standards.[60] Furthermore, Members may also 'rely, in good faith, on scientific sources which, at that time, may represent a divergent, but qualified and respected, opinion' and are thus not obliged to follow the majority scientific opinion.[61] Based on international state practice, one could argue

56 Rosie Cooney and Andrew T.F. Lang, 'Taking Uncertainty Seriously: Adaptive Governance and International Trade' 2007, 18 European Journal of International Law 523.

57 Ibid 529. Adaptive management sets out an approach to manage ecological resources, recognizing and responding to the uncertainty, systemic unpredictability and complexity characteristics of large-scale ecosystems. Key characteristics are a focus on facilitating continuous learning (both in terms of acquiring information and developing new skills, and by redefining a particular problem and reconstructing policy views); policy interventions that can be provisional and reversible; strong monitoring mechanisms, the outcomes of which are fed back into the policy-making process; and open and transparent sharing of knowledge (see p.531-539).

58 Rio Declaration on Environment and Development, 31ILM 874, Principle 15 (June 14, 1992).

59 AB Report *EC-Hormones* 1998, paras.123; Panel report *EC-Biotech* 2006, paras.7.87.

60 AB Report *EC-Hormones* 1998, paras.123.

61 Ibid para.178.

that the precautionary principle has become a principle of environmental law.[62] In light thereof, it could be taken into account for the interpretation of relevant WTO provisions, such as Article XX GATT, even without explicit reference, pursuant to article 31(3)(c) of the Vienna Convention.[63]

In cases of inward-looking concerns, there should be little doubt that states may indeed rely upon the precautionary principle as only a state itself can consider its appropriate level of protection.[64] However, when a concern is partly outward-looking, a stricter balance must be struck between the domestic interests and the sovereignty of other states affected. As the territorial link (effects) becomes weaker, the interests of the exporting states will carry more weight.[65] Both general international law and competition law prescribe a reasonableness or comity test to avoid conflict between the interests of two or more sovereign states in the exercise of extraterritorial jurisdiction.[66] Are the effects felt in one state more direct than those felt in other states and are the effects felt in one state more substantial than those felt in other states?[67] The legitimate environmental concerns of the importing state and legitimate concerns of the exporting state must be considered. For instance, biofuels policy could clash with foreign interests, such as, food security or land grabbing.[68] Environmental concerns arising abroad may have an impact on indigenous peoples and other groups such as artisanal and subsistence fishers, forest

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62 Principle 15 of the Rio Declaration (1992) provides that 'in order to protect the environment, the precautionary principle shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.' See also among others Tim O'Riordan, James Cameron and Andrew Jordan (eds), *Reinterpreting The Precautionary Principle* (Cameron May 2001); Ilona Cheyne, 'The Use of the Precautionary Principle in WTO Law and EC Law' (European Union Studies Association Biennial Conference 2005); Mary Stevens, 'The Precautionary Principle in the International Arena' 2002, 2 Sustainable Development Law & Policy 13; Alan O. Sykes, 'Domestic Regulation, Sovereignty and Scientific Evidence Requirements: A Pessimistic View' 2002, 3 Chicago Journal of International Law 353.

63 Marceau and Trachtman (2002), 849.

64 AB Report *EC-Hormones* 1998, para.186.

65 See by analogy a reasonableness or comity test as applied in international law and competition law to avoid conflict between the interests of two or more sovereign states in the exercise of extraterritorial jurisdiction. This requires a careful balancing act, whereby the interests of other countries need to be taken into account as much as possible.

66 See chapter 4 for a discussion of comity and reasonableness and chapter 5 for a discussion of comity in the context of competition law.

67 Akehurst (1972-1973), 198.

68 Paolo Farah, ASIL/IEcLIG Conference paper, November 2014. See in that regard also the pending dispute between the EU and Argentina on bidodiesel (*European Union – Anti-Dumping Measures on Biodiesel from Argentina*, WT/DS473. The panel has been established in June 2014, but no report has yet been published at time of writing (March 2016)).

dwellers or Inuit seal hunters.[69] This requires a careful balancing act, whereby the interests of other countries need to be taken into account as much as possible. Determining which interest is 'more important' is a challenging exercise that must balance possible trade-offs. Also, when there is scientific uncertainty with regard to an environmental concern, measures that adopt a precautionary approach so as to address that specific concern will be subject to greater scrutiny than with respect to those concerns where the threat or harm can be fully evidenced. In these balancing acts, the body of international environmental law can be taken into account to determine the international support for a particular concern. In contrast to competition law, with no relevant international body rules to rely on, there is a wide body of (mostly soft) international environmental instruments that can be considered in order to support state action.[70] In addition to international support, another important consideration in this balancing of state interests is good faith, as implied in the *chapeau* of Article XX GATT: efforts such as dialogue with third countries or technical assistance in combination to the trade measure can go a long way in preventing or limiting these types of conflicts.

Concerns on conflicts of interests are particularly relevant where the global resources are concerned. With regard to protection of global resources, the strength of the territorial link or effects cannot apply as such: by its very nature, every state has an equal interest in protecting the global commons.[71] We all share our planet, and peoples and states have responsibilities to each

69 Margaret A. Young, 'Trade Measures to Address Environmental Concerns in Faraway Places: Jurisdictional Issues' 2014, 23 Review of European Community & International Environmental Law 302, 303. See for instance *EC-Seal Products*, where the protection of indigenous people had to be balanced with the welfare of seals.

70 This international body of law serves as the second step of the decision tree, to be discussed below in section 7.2.3, to furher justify a territoriality claim.

71 See in that regard the doctrine of obligations *erga omnes*, as recognized by the ICJ in the Barcelona Traction case. However, under the current status quo of environmental law, no such obligations have been clearly identified. State practice to date only supports the development of *erga omnes* obligations in the context of human rights and humanitarian norms. Christian Tams, *Enforcing Obligations Erga Omnes in International Law* (Cambridge University Press 2005). Nevertheless, the fundamental importance of protecting the environment was emphasized in the preamble of the Institut de Droit International, 2005 Krakow Resolution on Obligations and Rights *Erga Omnes* in International law, stating that 'a wide consensus exists to the effect that (…) obligations relating to the environment of common spaces are examples of obligations reflecting those fundamental values'. If environmental protection of the global commons were to get the status of an obligation *erga omnes*, acts of states breaching that obligation could then lead to state responsibility and the right of injured states to take countermeasures. Where obligations *erga omnes* are concerned, also non-injured states can invoke state responsibility. See Draft Articles on Responsibility of States for Internationally Wrongful Acts, Articles 48 and 54.

other and to future generations for preserving its environment.[72] The fact that some states experience less physical harm today than others (or vice-versa) should not be the sole ground to determine which state has an 'overriding interest'.[73] For example, even those states that are not yet suffering from e.g. extreme droughts, may still want to address climate change concerns. It is therefore suggested that in addition to environmental effects, the international characterization of a substantive norm is considered in an extraterritoriality analysis under Article XX: when the environment of numerous states is affected, international support for the norm that is imposed through a npr-PPM can strengthen a claim of justified extraterritorial effects. This additional criterion will be discussed below at 2.3 as the second step of the decision tree. International support for a substantive norm as imposed by a npr-PPM is also of importance to further justify the extraterritorial effects of a npr-PPM where the effects on the territory are weaker, more indirect or uncertain. In addition to a precautionary approach that states can adopt, a partly outward-looking concern will more easily pass the extraterritoriality threshold when it is protecting a norm that is recognized and/or protected by international legal instruments (hard law or soft law).[74]

7.2.2.3 *Outward*

A third category of measures relates to environmental concerns which are located entirely within the territory of a foreign state, such as a polluted lake in a foreign country, a foreign plant species or foreign animal threatened with extinction.[75] The distinction between foreign harm and transboundary harm depends on the determination of directness of harm: environmental concerns such as polluted or dried out lakes could indirectly lead to other transboundary harm, however, those effects can no longer be considered 'direct' and 'substantial'. Where the environmental effects caused by an activity are too indirect, or too insignificant, a npr-PPM regulating that activity should be considered outward-looking.

72 See also preamble of the WTO Agreement and its reference to sustainable development: '*Recognizing* that their relations in the field of trade and economic endeavour should be conducted with a view to raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, and expanding the production of and trade in goods and services, while allowing for the optimal use of the world's resources in accordance with the objective of sustainable development, seeking both to protect and preserve the environment and to enhance the means for doing so in a manner consistent with their respective needs and concerns at different levels of economic development'.

73 See in this regard also the possible existence of environmental customary norms as discussed infra at 7.2.3.2.

74 See section 7.2.3.

75 Horn and Mavroidis (2008), 1166.

Trade barriers solely based on outward-looking concerns, without any territorial link, nexus or effects, cannot be accepted under Article XX GATT, as there is no support for such practice under international law. It is then up to the affected states or the international community as a whole to act. It would be possible to adopt less-trade restrictive measures, such as labelling requirements that provide information on the production process (market incentives rather than market bans) that could be accepted under the TBT Agreement.[76] Alternatively, a Member may seek justification under the moral exception of Article XX(a).[77] In the absence of moral concerns or environmental effects on the territory, it is very unlikely that a PPM addressing a fully demarcated foreign environmental harm with no or only an indirect environmental impact on the regulating state would be accepted under Article XX GATT.

7.2.3 Step 2 of the decision tree: Nature of the Concern and Norm Recognition

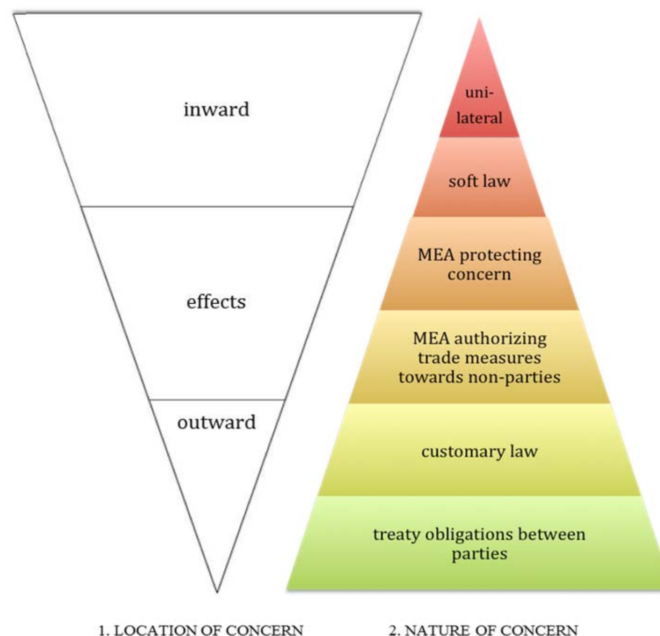

Figure 2. Step 2

76 The second sentence of Annex 1.1 TBT, referring to among others labelling requirements, only refers to PPMs in general, without distinguishing between related and non-related PPMs. It can thus be accepted that it is then irrelevant to what extent the production process impacts on the final product in order to fall within the scope of the TBT Agreement. See e.g. AB Report *US-Tuna II* 2012. See also Marceau (2014), 327.

77 See infra at 7.3 on environmental concerns and public morals.

The analysis above has shown that npr-PPMs can be more easily accepted when they are inward-looking; or have a connection or nexus through effects and thus inward/outward-looking. The weaker this territorial connection, however, the more additional support a state will need in order to justify imposing npr-PPMs. In those cases, the level of international recognition and support of a particular norm or concern to be protected is important to determine whether the 'end can justify the means'.[78] As argued above, the necessity test of the paragraphs of Article XX can be interpreted to give added value to international support. Furthermore, the analysis of extraterritoriality in the context of international human rights law has shown that jurisdictional boundaries can be more elastic when common norms are concerned.[79] If this observation is applied to a trade and environment context, it seems that the more a certain environmental norm is recognized and supported internationally, the more acceptable a npr-PPM protecting that norm through regulating an activity outside its borders will be;[80] and the likelihood of the PPM having a protectionist objective will decrease. Scott has referred in this regard to the 'international characterization' of norms.[81] The importance of international support is also recognized in Principle 12 of the Rio Declaration on Environment and Development, stating that 'environmental measures addressing transboundary and global environmental problems should, as far as possible, be based on international consensus'. The identical phrase is found in paragraph 2.22(i) of Agenda 21.

A requirement of international support is not explicitly included in the text of either Article XX(b) or article XX(g). In *US-Shrimp*, the AB emphasized the wide support for the concern at issue when discussing whether the measure at stake was related to the legitimate policy concern.[82] In combination with

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78 According to the AB, Article 3.2 DSU supports that WTO law must be understood within the context of the broader body of international law, including multilateral environmental agreements. AB Report *US-Gasoline* 1996, p.30.

79 See chapter 6. A distinction between the human rights context and the trade-environment is that international human rights obligations will apply when states exercise 'effective control' over territory outside their borders. The actual territorial state is at that point unable to ensure sufficient human rights protection in its territory due to lack of control. In an environmental context, a PPM would apply to all imported goods, without distinguishing between states that are unable to ensure a sufficiently high level of environmental protection, and states that are unwilling to ensure that level of protection.

80 Under international human rights law, the obligations at issue are laid down in regional and universal human rights treaties, which leads to strong international recognition of these norms by a high number of states (almost universal membership of the UN treaties). As a large number of states have expressed support for the same norms, extraterritorial jurisdiction is definitely easier to accept and the risk of conflicting regulation is dramatically diminished. The main difference in this regard between human rights law and current environmental law is that the former consists mainly of binding treaties and declarations, whereas the latter includes many non-binding declarations and other soft law instruments.

81 Scott (2014), 89.

82 AB Report *US-Shrimp* 1998, para.135.

the previous step of the decision tree, assessing the location of the concern, a compelling and widely supported international norm could give additional support to npr-PPMs addressing inward/outward-looking concerns, even when the effects would be weaker. Vice vera, the less 'back-up' for the norm, the stronger the evidence of effects must be in order to pass the extraterritoriality threshold.

Assessing international support for a norm goes beyond the distinction between multilateral versus unilateral action, as reality is more complex. Treaties can for instance mandate the use of PPMs, authorize PPMs, or authorize trade measures in response to actions that undermine the treaty.[83] Even when there is no international agreement prescribing the use of trade measures, the environmental cause may find support in a multilateral environmental agreement (MEA) or in soft law. When the concern at issue does not yet find any support in soft of hard law, because the concern is newly arising or yet unknown, this will be referred to as unilateral in substance, or a 'unilateral norm'. The extraterritoriality decision tree distinguishes between different degrees of multi-and unilateralism. The focus is on the degree of multilateral approval of the norm or concern to be protected, or in other words, the degree of norm recognition, rather than on the form of the measure: a PPM is inherently unilaterally imposed. The following subsections will elaborate on how international support can be assessed or measured.

Panels and the AB cannot make findings on violations of other (non-WTO) agreements.[84] This is closely related to, but not the same as, the applicable law to a dispute, which refers to which rules and principles can be invoked as a relevant legal basis for the resolution of a dispute.[85] Whether the applicable law is limited to WTO law or whether and to what extent 'external' international law can be invoked in WTO law is a topic of wide scholarly debate, absent a clear statement on the matter by panels or the AB.[86] External rules can shed light on the interpretation of the terms of a treaty per Article 31(1) VCLT.[87] Arguably, external rules could also be relied upon to interpret a WTO obligation per Article 31(3) VCLT, referring to 'subsequent agreement between the parties', 'subsequent practice in the application of a treaty', or 'relevant rules of international law' – allowing panels and the AB to look at non-trade

83 Charnovitz (2002), 105; Bartels (2002), 391.
84 WTO, *Mexico-Tax Measures on Soft Drinks and Other Beverages* AB Report 2006, WT/DS308/AB/R, para.56. Articles 7 and 11 DSU.
85 Zleptnig(2010), 59; Emily Reid, *Balancing Human Rights, Environmental Protection and International Trade* (Hart Publishing 2015) 207.
86 For a discussion of the different views held, see Joost Pauwelyn, *Conflict of Norms in Public International Law: How WTO Law Relates to Other Rules of International Law* (Cambridge University Press 2009); Ronnie R.F. Yearwood, *The Interaction Between World Trade Organisation (WTO) Law and External International Law: The Constrained Openness of WTO Law (A Prologue to a Theory)* (Routledge 2012); Marceau (1999).
87 AB Report *US-Shrimp* 1998, paras.130-132.

agreements to inform the interpretation of the WTO agreements.[88] It is unclear whether Article 31(3)(c) VCLT, referring to the 'relevant rules of international law applicable in the relations between the parties', should be interpreted in a WTO context as the parties to a dispute, or rather as the parties to the WTO as a whole.[89] In *EC-Biotech*, the panel adopted the latter interpretation, stating that only those rules 'applicable in the relations between all parties to the treaty which is being interpreted' can be taken into account.[90] The panel then observed, however, that 'the mere fact that one or more disputing parties are not parties to a convention does not necessarily mean that a convention cannot shed light on the meaning and scope of a treaty term to be interpreted'.[91] The AB has adopted a subtle middle way by stating that 'the purpose of treaty interpretation is to establish the common intention of the parties'[92] According to the AB, 'one must exercise caution in drawing from an international agreement to which not all WTO Members are party', but also recognize that Article 31(3)(c) is

> 'considered an expression of the "principle of systemic integration", which (…) seeks to ensure that international obligations are interpreted by reference to their normative environment in a manner that gives coherence and meaningfulness to the process of legal interpretation.'[93]

This means that a delicate balance must be struck between the international obligations of individual WTO Members and ensuring a consistent interpretation of WTO law for all WTO Members.[94] It could thus be said that under Article 31(3)(c) VCLT the intentions of the broader WTO membership must be taken

88 Knox (2004), 65.

89 Article 2(1)(g) VCLT defines ' party' as a 'State which has consented to be bound by the treaty and for which the treaty is in force'. When interpreting obligations under a treaty in light of subsequent agreements or subsequent practice, it only makes sense if the entire Membership has agreed to those. See Pauwelyn (2001), 575; WTO, *European Communities - Customs Classification of Certain Computer Equipment* AB Report 1998, WTO/DS62/AB/R, para.84. The requirement of all parties has a broad scope though, for instance in *US-Cloves* a Doha Ministerial Decision was accepted as representing the 'common understanding' of the membership and in *US-Tuna II* the AB accepted a TBT Committee Decision as a subsequent agreement. It thus seems that all decisions made by consensus by organs and bodies comprising 'all WTO Members' can take decisions that qualify as subsequent agreements. Vidigal (2013), 1034; Reid(2015), 204. See also for a discussion on Article 31(3)(c) VCLT, McLachlan (2005); Marceau (1999), 124; Philippe Sands, 'Treaty, Custom and the Cross-Fertilization of International Law' 1998, 1 Yale Human Rights & Development Law Journal 85.

90 Panel report *EC-Biotech* 2006, para.7.71. See also Reid(2015), 204.

91 Panel report *EC-Biotech* 2006, para.7.94.

92 AB Report, *EC-Computer Equipment* 1998, para.93

93 AB Report *EC-Aircraft* 2011, para.845.

94 Ibid.

into account, and a rule must be 'at least implicitly accepted or tolerated by all WTO Members'.[95]

It is submitted that when assessing a generally applicable trade measure, a panel must when interpreting treaty obligations indeed assess the broader interests of the WTO Membership and not only those of the parties to a dispute. The decision tree as proposed here does not suggest any interpretation of WTO provisions by relying on external treaties. Rather, what is proposed here is that external rules are taken into account when determining the nature of the norm as imposed through a PPM, in order to determine whether that PPM can be considered necessary in light of the common interests of the WTO Members.

7.2.3.1 Treaty obligations between parties

The first category in the second pyramid of the decision model relates to measures that are mandated or authorized by a treaty to which both all affected states (i.e. all states with an interest in production and/or export of the good subject to the PPM in question) are a party, and include both mandated PPMs as well as trade sanctions in response to non-observance of the treaty in question.[96] Panels and AB cannot make findings on violations of other agreements, and thus any panel's findings must be limited to WTO rules.[97] The treaty between the affected parties could, however, be considered when determining whether the necessity of a npr-PPM.[98] Thus, within the scope of WTO disputes, regulating WTO members could refer to bi- or plurilateral treaties to substantiate the requirement of necessity of a disputed trade measure, and measures executing obligations under or complying with such treaty will easily pass the extraterritoriality test.[99] However, this reasoning is only valid where the npr-PPM in question only affects those states that are a party to the modifying treaty.

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95 Vidigal (2013), 1030; Pauwelyn (2001), 576.

96 Charnovitz (2002), 105; Bartels (2002), 391. For an overview of multilateral environmental treaties prescribing trade measures see Duncan Brack and Kevin Gray, *Multilateral Environmental Agreements and the WTO* (2003); Peter Van den Bossche, Nico Schrijver and Gerrit Faber, *Unilateral Measures Addressing Non-Trade Concerns: A Study on WTO Consistency, Relevance of other International Agreements, Economic Effectiveness and Impact on Developing Countries of Measures concerning Non-Product-Related Processes and Production Methods* (2007) 165.

97 AB Report *Mexico-Soft Drinks* 2006, para.56; WTO, *European Communities – Measures Affecting Importation of Certain Poultry Products* AB Report 1998, WT/DS69/AB/R.whereby the bilateral oilseeds agreement was not applicable law and could not be enforced by the WTO DSB. If there is a conflict between the GATT/WTO and the other treaty in question, as a general rule the later treaty will prevail according to Article 30 VCLT.

98 Article 31 VCLT.

99 Please note that the measure will still need to comply with the conditions of the chapeau of Article XX, as any other trade measure seeking justification under Article XX GATT.

Examples include sustainability clauses in FTA's[100] (the EU for instance has an extensive network of bilateral preferential agreements, in which market access is often used as a bargaining chip to obtain changes in e.g. environmental policy of the EU's trading partner);[101] international resource conservation agreements that authorize trade measures to enforce the agreements among the parties;[102] or agreements that foresee in trade sanctions when their standards are not respected.

7.2.3.2 Customary international law

A second category with broad international support, but more debated than treaty obligations between affected parties, is customary international law. In order to determine whether a rule has the status of customary international law, there must be consistent and uniform state practice, and a belief that such practice is required by law (*opinio juris*).[103] Once a rule is recognized as custom, it is binding on all states, except for persistent objector-states who have expressly shown that their practice has always differed.[104] In the area of environmental law, very few rules have gained the status of customary law.[105] While there might be consensus on the broader need to protect the environment, or at least a clear prohibition on causing transboundary pollution, there are no rules of customary international law that determine how to address certain concerns or how environmental harm can be punished. References to common concerns of humankind or the global commons should not

100 See for instance EU-South Korea FTA Article 1.1(g); Article 13(6); Ludo Cuyvers, 'The Sustainable Development Clauses in Free Trade Agreements: An EU Perspective for ASEAN?' 2013, W-2013/10 UNU-CRIS Working Papers.

101 Sophie Meunier and Kalypso Nicolaidis, 'The European Union as a Conflicted Trade Power' 2006, 13 Journal of European Public Policy 906, 913. For some examples of such agreements, see Article 20 Cotonou Convention, signed 23 June 2000; Article 52 EU-Ukraine Partnership and Cooperation Agreement [1998] OJ L51/3; Article 9 1988 Cooperation Agreement with the Gulf Cooperation Council [1989] OJ L54/3.

102 E.g. Convention on International Trade in Endangered Species 1973. The International Commission for the Conservation of Atlantic Tunas recommended that parties take non-discriminatory trade restrictive measures on specified fishery products from listed countries that are adjudged to be violating the Convention. See Resolution by ICCAT Concerning an Action Plan to Ensure Effectiveness of the Conservation Program for Atlantic Bluefin Tuna, Jan 23, 1995, www.iccat.org.

103 Shaw(2008), 72.

104 See e.g. Jonathan Charney, 'The Persistent Objector Rule and the Development of Customary International Law' 1985, 56 British Yearbook of International Law 1; Joel P. Trachtman, 'Persistent Objectors, Cooperation, and the Utility of Customary International Law' 2010, 21 Duke Journal of Comparative & International Law 221.

105 One example could the 1982 United Nations Convention on the Law of the Sea (UNCLOS) which in part already codified existing customary law, and of which many norms now have the status of customary law as well, as non-parties to the treaty also follow many of the UNCLOS norms.

be considered under the category of customary law as long as there is no consistent practice and *opinio juris* on the matter.[106]

7.2.3.3 Multilateral treaty authorizing trade measures towards non-parties

A third layer of the decision tree refers to environmental trade measures authorized and supported by MEAs towards states that are not a party to that treaty. The regulating Member (party to the MEA) cannot legally rely on its treaty obligations towards the Member that is not a party to the MEA. However, that MEA can still offer support for npr-PPMs in the contextual analysis of determining the common nature of the concern to the international community as a whole. If the treaty has a substantial membership (including a large number of WTO Members for instance), establishing wide international support for the norm to be protected, but the exporting country has not signed the agreement, a balance of the interests at stake might tip to the advantage of the state imposing the measure.[107] From an environmental perspective, this approach makes most sense, as this does not allow states to escape their (moral/ethical) responsibilities and to free-ride on the environmental efforts of other states.[108]

If the MEA has a more limited membership, relying on the MEA becomes more complicated and sensitive, as one needs to balance individual interests of states, which might all find support in international practice. This balancing of interests will need to be determined on a case-by-case basis, as there is no conclusive general answer. Elements that can be taken into account are the composition of the membership and the affected states (e.g. can an MEA consisting only of developed countries be relied on as support for a measure that mostly affects developing countries?). It could also be considered whether the non-signatory party has clearly opted for not being involved in negotiations or not signing the treaty (fundamental disagreement, for example), or whether there is another reason why it has not become a party to the MEA yet (closed membership, delay in negotiations, or other priorities, for instance).

Examples of treaties authorizing trade measures towards non-parties include the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal which requires parties to prohibit

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106 See infra in categories 7.2.3.4-2.3.6.

107 Hudec(1996), 124. See by analogy the reasoning of the AB with regard to recognized international standards under the TBT Agreement. The obligations and privileges associated with international standards pursuant to the TBT Agreement apply with respect to *all* WTO Members, not merely those who participated in the development of the respective standard. Still, the AB found that the larger the number of countries that participate in the development of a standard, the more likely it can be said that the respective body's activities in standardization are recognized. See AB Report *US-Tuna II* 2012, para.390.

108 Hudec(1996), 131.

imports of hazardous waste from non-parties;[109] CITES which does not permit trade of threatened species with non-parties unless with documentation equivalent to CITES permits;[110] the Wellington Convention on Driftnets which states that a Party may take measures *consistent with international law* to prohibit the importation of fish caught using a driftnet;[111] the Anadromous Stocks Convention which directs parties to prevent trafficking in illegally caught anadromous fish;[112] and the Montreal Protocol on Substances that Deplete the Ozon Layer which bans the import of controlled substances from any non-party.[113]

7.2.3.4 Multilateral treaty aiming at the protection of particular environmental concern

This category of the decision tree refers to trade measures that are protecting an environmental cause that is supported by a treaty, whereby the treaty does not refer to the use of PPMs or any other trade measures.[114] The environmental measure is taken in furtherance of the MEA's objectives. If the agreement at issue is an MEA to which the importing and the exporting state are parties, there should be little disagreement on the environmental objective in case of a dispute. Any discussion will most likely focus on the measure's design and application (including the preferred method to reach an environmental objective). If only the importing member is a party to the MEA, the size of the MEA's membership should be considered in order to assess the degree of international recognition for the environmental objective, as discussed above.[115] Whether the npr-PPM is aiming to protect a regional concern, or a global concern (protection of the global commons or common concerns of humankind) should be taken into account in the assessment of the MEA's membership. In case of a regional concern, a sizeable membership from the affected region could suffice.

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109 *Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal*, March 22, 1989, 28 ILM 649), art 4.5.

110 CITES, 1973.

111 *Convention for the Prohibition of Fishing with Long Driftnets in the South Pacific*, Nov 24, 1989, 29 ILM 1454, Art 3(2). Note that it is not clear what is meant with 'consistent with international law' as no reference is made to jurisdictional rules or extraterritoriality.

112 *Convention for the Conservation of Anadromous Stocks in the North Pacific Ocean*, Feb 11, 1992, US Senate Treaty Doc 102-30, art III:3 (www.npafc.org).

113 *Montreal Protocol on Substances that Deplete the Ozon Layer*, 1987, arts 4.1, 4.9. The Parties also examined the feasibility of banning or restricting from countries not party to the protocol the import of products *produced with* but not containing controlled substances, however, found that it was not feasible to impose such a ban or restriction on imports. See OECD (1997), 20.

114 The majority of MEAs do not contain trade measures. Neumayer(2002), 141.

115 See *supra* at 7.2.3.3.

The Kyoto Protocol is an example of an agreement aiming at protecting an environmental concern, without imposing binding commitments on all treaty parties: if a measure is taken with the objective of tackling climate change, the Kyoto Protocol can be relied upon to demonstrate the wide recognition of the need for emission reduction. The targets are binding, even though the Protocol does not prescribe how states should facilitate the necessary reductions.[116] This reference to the Kyoto protocol raises the question how specific the international agreement should be. Is it sufficient to share the concern (for instance, global warming) or should also the prescribed standards (for instance, emission limits, specific technologies, measurements techniques) be agreed on internationally? A binding international agreement that regulates the appropriate methods to reach an objective definitely increases the likelihood that a measure will be considered necessary or related to the objective. If the MEA only recognizes the need for protecting the particular concern, panels would need to scrutinize the available (scientific) evidence in order to determine whether the specific measure is not more trade restrictive than necessary. The question is thus whether the measure at issue seeks to enforce internationally recognized standards, or whether the npr-PPMs is aiming at protection levels considerably stricter than the corresponding international standards. In the latter case, the stricter part of the npr-PPM could possibly be considered a unilaterally recognized concern,[117] making it more difficult for WTO Members to justify its extraterritorial effect.[118]

7.2.3.5 Soft law

This layer of the decision tree relates to trade measures protecting an environmental concern that is only addressed in non-binding or soft law, such as UN Declarations.[119] A widely recognized soft law norm could also strengthen a claim for justiciation of partly outward-looking measures. The recognition of the norm of non-binding agreement must be considered: have a large number of states expressed support to the norm? In other words, can the norm be considered as largely consensual within the international community of states, rather than solely between certain states or within a specific regime?[120] The smaller the support, the stronger the environmental effects on the regulating state must be in order to justify a measure with extraterritorial effects. While the lack of binding agreements could imply a lack of international consensus or of sense of urgency at the international level, the choice for a soft law instrument could also be a conscious choice in order to avoid concerns

116 Kyoto Protocol, 1997.
117 See infra at 7.2.3.6.
118 Scott (2014), 62.
119 E.g. Rio Declaration on Environment and Development, 1992.
120 Vidigal (2013), 1038.

about legal compliance and resulting shallow commitments – in particular in areas of high uncertainty.[121] Despite the weaker incentives for compliance, soft law agreements do demonstrate states' policy concerns and can even entail more clearly drafted and ambitious commitments.[122]

An example of where trade measures are based on soft law is the EU Timber Regulation,[123] which prohibits placing illegally harvested timber on the market, to combat illegal logging, a cause supported in several soft law norms, such as the Rio Forest Principles or the 2001 Bali Declaration.[124]

7.2.3.6 Unilateral norms

Concerns that find no support under international law, not even under soft law, are classified in this decision tree as unilateral norms.[125] The absence of international (soft or hard) law does not necessarily mean that there is no state practice by states other than the imposing state, but that there is no concerted formal instrument yet, which increases the level of scrutiny. An element that should be considered here is whether states have started bi- or multilateral negotiations. In *US-Shrimp*, the AB addressed this point under the chapeau of Article XX GATT as an aspect of the good faith test implied in the prohibition on arbitrary and unjustifiable discrimination.[126] However, it is submit that it is more appropriate to consider at this stage of the decision tree whether states have started negotiations, and why they might have failed. In the words of Nollkaemper, 'the preference for multilateralism does not affect the legality of unilateralism when agreements are only hypothetically available'.[127] In case of failed negotiations, it is important to take a closer look at the reason for failure: is there a lack of consensus on the concern to be

121 Kal Raustiala, 'Form and Substance in International Agreements' 2005, 99 American Journal of International Law 581, 611. Raustiala provides a very interesting discussion on why and how states opt for soft or hard law (pledges or contracts).

122 Ibid 612.

123 Regulation EU/995/2010. For a discussion of the EU Timber Regulation, see chapter 7.

124 Report of the United Nations on Environment and Development, Non-legally Binding Authoritative Statement of Principles for a Global Consensus on the Management, Conservation and Sustainable Development of all Types of Forests, A/CONF.151/26 (Vol. III), Annex III, 14 August 1992; Ministerial Declaration, Forest Law Enforcement and Governance East Asia Ministerial Conference, Bali September 2001, p. 2. The EU Timber Regulation is particular in that it is not only based on international soft law norms, but also relies explicitly on the national law of the producing country to determine the legality of timber. As the producing country is not necessarily the exporting country to the target market, the soft law support is still relevant.

125 I do not refer to *unilaterally described* policies, as that might be a common aspect of all measures seeking justification under Article XX. (AB Report *US-Shrimp* 1998, para.121.) Unilaterally described policies can still find broader support in international law as the previously discussed categories demonstrate.

126 Ibid para.166.

127 Nollkaemper (1996), 251.

protected, or on the ways on how to protect it?[128] As the AB has noted, 'it is one to thing to *prefer* a multilateral approach … it is another to require the *conclusion* of a multilateral agreement'.[129] Environmental concerns that are deemed in need of protection by a large group of states, although no agreement has so far been reached in terms of specific commitments or compliance mechanisms, differ from concerns that find very little approval internationally. If there is wide(r) consensus on the urgency and need to protect an environmental threat, which could for instance be evidenced by scientific reports or environmental NGO activities, all actors involved should aim at formal cooperation with respect to the particular threat.[130] Such formal cooperation, either through hard or soft law, could then legitimaze further unilateral action through e.g. npr-PPMs.

In the absence of multilateral solutions or international recognition of a need due to uncertainty about harm, its seriousness, or its causes, could states rely upon the precautionary principle to protect an environmental concern?[131] As has been stated above when discussing the foreseeability of environmental effects, the precautionary principle is recognized as a principle of environmental law.[132] If there is insufficient evidence available on a certain risk, the precautionary principle could be relied upon by states to protect against that risk, especially in the light of the slow pace of the international law-making process.[133] Due to the emergence of new or previously unknown risks, the slow manifestation of environmental effects, and the complexity of contributing factors and causality, scientific uncertainty is common. A lack of action due to a strict requirement of positive scientific evidence, especially where risks are complex and poorly understood, could lead to significant damage.[134]

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128 In *US-Shrimp* the measure was originally regarded as discriminatory because a multilateral approach was not pursued in the implementation of the measures. After the first AB report the US reached agreements with a number of countries, including three out of the four complainants (not Malaysia). The AB had not found the measure discriminatory because of the lack of consent, but because of the lack of pursuing a multilateral approach. In the compliance case, the AB concluded that this time the US had provided shrimp-exporting countries with 'similar opportunities to negotiate' an international agreement. As a number of countries consented to the US proposal, it is likely that the US proposal could be considered a serious negotiating offer. It is then interesting to examine why other countries did not enter into negotiations or accepted the offer. (AB Report *US-Shrimp (Article 21.5 Malaysia)* 2001, paras.131.)

129 Ibid para.124.

130 NGO's can be very active participants in treatymaking, in particular in the field of environmental law. After conclusion, they may also monitor implementation, chastise the non-compliant, and encourage reform and renegotiation. See Kal Raustiala, 'NGOs in International Treatymaking' in Duncan B. Hollis (ed), *The Oxford Guide to Treaties* (Oxford University Press 2012).

131 Boisson de Chazournes (2000), 325.

132 See *supra* at 7.2.2.2.

133 Boisson de Chazournes (2000), 325.

134 Cooney and Lang (2007), 527.

As has been argued above, states can rely on the precautionary principle when addressing inward-looking concerns.[135] When a concern is partly outward-looking, a much stricter balance must be struck between the interests of the regulating state and the sovereignty of other states and the risk for international conflict. It is submitted that where a measure is partly outward-looking, and the concern to be protected is not yet recognized internationally (i.e. unilateral norm), states cannot rely on the precautionary principle to adopt npr-PPMs with an extraterritorial effect. While it is important to protect emerging but yet uncertain environmental concerns in the absence of international action, the multilateral character of the WTO must be respected. While environmental trade leverage tools may be very useful to 'force' regime formation, in a multilateral setting states should first raise awareness and convene support for an environmental concern,[136]

Where state interests (unilateral, or more widely supported) conflict with interests of other states, a comity or reasonableness test can be applied.[137] The legitimate interests of the importing country must be balanced against the legitimate interests of the exporting country. This requires a difficult balancing act, in which the context and impact of the measure need to be carefully assessed and in which the regulating country will need to prove that the imposed npr-PPM is the least trade restrictive to obtain the same level of protection.

Unless the npr-PPM is inward-looking, it is submitted that states cannot impose npr-PPMs that find no support in any formal instrument of law, whether soft of hard law. In case of unilateral norms, states should raise further international awareness and focus on international negotiations and other means of action, before imposing npr-PPMs that address these yet-unknown concerns.

135 See *supra* at 7.2.2.2.

136 Richard W. Parker, 'The Use and Abuse of Trade Leverage to Protect the Global Commons: What We Can Learn From the Tuna-Dolphin Conflict' 1999, 12 Georgetown International Environmental Law Review 1, 116; Schoenbaum (1997), 299.

137 See *supra* at 7.2.2.2. In the context of competition law, 'true conflict' has been used when conduct complying with one state's regulation is in violation with another state's regulation. When one can comply with both without necessarily violating one set of regulations, there would be no true conflict. [Hartford Fire Ins. Co. v California, 509 US 764 (1993) (Scalia J., dissenting)] According to Regan and Howse, such true conflict is not very likely, as 'not many countries require that shrimpers use turtle-unfriendly nets, or that cosmetics be tested on animals'. See Howse and Regan (2000), 286.

7.2.4 The decision tree: the model

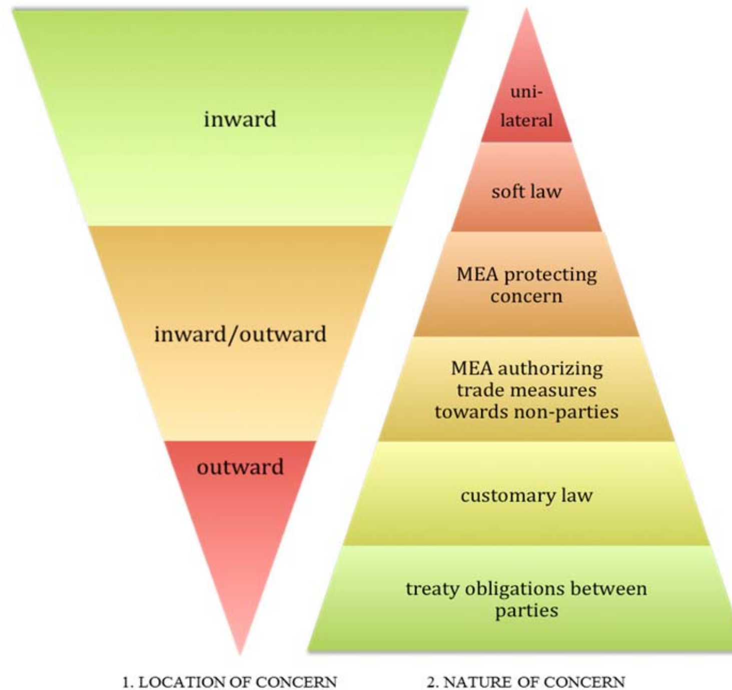

Figure 3. WTO extraterritoriality decision tree

7.3 Environmental Concerns and Public Morals

Seal pups being inhumanly clubbed to death, pandas threatened with extinction, pollution by industry of a lake that is the local supply of drinking water: these examples raise concerns related to human and animal welfare and environmental protection. Even though the environmental concern is located entirely within the territory of another state, and there may be no transboundary environmental externality (no effects), domestic consumers can have strong moral objections or concerns about the foreign activity and the resulting environmental harm.[138] As Howse and Regan argue,

138 Note that if consumer preferences are very strong that this could already influence the finding of likeness of products under Article III GATT (if npr-PPMs would be taken into account under said article). If products would be deemed unlike based on consumer preferences, there would be no inconsistency with Article III and no need for any further

> 'even if the physical effects of the disfavoured processing method occur entirely outside the importing country, the importing country may be concerned to avoid the moral discredit … of … encouraging harm or wickedness – and the moral discredit occurs within the importing country, regardless of where the physical harm occurs.'[139]

It can be difficult to distinguish moral from environmental concerns: for instance, the fact that an animal species is threatened with extinction can have a direct environmental impact on country A, but can be a moral concern to the not-directly-affected country B. In the recent *EC-Seal Products* case, the public morals exception under Article XX(a) GATT was invoked by the EU to justify an import ban on seal products, while Article XX(b) was invoked as back-up argument.[140] The panel and the AB accepted the reliance on Article XX(a) without questioning the relationship with the environmental exception grounds of Article XX(b).

Thus, when could states invoke the public morals exception to address environmental concerns? Two questions must be answered: firstly, is there a jurisdictional limitation to the public morals exception, or in other words, to what extent can states invoke the public morals exception to address concerns outside the regulating state? Secondly, can the public morals exception be relied on to address environmental concerns? This is of particular relevance if there is no jurisdictional limitation to Article XX(a).

As has been pointed out on several occasions throughout this chapter, there can be substantive overlap between moral and environmental concerns, and hence also between the different exception grounds. This section will take a closer look at the relationship between the environmental exceptions and the public morals exception. First the territorial scope of Article XX(a) will be examined. As it is argued that there is no territorial limitation to the public morals exception, criteria will be proposed to determine the acceptability of a public morals defence.

7.3.1 Territorial scope of Article XX(a) GATT

It is important to first consider the territorial scope of Article XX(a) and address the question whether there might be a jurisdictional limitation to the exception, before moving on to defining what could be covered by 'public morals'. In the recent *Seals* dispute, the EU invoked the public morals exception to justify

analysis of the extraterritorial effect.

139 Howse and Regan (2000), 279.

140 WTO, Panel Report, *European Communities – Measures Prohibiting the Importation and Marketing of Seal Products*, WT/DS401/R, 2013; WTO, AB Report, *EC-Seal Products*, 2014.

its seals regime. Unfortunately, neither the panel nor the AB addressed the question of jurisdictional limitation. The AB did mention the systemic importance of determining the of Article XX(a), however, it could not examine the issue further as no arguments were made by the parties in this regard.[141] The jurisdictional limitation of public morals refers to the question of whose morals can be protected. Can Article XX(a) only be relied on in order to protect the public morals of people within the regulating state's territory (for instance, an import ban on alcohol or pornography), or could it also serve to protect public morals of people outside that territory (for instance, an import ban aiming at the protection of children subject to child labour or an export ban on pornography to protect the morals of foreign citizens)?[142] It seems to be most likely that the protection of public morals must be interpreted as referring to the morals of the people within the territory who can be concerned about actions occurring both within and/or outside the territory, which could relate to the environment, human rights, religion or even politics both within and outside the territory. This protection of public morals within the territory can also lead to protection of public morals outside the territory, but the exception cannot be used if it solely aimed at protecting the latter. For instance, country A has an avowed policy of protecting a particular moral standpoint, but it exports goods that contradict this standpoint. If country B then restricts imports of these goods because of its own public morals, then the measure by country B might protect both the public morals in its own country and in country A. If country B does not adhere to the particular moral standpoint, and only imposes restrictions in order to support the moral view point in country A, then country B could not rely on the public morals exception as it would not be protecting its *own* public morals. In the example of child labour: if country

141 AB Report *EC-Seal Products* 2014, para.5.173.

142 Charnovitz used the distinction between inward- and outward-looking measures, whereby inward-directed measures are used to protect the morals of persons in one's own country, and outward-directed measures are used to protect the morals of foreigners residing outside one's own country. He indicates himself that the terms are somewhat arbitrary, because a ban on goods made by children might be 'haracterized as inwardly-directed to prevent domestic consumers from suffering a moral taint from serving as a market for such products'. (Charnovitz (1998), 695.) As I would submit that most, if not all, moral concerns could be rephrased as inward-looking concerns, I will not refer to this distinction (used elsewhere in this thesis) when it comes to moral concerns. One could think of a test where one would need to look at the primary aim of the measure (for instance is the measure more aimed at protecting the children abroad, or is the measure more aimed at protecting the domestic consumers). However, evidencing such claims would be difficult and remain subjective, and thus would be of little help to help distinguishing between genuine inward-looking or outward-looking concerns. As Wu puts it, all types of restrictions arise out of the importing state's moral concern, the difference is that the 'outwardly-directed' concerns may also be seeking to protect certain individuals beyond the restricting state's own borders. (Mark Wu, 'Free Trade and the Protection of Public Morals: An Analysis of the Newly Emerging Public Morals Clause Doctrine' 2008, 33 Yale Journal of International Law 215, 236.)

A is morally concerned about rights of children, both in country A and B, an import ban aiming on goods produced by child labour would be considered a domestic moral concern, even if the concerns related to an activity occurring abroad. An export ban on pornography would not be considered an issue of domestic moral concern, if pornographic materials are allowed within the domestic market. It is then not up to country A to determine what is morally accepted for country B. This interpretation allows for an unlimited territorial scope, on one condition: citizens, consumers and/or government in the regulating state must be morally concerned. Where a state decides that it wants to protect public morals elsewhere, the exception cannot hold if those concerns are not shared by the public in the regulating state.

As already noted, this does not mean that those public morals cannot relate to concerns occurring abroad. The public morals exception would make little sense if the moral concerns in question could only relate to domestic activities: as it is inherent that trade measures have an effect on activities occurring abroad, cases where moral harm results from those activities should be covered by the public morals exception. There cannot be any requirement that the subject of concern should be linked to the territory: if a jurisdictional link is required, as was implied by the AB in *US-Shrimp* in the context of Article XX(g), then domestic consumers and their concerns *are* that jurisdictional link.[143] Any other more restrictive reading seems to be unaccounted for in the wording of Article XX(a) GATT.

As it has been submitted that the extraterritorial scope of moral concerns is no impediment to justification under Article XX GATT, the assessment of acceptability will thus need to focus on the definition of public morals. A WTO Member invoking the public morals exception will need to demonstrate that firstly, its citizens and consumers are indeed concerned about the activity to be regulated[144] (show the existence of a moral concern), and secondly, that the measure is necessary to attain the objective, which includes a process of weighing and balancing factors such as the importance of the objective, the contribution to the objective, the trade-restrictiveness of the measure, and the existence of less-trade restrictive alternatives.[145] Lastly, the good faith conditions of the chapeau must have been complied with, as for any measure seeking justification under Article XX. The following sections will take a closer look at how panels can assess the legitimacy of public morals, by addressing the validity of public morals as well as the evidence question of public morals.

143 Robert Howse, Joanna Langille and Katie Sykes, 'Pluralism in Practice: Moral Legislation and the Law of the WTO after *Seal Products*' 2015, New York University Public Law and Legal Theory Working Papers, 46.

144 AB Report *EC-Seal Products* 2014, paras.5.136.

145 Ibid para.5.169.

7.3.2 Validity of public morals

If there is no territorial limitation to the public morals exception, except that the exception must aim at protecting public morals within the regulating country – irrespective of whether these moral concerns relate to activities occurring within or outside the territory of that state – the content of 'public morals' needs to be defined. What can be considered as a public moral? Could any type of 'worry' or value judgment by people, consumers, and/or governments be considered a public moral? The scope of the public morals exception is not revealed by looking at the text of Article XX(a), nor do the *travaux préparatoires* offer much help.[146] After having examined moral exceptions in other trade treaties, Charnovitz found that these exceptions were initially a response to a broadly-felt need to be able to impose trade restrictions relating to narcotics, alcohol, slaves, pornography as well as animal cruelty among others.[147] However, nowhere in the WTO Agreements are 'public morals' as such defined, and these historic examples cannot be considered exhaustive. As the AB noted in *US-Shrimp,* generic terms are by definition evolutionary rather than static, and should thus be interpreted in light of current concerns.[148]

The panel in *US-Gambling* held that the term public morals 'denotes standards of right and wrong conduct maintained by or on behalf of a community or nation'.[149] The panel recognized that the content of public morals can 'vary in time and space, depending upon a range of factors, including prevailing social, cultural, ethical and religious values'.[150] Members have the right to determine the level of protection they consider appropriate.[151] For all these reasons, I submit that WTO adjudicators in determining the validity of public morals should adopt a deferential approach and should not exercise a normative power that they do not hold.[152]

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146 Charnovitz (1998), 704.
147 Ibid 713.
148 AB Report *US-Shrimp* 1998, para.130.
149 Panel Report *US-Gambling* 2004, para.6.465. In this case the US imposed a ban on cross border gambling and betting services. Antigua, a small country but a big player in the internet-based offshore gaming industry, brought a complaint against the ban. The US raised the public morals defense, asserting that the service posed a threat for organized crime, money laundering, fraud, public health (pathological gambling), and underage gambling.
150 Ibid para.6.461. This reading of the public morals exception under GATS was reiterated by the panel in *China-Audiovisuals* when dealing with the public morals exception under GATT. Panel Report *China-Publications and Audiovisual Products* 2009, para.7.759.
151 AB Report *EC-Asbestos* 2001, para.172.
152 This does not mean that public morals in the WTO should not be read in conjunction with other sources of international law. Howse et al give the example of an import ban based in racist hatred towards individuals of third countries, based on the countries 'moral' values. Such a ban would likely violate the *jus cogens* norm against racial discrimination. See Howse, Langille and Sykes (2015), 23; 1970. See also Bal (2001), 93.

Nevertheless, it has been suggested that additional 'checks' should be taken into account when determining the scope of valid 'public morals'. For instance, in *EC-Seal Products*, Canada argued that WTO Members must be consistent in their protection of public morals, and that the lack of (philosophical) consistency could lead to a finding that a concern is not a genuine moral belief. Canada claimed that the EU invoked public morals on animal welfare with regard to seals, but was inconsistent in its approach with regard to for instance slaughterhouses within the EU.[153] The argument was rejected by the AB, stating that states have the right to set the level of protection they desire, and thus 'may set different levels of protection even when responding to similar interests of moral concern'.[154] States can thus not be required to assess similar public morals in the same way, which allows for a gradual evolution of law.[155] Members should be able to distinguish, as long as this distinction can be explained by legitimate reasons.[156]

Another proposed check is that public morals must be shared widely or even universally. So, must a Member's definition of public morals find support in an international interpretation?[157] On the one hand, international consensus on values can support the argument that a measure can indeed relate to a shared value or public moral;[158] however, imposing an internationally uniform definition of morals would take away the whole point that Members are free in determining their own level of protection.[159] Moral concerns and values can vary greatly between countries, and depend not only on cultural or religious preferences, but also on employment and income opportunities and priorities of the population.[160] Even if one were to accept that the absence of international consensus or support for a certain value would not lead to

153 Canada's appellant's submission, para. 395. Canada argued that the EU claimed its main objective was animal welfare and prevent suffering for animals, but in the meantime included a tolerance for other types of suffering, as for instance for slaughterhouses and wildlife hunts.

154 AB Report *EC-Seal Products* 2014, para.5.200. See also on the argument that a measure should be coherent and consistent with other domestic regulation, Tamara Perisin, 'Is the EU Seal Products Regulation A Sealed Deal? EU and WTO Challenges' 2013, 62 International and Comparative Law Quarterly 373, 373.

155 Howse, Langille and Sykes (2015), 35.

156 See in that regard also Article 5.5 SPS, stating that Members shall avoid arbitrary and unjustifiable distinctions in the levels it considers to be appropriate in different situations.

157 Wu (2008), 231.

158 The Panel in *EC-Seal Products* took into account the growing global tendency towards taking animal welfare seriously in concluding that it could be a component of the public morals exception. See Panel Report *EC-Seal Products* 2013, para.7.420.)

159 Nicolas Diebold, 'The Morals and Order Exceptions in WTO Law: Balancing the Toothless Tiger and the Undermining mole' 2008, 11 Journal of International Economic Law 43, 12. He gives the example of Israel who would be unable to prohibit the importation of non-kosher meat products unless the kosher requirement was considered as part of the internationally uniform public morals.

160 OECD (1997), 28.

the failure of the justification, there would be an implied assumption that any value that is shared internationally would more easily qualify as 'valid'. If public morals and values are indeed individual to each Member, international practice should not be taken into account.[161] Moreover, practically speaking, when a norm is widely shared, states will have less need to impose import or export restrictions to protect those morals.[162] Wu adds an additional element with regard to shared values: he argues that the country at which the restriction is directed, must also have embraced the norm and a restriction could not be imposed against a country for violating a norm that it has never endorsed.[163] However, domestic concerns should not (and cannot) be conditional on the moral policy of another state. Furthermore, in order to be consistent with the chapeau of Article XX, a measure cannot discriminate arbitrarily or unjustifiably and a Member can thus not distinguish between countries in imposing trade-restrictive measures. The argument that states would abuse the public morals exception if public morals can be determined unilaterally, needs to be rebutted by a stringent assessment of the evidentiary proof of the existence of actual public morals, as well as the necessity test.[164] The AB has furthermore stated in *US-Shrimp*, in the context of environmental exceptions but equally applicable to morals, that conditioning market access to a Member's domestic market on whether exporting Members comply with, or adopt, a policy or policies *unilaterally described* by the importing Member may, to some degree, be a common aspect of measures falling within the scope of the exceptions (a) to (j) of Article XX.[165]

7.3.3 Evidence of public morals

In light of the proposed deferential approach to accepting public morals as valid, it is important to constrain the scope of the public morals exception by focusing on a factual evidence analysis. I propose that a clear distinction be made between the validity of the moral concern as discussed above (for instance, animal welfare) and the existence of actual public moral concerns (for instance, the specific welfare of seals). The panel in *EC-Seal Products* can

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161 This could be different in the context of the TBT Agreement and the SPS Agreement, where explicit references are made to existing international standards. If for instance a trade measure would refer to animal welfare standards (assuming that these measures would fall within the scope of the agreements), which were based upon relevant international standards of animal welfare, then at that point international practice and consensus would of course offer support. However, in those examples, one would not discuss public morals as a justification for a (discriminatory) trade-restrictive measure, rather the argument would come up when discussing the validity of the standards in question.

162 Wu (2008), 232.

163 Ibid 246.

164 See *infra* at 7.3.3 and 7.3.4.

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

be criticized for not making such distinction, and for accepting too easily that the EU's concerns could be considered as a matter of Article XX(a).[166]

The burden of proof is on the respondent to prove that the policy objective pursued by the challenged measure really does relate to matters of domestic public morals[167] and that, if the state were not to act, it would be 'harming' public morals.[168] The fundamental question is whose moral concerns are at issue: can the government determine the content of morals, or must there be a clearly expressed concern by the public, and if so, in their capacity as citizen (voter) or as consumer? Must the concerns be shared by a significant number of people; a majority of the people; or would a sizable minority suffice as well? Diebold argues that based on the principles of a democratic society, the majority of a Member's population should endorse the moral value in order for it to qualify under Article XX(a) GATT.[169] However, requiring a majority preference does not seem to be the right threshold to measure moral concerns, as it raises questions related to the reliability measuring methods as well as the feasibility in federal or quasi-federal systems such as the UK or Belgium. Lamy referred in this regard to 'collective preferences', whereby 'collective choices are binding on a society as a whole and transcend individual preferences'.[170]

What would be legitimate evidence that the public is indeed morally concerned?[171] Would this be an opinion poll, a referendum, regulation?[172] Legislative acts could support the existence of a public moral concern and public morals could be assessed in light of their legislative history, the hierarchy of law (e.g. constitutional law) and the nature of legislative acts (e.g. criminal law, administrative law).[173] If one were to focus on legislative acts, would the WTO implicitly be endorsing a theory of democratic legitimacy? As political structures of WTO Members vary radically, what should be the proper standard to determine whether a belief really is an expression of the morality of a particular society?[174] With regard to authoritarian, non-democratic systems, evidence of a democratic legislative process could not be used.

166 Panel Report *EC-Seal Products* 2013, para.7.631.
167 AB Report *EC-Seal Products* 2014, paras.5.136.
168 If the objective of the measure was not to harm animals (rather than public morals), the relevant exception ground would be Article XX(b) GATT.
169 Diebold (2008), 19.
170 Speech by Pascal Lamy as European Commissioner, 'The Emergence of Collective Preferences in International Trade: Implications for Regulating Globalisation", 15 September 2004, at http://ec.europa.eu/archives/commission_1999_2004/lamy/speeches_articles/spla242_en.htm.
171 Wu (2008), 233.
172 In *EC-Seal Products* the EU submitted a series of opinion polls to evidence that seal welfare was indeed a moral concern by the EU population. (First written submission by the European Union (21 December 2012), para.194. See for a critical analysis of the EU opinion polls, Paola Conconi and Tania Voon, '*EC-Seal Products*: The Tension Between Public Morals and International Trade Agreements' 2016, 15 World Trade Review 211, 231.
173 Diebold (2008), 23.
174 Howse, Langille and Sykes (2015), 6.

Could this 'discrimination' of non-democracies be nonetheless supported in light of 'enhancing democracy'?[175] In *China-Audiovisuals,* the AB condoned in principle China's appeal to the right of censorship under Article XX(a) GATT. The Chinese government had imposed import restrictions on written publications and audiovisual products in order to prevent the dissemination of cultural goods with a content that could have a negative impact on public morals in China.[176] Following the panel and the AB, I do not believe that requirement of 'democratic legitimacy' can be read in Article XX(a). Governments can decide what is 'good' or 'bad' for their citizens, and while a legislative support may be acceptable evidence to a public morals claim, such support cannot be required. WTO panels or the AB should adopt a deferential approach to the specific methods of decision-making in the regulating country.

Next to 'publicly' determined morals by citizens and governments, it is worth taking a closer look at the role of consumers, especially where 'ethical' moral concerns are at issue.[177] If consumers value highly certain morals, in principle the market principle of demand should already lead to decreased imports. Why then still rely on trade restrictive measures? It has been argued that people hold and express different preferences in their consumer role and in their citizen role. Some morals may be highly valued by political participants, but as consumers on the market they are not willing to back up that valuation. Sunstein offers a number of explanations for this disjunction: markets reflect individual choice more reliably than politics; voters can be confused as they do not realize that they must ultimately bear the costs of the programs they favour; voting patterns reveal a free-rider problem; or voters may often uninformed about public policy issues. People may also be aware of their own selfishness and might commit themselves in democratic processes to a course of action that they consider to be in the general interest. The collective character of politics furthermore grants some legal assurance that others will have to participate in the same system, and you are not contributing alone (a sort of prisoners' dilemma).[178] Lewinsohn-Zamir argues that a perceived sense of 'hopelessness' may play a crucial role in the behaviour of

175 See e.g.Thomas Frank, 'The Emerging Right to Democratic Governance' 1992, 86 American Journal of International Law 46; Robert Keohane, Stephen Macedo and Andrew Moravcsik, 'Democracy-Enhancing Multilateralism' 2009, 63 International Organization 1.

176 Panel Report *China-Publications and Audiovisual Products* 2009, para.7.752; WTO, *China-Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment* AB Report 2009, WT/DS363/AB/R, para.233.

177 It might be relevant to distinguish between 'order-disturbing' public morals and 'ethical' public morals. In the former category, a stronger role should be given to governments, rather than consumer preferences (consumers might for instance be very much interested in the 'immoral' goods such as pornography). As to the latter category, more weight could be given to consumer preferences and behaviour to determine the existence of a genuine moral concerns.

178 Sunstein (1993), 242.

consumers, which is absent in political settings.[179] If citizens/voters express strong values, beliefs and preferences, which they do not implement as individual consumers, which action is then the more realistic reflection of those preferences?[180] Can the alleged moral concerns of citizens/voters then be considered genuine? If citizens are willing to take a strong moral stand in theory, but not in practice (when it comes to the choice of 'good' products over 'bad' products), how fair is it then to pass on the bill to foreign producers who might need to adjust production processes or suffer the economic consequences as a result of trade restrictions based on ambiguous public morals?[181]

The crucial question seems to be: should trade measures address public morals as reflected by consumer preferences, voters' opinions, or both?[182] I submit that both must be taken into account when examining the evidence of a genuine public moral, especially in light of information asymmetries and information manipulation. The available information for consumers must be taken into account, such as for instance the comprehensiveness and clarity of labels: labels could be misleading, and patterns of consumer preferences could be influenced by governments through prescribing the amount of information that must or may be disclosed to consumers.[183] Public opinion can be manipulated both by governments but also by the corporate sector that has its own specific interests.[184] Furthermore, consumers might be led by the price of products primarily, and might decide to buy the cheaper product and 'free ride'. In addition, also those consumers who do not plan on consuming a particular product might be morally concerned (e.g. even without buying seal products, one can care about animal welfare of seals and vegetarians can still be concerned about sustainable production of meat).[185] If market behaviour were to be the only indicator of genuine moral concerns, more

179 Lewinsohn-Zamir (1998), 379. As Deborah Lynn Guber has also argued, "a critical component of an individual's willingness to engage in activity designed to support environmental causes or other public goods hinges upon the perceived efficacy of that activity." See Deborah Guber, *The Grassroots of a Green Revolution: Polling America on the Environment* (MIT Press 2002) 155.

180 Note in that regard the interesting wording in *EC-Seal Products* of the objective of the measure: 'addressing public moral concerns relating to the EU public's participation as consumers in the market for products derived from inhumanely killed seals'. AB Report *EC-Seal Products* 2014, para.5.223.

181 Note that citizens in the regulating country might pay a price for imposing trade-restrictive measures. If the market is more limited, prices are likely to increase. In other words, the bill is not merely passed on the foreign producers, part of the bill will also be on domestic consumers.

182 Lewinsohn-Zamir (1998), 378. See also Gregory Shaffer and Joel P. Trachtman, 'Interpretation and Institutional Choice at the WTO' 2011, 52 Virginia Journal of International Law 103, 146.

183 Kysar (2004), 579.

184 This is for instance made all too clear in Naomi Oreskes and Erik M. Conway, *Merchants of Doubt* (Bloomsbury Press 2010).

185 Shaffer and Trachtman (2011), 146.

socially protective regulation might no longer pass the evidence threshold. This is also relevant in relation to new issues or new risks on which the public has not had the time yet to form an opinion, or about which insufficient information is available. Where the emerging risk would impose a risk for human/animal/plant health or the environment, trade restrictions would need to be justified under the environmental exceptions; *idem* for security threats under the security exception. Any other risk that is merely of a moral nature would need to be evidenced by consumer preferences and clearly expressed public concerns, e.g. through civil society initiatives, before a government can rely on the public morals exception.

Assessing these concerns and this type of evidence is a complex task to undertake for panels and it could be argued that the exception might be easily abused. However, assessing the credibility of evidence and complex fact-finding is not new to WTO panels.[186] Panels have the authority to seek information from any relevant source,[187] which could include civil society organizations, public opinion firms, local government officials and citizens.[188]

7.3.4 Necessity

Once the validity of public morals has been accepted and its factual existence has been established, the respondent must demonstrate that the measure is necessary to attain the objective. Refusing justification for lack of necessity will be less infringing on the regulatory autonomy of the regulating state than rejecting the validity of certain public morals.[189]

The necessity test involves a process of weighing and balancing a series of factors, such as the interests at stake, the importance of the objective, the contribution of the measure to that objective, the negative trade impact, and possible less-trade restrictive alternatives that could secure the same objective and level of protection.[190] This balancing act results in an ad-hoc, contextual assessment of each measure.[191] A measure seeking justification based on public morals does not necessarily need to make a material contribution[192] or seek to further concrete effects, but can also be issued merely to express

186 Jeremy Marwell, 'Trade and Morality: The WTO Public Morals Exception After *Gambling*' 2006, 81 New York University Law Review 802, 825.

187 Article 13 DSU.

188 Marwell (2006), 825.

189 Diebold (2008), 25.

190 Panel Report *US-Gambling* 2004, para.6.492; AB Report *Brazil – Retreaded Tyres* 2007, para.178; AB Report *EC-Seal Products* 2014, para.5.169.

191 See WTO, AB Report, *Korea-Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, WT/DS161/AB/R, 2000; WTO, AB Report, *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*, WT/DS135/AB/R, 2001; AB Report *Brazil – Retreaded Tyres* 2007.

192 AB Report *EC-Seal Products* 2014, para.5.216.

moral convictions.[193] The question is then to what extent a regular necessity test – whereby the extent to which a measure contributes to the end pursued is considered – can be applied in the context of public morals. As the notion of risk, as can be applied in a context of environmental damage, might be difficult to reconcile with the subject of protection being public morals[194] (i.e. what is the 'risk' to public morals, what would be the 'extent of the damage'), how can the level of protection set by the regulating Member then be assessed? I submit that the stronger the evidence of a genuine public concern (depending on the nature, quantity and quality of the evidence),[195] the more autonomy states should have with regard to the appropriate level of protection.

Nevertheless, less-trade restrictive alternatives have to be examined, even where WTO Members can set their own level of protection. A genuine alternative should allow the regulating Member to still achieve its desired level of protection.[196] For instance, with regard to less-trade restrictive alternatives, one could wonder whether the use of an outright ban on products may be essential to express the moral sentiment underlying a measure, compared to a labelling scheme for instance?[197] If consumers indeed do care about a moral concern, especially when related to PPMs, the provision of information should be sufficient: once the consumers know the origin and production method of a product for instance, they can make an individual value judgment and decide whether they want to buy a certain product.[198] Part of the necessity test could thus also require the state to demonstrate that consumers are indeed misinformed,[199] that they would not be able to make the 'right choice',[200]

193 Howse, Langille and Sykes (2015), 2. According to the authors, the EU ban on seal products for instance was introduced to make a statement about the problematic nature of cruelty to animals and the impermissibility of consumptive behaviours that tolerate and encourage such cruelty. An important aspect of the ban's meaning and purpose was the expression of a deontological belief that seals ought not to be treated in the manner permitted by the hunts in Canada and other sealing nations. The ban was a statement of fundamental European moral and ethical beliefs about the proper treatment of non-human animals.

194 AB Report *EC-Seal Products* 2014, para.5.198.

195 Ibid para.5.215.

196 WTO, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services* AB Report 2005, WT/DS285/AB/R, para.308.

197 Howse and Langille (2012), 430.

198 Kysar (2004), 579.

199 See for instance literature on consumers and incomplete information (e.g. Ran Kivetz and Itamar Simonson, 'The Effects of Incomplete Information on Consumer Choice' 2000, 37 Journal of Marketing Research 427; Shih-Chieh Chuang and others, 'The Effect of Incomplete Information on the Compromise Effect' 2012, 7 Judgment and Decision Making 196.).

200 See in this regard the literature on behavourial economics, consumer choice and consumer bias, e.g. Diane DiClemente and Donald Hantula, 'Applied Behavorial Economics and Consumer Choice' 2003, 24 Journal of Economic Psychology 589; Daniel Kahneman and Amos Tversky, 'Choices, Values, and Frames' 1984, 39 American Psychologist 341; Tim Jackson, *Motivating Sustainable Consumption: A Review of Evidence on Consumer Behaviour and Behavioural Change* (2005); Steffen Huck, Jidong Zhou and Charlotte Duke, *Consumer*

that market mechanisms might fail in the supply of public goods,[201] and that more restrictive state action is thus required in order to make the choice that aligns best with public morals. Demonstrating the need for such patronizing behaviour by the state might be difficult, and serve as a safeguard for a too lenient approach towards the public morals exception.

7.3.5 Morals in relation to the environmental exceptions

Without any territorial limitation Article XX(a) might invite attempts to circumvent territorial limitations in other exceptions, where states need to comply with a higher threshold to demonstrate a sufficient nexus and/or international support for the environmental concern they aim to protect. A too lenient assessment of Article XX(a) could in that regard deprive the other exceptions of their *effet utile*. Public morals should not be read in a way to deny the other paragraphs of Article XX independent meaning.[202] Whereas there might be some overlap in different clauses, justification for a measure should be sought on the most applicable ground or in other words the main objective of the measure. If a state relies on the public morals exception, a panel must check whether the rule in question is genuinely concerned with standards of right and wrong within a society[203] and is thus actually aimed at the protection of public morals. The emphasis on evidence and necessity as discussed above must serve to avoid abuse of the exception.

The proposed extraterritoriality decision tree has little relevance in a context of public morals: if we indeed consider the existence of a moral concern within the territory of the regulating state sufficient a nexus, public morals fall by definition within the inward-looking concerns then, which establishes a jurisdictional nexus and there would be no need to go further to the second step of the tree. Even if one were to consider the second step (international support), it would be of no value, as it is intrinsic to the concept of public morals that these can be local, and cannot be determined based on the existence or lack of international support. Hence I submit that the risk to an 'uncontainable' Article XX(a) or the slippery slope is not its extraterritorial reach, but an overly broad acceptance of public morals, as described above.

Behavioural Biases in Competition: A Survey (2011); Europe Economics, *An Analysis of the Issue of Consumer Detriment and The Most Appropriate Methodologies to Estimate It.* (2007).

201 Public goods are characterized by their non-excludability, meaning that it is impossible or impractical to prevent those who do not pay for a good from enjoying its mechanisms. Because of this, state intervention in the market might be necessary in providing and protecting public goods, such as guarding against air pollution or the extinction of endangered species. See Lewinsohn-Zamir (1998), 377.

202 Marwell (2006), 823.

203 Howse, Langille and Sykes (2015), 25.

This does not diminish the decision tree's value for the environmental exceptions: it is precisely because of this different territorial scope (and the more careful consideration that can be given to sovereignty concerns under the environmental exceptions) that it is important that the relation between the different exceptions as well as their scope is clearly delineated.

Thus, in conclusion, WTO adjudicators should adopt a deferential approach to what beliefs *may constitute* public morals. It is not the WTO's task to take a normative stand when it comes to morals, which are intrinsically linked to cultural values, time and place. However, in order to 'cap' the possible overreach and abuse of the public morals exception, adjudicators should focus on the *actual existence* of a public moral, as well as strictly scrutinize the *necessity* of any measure with regard to the claimed objective of public morals. A clear distinction must thus be made between the validity of the concern as such – where I propose a deferential approach – and the actual existence of the concern – which is a factual evidence question of the public's actual preferences and values. Without such strict scrutiny, trade-restrictive measures might be presented as addressing moral concerns, even when they might not be. Additionally, any measure needs to be necessary to attain the objective, and must comply with the chapeau of Article XX GATT.[204]

7.4 THE CHAPEAU OF ARTICLE XX GATT

Once a measure falls under of one of the exceptions of Article XX, and has thus passed the 'extraterritoriality threshold', the analysis turns to the *chapeau* of Article XX. In assessing the application of the measure, the *chapeau*'s purpose is to prevent abuse or misuse of the specific exemptions provided for in Article XX.[205] The analysis of the *chapeau* is not specific to npr-PPMs with an extraterritorial objective, but can offer additional safeguards against a possible overreach.

In assessing the application of the measure, one must examine the manner in which the measure is implemented in practice, and how other elements extraneous to the measure could affect the measure's ability to perform its function.[206] According to the AB, the *chapeau* is an expression of the principle of good faith as a general principle of law.[207] Good faith in this context can be reflected in a duty to cooperate, and to show systematic respect for multi-

204 In order to comply with the conditions of the chapeau, measures must have been taken in good faith and cannot lead to arbitrary and unjustifiable discrimination. This will be discussed in greater detail below at 7.4. See also chapter 2.

205 AB Report *US-Shrimp* 1998, para.119; 156; AB Report *US-Gasoline* 1996, 25.

206 AB Report *Brazil – Retreaded Tyres* 2007, para.7.107.

207 AB Report *US-Shrimp* 1998, para.158.

lateralism and the international community's interests.[208] Basically, the integrity of the measure should be key.[209]

The text of the chapeau establishes three standards regarding the application of measures: first, there must be no arbitrary discrimination between countries where the same conditions prevail; second, there must be no unjustifiable discrimination between countries where the same conditions prevail; and third, there must be no disguised restriction on international trade. These concepts may be read side-by-side and impart meaning to one another. It is argued that firstly, determining whether the prevailing conditions are the same is a consideration of whether the main objective of the measure can justify a disparate impact; secondly, if the conditions are the same, a finding of arbitrary and unjustifiable discrimination should assess objectives distinct from the main objectives as a measure is likely to have multiple objectives; and thirdly, even if a measure does not discriminate, it should be examined whether it also has protectionist purposes. This section will highlight some key elements that can be of particular relevance to environmental npr-PPMs.

7.4.1 Countries where the same conditions prevail

A measure imposed by a WTO Member may not arbitrarily or unjustifiably discriminate between countries where the same conditions prevail. This latter condition is sometimes underemphasized. Any discrimination must relate to the objective of the measure, as found under the respective paragraph of Article XX GATT. In the case of environmental PPMs, this means that any discrimination must be rationally related to the environmental objective. In other words, a PPM cannot discriminate between countries where the same environmental conditions prevail (those conditions that are relevant to the main objective), such as for instance all countries with tropical woods in relation to PPMs on the logging of timber. A PPM that imposes different requirements to countries with similar environmental contexts would then constitute unjustifiable discrimination.[210]

Purely economic conditions should not play a role under the *chapeau* when seeking justification for environmental npr-PPMs. However, economic conditions can be related to the environmental context of a country, and can in particular lead to a distinction between resourceful, developed countries and less developed countries without the necessary resources or technologies to attain high environmental standards. A PPM that targets all producers in a neutral way

208 Elisa Morgera, 'The EU and Environmental Multilateralism: The Case of Access and Benefit-Sharing and the Need for a Good-Faith Test' 2013-2014, 16 Cambridge Yearbook of European Legal Studies 109, 119.
209 Gaines (2002), 431.
210 Ibid 429.

is likely to have a greater impact on producers in developing countries that might have less economic resources and technical knowledge. Thus, even though similar natural resources may be available in developed and developing countries, or equally polluting activities might take place in developed and developing countries, the technical know-how, capacity and economic means to protect environmental concerns differ. Arguably, to the extent that economic conditions of a country relate to its environmental conditions, these could or even should be taken into account for finding that countries are not similar, if the PPM in question were to distinguish between developed and developing countries.[211] In *US-Shrimp*, the AB found that discrimination also results 'when the application of the measure at issue does not allow for any inquiry into the appropriateness of the regulatory program for the conditions prevailing in exporting countries'.[212] Considering development factors in order to determine whether 'the same conditions prevail' could find support in the GATT Enabling Clause that allows for differential and more favourable treatment for developing countries.[213] Different contextual factors related to the 'development, financial and trade needs' allow Members to differentiate between developing countries as well, as long as the distinguishing criteria are objective generally applicable.[214] This distinction is also reflected in the principle of common but differentiated responsibility (CBDR), a principle justifying the design of different international obligations on the basis of differences in the current socio-economic situations of countries and their historical contribution to a specific environmental problem.[215]

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211 This would most likely be a violation of the MFN obligation under Article I GATT, which would then need to be justified under Article XX GATT. See also by analogy AB Report *EC-Tariff Preferences* 2004.in which the AB contended that different developing countries were not 'similarly situated' when they had 'different needs' and thus could be subject to 'performance requirements' as long as these were objective, transparent and indeed non-discriminatory in the broad sense. For a hypothetical analysis of differential treatment for Kyoto-signatories and non-signatories with reference to *EC-Tariff Preferences*, see Jagdish Bhagwati and Petros C. Mavroidis, 'Is Action Against US Exports for Failure to Sign Kyoto Protocol WTO-legal?' 2007, 6 World Trade Review 299.

212 AB Report *US-Shrimp* 1998, para.165.

213 GATT Contracting Parties, Decision of 28 November 1979 (L/4903) on Differential and more favourable treatment reciprocity and fuller participation of developing countries. The Enabling Clause has been applied with regard to tariff preferences, but also allows for special and differential treatment with regard to non-tariff measures (paragraph 2(b)). See also Alexander Keck and Patrick Low, 'Special and Differential Treatment in the WTO: Why, When and How?' 2004, ERSD-2004-03 WTO Staff Working Paper.

214 GATT Contracting Parties, Differential and More Favourable Treatment Reciprocity and Fuller Participation of Developing Countries (Enabling Clause), L/4903, 28 November of 1979, para.3(c). WTO, *European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries* AB Report 2004, WTO/DS246/AB/R, paras.156.

215 UNFCCC, 1992, preamble; Article 4; Martin Khor, 'The Climate and Trade Relation: Some Issues' 2009, South Centre Research Paper, 22; Morgera (2013-2014), 117; Pieter Pauw and others, 'Different Perspectives on Differentiated Responsibilities: A State-of-the-Art Review of the Notion of Common but Differentiated Responsibilities in International Negotiations'

Even if countries were to be found in a similar situation, and a measure would produce disparate effects, those effects are only prohibited under the chapeau where the discrimination is 'arbitrary and unjustifiable'. The question is whether *any* reason can be invoked to justify discrimination, or whether the reason must relate to the main objective as found under the paragraphs under Article XX. In *Brazil-Retreaded Tyres,* the AB found that discrimination would be arbitrary or unjustifiable if the reasons given 'bear no rational connection to the objective falling within the purview of a paragraph of Article XX, or would go against that objective'.[216] This statement can be problematic. While the rationale for the discrimination may relate to the main objective, it is also very well possible that it will contradict it.[217] For instance, in *EC-Seal Products* the EU's main concern was the protection of seals and animal welfare, but the Seals Regulation allowed for exception grounds related to among others the protection of indigenous communities and marine resources management. Which grounds could be accepted as legitimate objectives at this stage of the analysis remains an open question, even though it can be noted that the panel and the AB did not question the EU's objective to protect indigenous interests for instance. Howse et al suggested that in any case multiple objectives of a measure would need to be reconciled in good faith, which could be interpreted as requiring 'one objective to be applied so as to minimize or reduce to what is necessary the sacrifice of the main objective to the other competing objective(s)'.[218] Furthermore, if indeed different objectives are accepted under the *chapeau*, a new necessity test would be invoked, where no other less discriminatory measure must be reasonably available to achieve the same protection.[219] It is in that light that the following subsections on the *chapeau* can be read.

7.4.2 Coercive effect

In *US-Shrimp*, the AB noted in its analysis of unjustifiable discrimination that

> 'the most conspicuous flaw in the measure's application related to its intended and actual coercive effect on the specific policy decisions made by foreign governments. [The measure at issue…] requires *all other exporting Members* … to adopt *essentially the same* policy….'[220]

2014, 6/2014 Deutsches Institut für Entwicklungspolitik Discussion Paper, 36. For a discussion of CBDRRC in the context of climate change, see chapter 7.

216 AB Report *Brazil – Retreaded Tyres* 2007, 227.

217 Bartels (2015), 116.

218 Howse, Langille and Sykes (2015), 44.

219 Julia Qin, 'Defining Nondiscrimination under the Law of the World Trade Organization' 2005, 23 Boston University International Law Journal 215, 267.

220 AB Report *US-Shrimp* 1998, paras.161.

Shrimp harvesting methods comparable in effectiveness to those required by the US were not accepted. This was proof to the AB that the measure in its application was more concerned with effectively influencing other WTO Members to adopt the same policy, rather than inquiring into the appropriateness of different comparable programs to protect the concern at issue. The AB considered this 'rigidity and inflexibility' to also constitute arbitrary discrimination within the meaning of the *chapeau*.[221] A measure must thus allow for other, comparably effective means to reach the objective pursued. An environmental npr-PPM should not prescribe the precise method on how results should be achieved or require the adoption of a rigid norm, but must pursue a clear objective, allowing other states to determine the most suitable way to reach certain standards.[222]

One way of attaining the required flexibility, and recognizing measures comparable in effectiveness, is through mutual recognition.[223] This can either be in a negotiated and reciprocal context, whereby several parties pledge to mutually recognize each other's practices if common minimum standards are respected,[224] but recognition can also be a unilateral inclusion, whereby the regulating state affirms that practices abroad that reach the required standards, will be accepted and recognized.[225] The idea is basically that when a product can be sold lawfully in one jurisdiction, it can be sold in any other participating jurisdiction. As Schaffer and Nicolaidis argue,

> 'mutual recognition regimes can promote greater tolerance for difference, and, as a result, greater resilience of domestic polities when interacting with each other,

221 Ibid para.177.

222 Grewal (2006), 97.

223 Marceau and Trachtman (2002), 844. Mutual recognition provisions can be found in the SPS Agreement Articles 3 and 4, as well as in article 6 and annex 3(D) of the TBT Agreement. Next to the mutual recognition rules within the internal market (implemented in secondary law), the EU has concluded a number of (sectoral) mutual recognition agreements with Australia, Canada, Israel, Japan, New Zealand, Switzerland and the USA. For an overview see http://ec.europa.eu/growth/single-market/goods/international-aspects/mutual-recognition-agreements/index_en.htm. Mutual recognition agreements are often sectoral. For an interesting assessment of mutual recognition in EU-US relations and the current TTIP negotiations, see Jacques Pelkmans and Anabela Correia de Brito, *Transatlantic MRAs: Lessons for TTIP?* (CEPS Special Report, 2015).

224 Kalypso Nicolaidis and Gregory Shaffer, 'Transnational Mutual Recognition Regimes: Governance Without Global Government' 2005, 68 Law and Contemporary Problems 263, 275. States could choose to effectively recognize the other state's standard as equivalent, but they could for instance also agree that each regulatory system will recognize only its own standards, but agree that a conformity assessment of the importing state's standards will be carried out in the exporting state.

225 Joel P. Trachtman, 'Regulatory Jurisdiction and the WTO' 2007, 10 Journal of International Economic Law 631, 639. Recognition by the importing Member of the exporting Member's regulation could also be an element in a necessity analysis under the paragraphs of Article XX GATT. Sometimes, the least trade restrictive alternative will be simple recognition of the effectiveness of the home country regulation.

> lessening the potential for conflict. Tolerance is indeed a defining feature of mutual recognition. Mutual recognition represents the acceptance of other systems and approaches as valid … promotes the acceptance of difference.'[226]

Coerciveness can furthermore relate to the 'target' of the measure. A distinction can be made between process-based measures and country-based measures, whereby the former are to be preferred as they target the individual producer and the odious production practice, rather than force a government to adopt a certain policy.[227] Process measures are more intrusive than product standards, and npr-PPMs based on a foreign government policy are even more intrusive than npr-PPMs targeting a production practice.[228] A measure should thus focus on the origin-neutral production process that can have an environmental impact, rather than focus on whether the government has adopted a specific policy regulating the concern at issue. Country-based discrimination may be considered too trade-restrictive: a producer within a country who could comply with the prescribed production requirements would still not be able to trade freely. While process-based measures may be less effective and unsatisfactory for environmentalists, as Charnovitz rightly observed, it is one thing for country A to specify a PPM for the fish that it imports from country B; it is quite another for country A to say that it will not import *any* fish from country B unless *all* of B's fish catch are caught in the prescribed way.[229] Country-measures may be seen as arbitrary and unjustifiable discrimination if the measures ban products that can be freely marketed within the importing country.[230] The panel in *US-Shrimp* also held this view, while it noted that 'it would be impossible for exporting Members to comply at the same time with multiple conflicting policy requirements'.[231] The difficulty of process-based measures, on the other hand, relates to the development and enforcement of an effective system to keep those products produced in a 'good' way, separate from those produced in a 'bad' way.[232]

226 Nicolaidis and Shaffer (2005), 317.
227 See Howse and Regan (2000), 269. Charnovitz uses a similar distinction between 'government-policy' and 'how-produced' restrictions. Charnovitz (2002), 107. Government-policy-standards or country-based measures may be more efficient in inducing the participation of other countries in multilateral environmental agreements though. For an interesting discussing on the efficiency of these measures, see Howard Chang, 'An Economic Analysis of Trade Measures to Protect the Global Environment' 1995, 83 Georgetown Law Journal 2131.
228 Charnovitz (1993), 40.
229 Charnovitz (2002), 69.
230 Nollkaemper (1996), 253.
231 Panel report *US-Shrimp* 1998, para.7.45.
232 Nollkaemper (1996), 254.

The effectiveness of any PPM in terms of better environmental protection will furthermore depend on (amongst others) the market power of the importing country, an aspect that will be discussed in greater detail below.[233]

7.4.3 Good faith and international contingency

Good faith in the context of the *chapeau* of Article XX can be seen as a general principle reflected in a duty to cooperate and to negotiate, or in a broader sense showing respect to the international legal order.[234] Good faith serves to balance domestic interests and values against jurisdictional overreach and international tensions.[235]

According to Morgera,

> 'demonstrating good faith necessitates systematic respect for multilateral norms as well as reliance on multilateral institutions that are essential to the effective, objective and even-handed promotion and protection of the international community's interests.'[236]

Respect for multilateralism can manifest itself in various ways. In *US-Shrimp*, the AB found the failure of the US 'to engage the appellees, as well as other Members exporting shrimp to the US, in serious, across-the-board negotiations with the objective of concluding bilateral or multilateral agreements for the protection and conservation of sea turtles' to be another aspect leading to unjustifiable discrimination.[237] This aspect was particularly important, as the very policy objective of the measure, the protection of highly migratory species of sea turtles, demanded 'concerted and cooperative efforts on the part of the many countries whose waters are traversed in the course of sea turtle migrations'.[238] With regard to a preference for multilateral solutions, including failed or ongoing attempts to find such solutions, I submit that these should be considered under the necessity test when assessing the international recognition of a norm rather than under the *chapeau*.[239] What could be considered under the *chapeau* though, is whether there is arbitrariness with regard to partner countries. For example, if a country has negotiated an agreement with country A but not with country B, even though both countries would be equally affected by the imposed measure. If no attempts have been made to

233 See *infra* at 7.6.1.
234 Morgera (2013-2014), 119.
235 Robert Howse, 'From Politics to Technocracy – and Back Again: The Fate of the Multilateral Trading Regime' 2002, 96 American Journal of International Law 94, 106; Scott (2014), 4.
236 Morgera (2013-2014), 119.
237 AB Report *US-Shrimp* 1998, 166.
238 Ibid 168.
239 See *supra* at 7.2.1.2.

open negotiations with country B as well, that discrimination can be considered arbitrary or unjustifiable.

The legitimacy of environmental trade restrictions will furthermore be strengthened if the measure is 'conditional' on international developments, and sufficiently flexible in light of those, for instance by including review clauses that can be triggered expressly by developments at the multilateral level and inputs from third countries at the bilateral level.[240] The 2009 EU Climate and Energy Package, for instance, contains review clauses linked to the outcome of ongoing international negotiations.[241] Responsiveness to international action is thus related to multilateral negotiations. Legitimate unilateral action does not oppose multilateral action: unilateral acts would be imposed because of the absence of effective multilateral alternatives, especially in light of grave and urgent environmental threats.[242] Unilateral PPMs should then be seen as a sort of interim measure, pending further international action.

Morgera has defined this openness as a requirement of continued 'responsiveness' to international developments.[243] Referred to by Scott and Rajamani as 'contingency upon international action',[244] it implies that while the EU is increasingly willing to insist upon the application of its legislation to conduct that takes place abroad, it should also be willing to consider 'disapplying' its legislation when the foreign conduct in question has been satisfactorily regulated by another state or by an international body.[245] If a state refuses to join in a multilateral arrangement, and instead continues to act unilaterally, the credibility of its case for unilateral action will erode.[246] It is thus important that a PPM is drafted in such a way that there is room for adaptation and flexibility, which should also be monitored strictly and revised where necessary.

240 Morgera (2013-2014), 121.

241 See for instance Directive 2009/29/EC amending Directive 2003/87/EC so as to improve and extend the greenhouse gas emission allowance trading scheme of the Community, arts 10b(1) and 11a.

242 Bilder (1981), 91.

243 Morgera (2013-2014), 121.

244 Joanne Scott and Lavanya Rajamani, 'EU Climate Change Unilateralism' 2012, 23 The European Journal of International Law 469.

245 Scott (2014), 24. Scott gives the EU's Derivatives Regulation (EMIR; Reg. 648/2012) as an example of 'contingency' whereby the EU is taking into account regulation by other countries. As she states, 'the Commission is empowered to adopt decisions declaring that the legal, supervisory and enforcement arrangements of a third country are equivalent to those laid down in EMIR and that these third country arrangements are being effectively applied and enforced in an equitable and non-distortive manner so as to ensure effective supervision and enforcement in that third country. Where at least one counterparty to a derivatives contract is established in a third country that benefits form an equivalence decision of this kind, all of the counterparties to the contract will be deemed to have fulfilled the specified obligations under EU law' (Art. 13(3)).

246 Bilder (1981), 92.

Responsiveness does not only relate to developments at a multilateral level, but also includes genuine dialogue and the exchange of views with third countries and stakeholders. This does not necessarily have to relate to law-making initiatives, but can relate to capacity building, research, monitoring efforts, joint activities etc.[247] That dialogue may involve relevant bodies under multilateral environmental agreements or relevant international organizations. In the absence of binding international agreement, these efforts can then be taken into account in a contextual analysis to demonstrate genuine attempts for multilateral solutions and respect for both the sovereignty of other countries and the multilateral system.

7.5 The decision tree outside of Article XX GATT

7.5.1 The TBT Agreement

The TBT Agreement has formed the ground of debate with regard to PPMs. In particular, it is still unresolved whether npr-PPMs could fall within the scope of the Agreement, or whether it is limited to pr-PPMs.[248] The TBT applies to 'technical regulations', a term defined in Annex 1.1, referring to

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

In *EC-Seal Products*, the AB first examined the meaning of 'product characteristics' and found that characteristics include objectively definable 'features', 'qualities', 'attributes' or other 'distinguishing marks' of a product.[249] The AB then found 'related' in the first sentence of Annex 1.1 to refer to these characteristics: the process or production method must be related to the product characteristics, or must, in other words, have a sufficient nexus to the characteristics of the product.[250] It is unclear what is meant with a 'sufficient nexus' in this context.

If one were to argue that 'related' means that the measure must have an impact on 'objectively definable product characteristics', then npr-PPMs that do not affect the physical characteristics of a product, might not be considered 'related' and could thus not fall within the scope of the TBT Agreement. If a sufficient nexus could on the other hand be understood as any link apart from

247 Morgera (2013-2014), 123.
248 See chapter 2.
249 AB Report *EC-Seal Products* 2014, para.5.11.
250 Ibid para.5.12.

a physical link, then certain npr-PPMs could be considered related. For instance, the fact that shrimp was harvested in a turtle-friendly way, could be 'related' to the end product. It remains somewhat of a mystery what the AB could have had in mind: any production process has an automatic 'nexus' to the product, but when is this sufficient? If assessing that nexus would imply a consideration of the objective of the PPM (e.g. an environmental objective, ethical characteristics), then how to distinguish the test from regulatory purpose or a necessity test?

In *Seals,* the AB found that the ban on seals products imposed a characteristic on products 'by providing that they may not contain seal',[251] however, the exceptions to the EU seal regime (the indigenous communities exception, the marine resources management exception and the travellers exception) did not. According to the AB, there is no basis in the text of Annex 1.1 to 'suggest that the identity of the hunter, the type of hunt, or the purpose of the hunt could be viewed as product characteristics'.[252] As a measure must be examined as a whole, including prohibitive and permissive elements, and the exceptions to the EU seal regime were considered to be the main feature of the measure, rather than the criteria relating to the *manner* in which seals are killed, the AB considered the EU seal regime to not lay down product characteristics and thus not to constitute a technical regulation.[253] Whether these exceptions could be considered PPMs *related to* product characteristics was unfortunately left open by the AB. As the panel had not examined the issue in its report, nor was it examined in previous cases, and as the parties had not submitted sufficient argumentation on this point, the AB did not rule on this point. The AB did note that 'the line between PPMs that fall, and those that do not fall, within the scope of the TBT Agreement raises important systemic issues'.[254] The contours of npr-PPMs within the TBT have thus not yet been determined.

The second sentence of Annex 1.1, referring to among others labelling requirements, only refers to PPMs in general, without distinguishing between related and non-related PPMs. It can thus be accepted that it is irrelevant to what extent the production process has an impact on the final product in order to fall within the scope of the TBT Agreement.[255] Labelling requirements could be seen as a special regime, exceptionally bringing npr-PPMs within the scope of the TBT. As suggested by Marceau, the regime of labelling requirements can be more flexible as such measures do not completely restrict trade but essentially provide information.[256] Whether or not the measure in question

251 Ibid para.5.39.
252 Ibid para.5.45.
253 Ibid para.5.58.
254 Ibid para.5.69.
255 See for instance *US-Tuna II* on dolphin-safe labels for tuna products. AB Report *US-Tuna II* 2012; Levy and Regan (2015), 350.
256 Marceau (2014), 327.

is inconsistent with the agreement then needs to be determined through an analysis of the substantive TBT obligations.

If one were to argue that a npr-PPM were to have a sufficient nexus with the product (characteristics) – without any physical impact – and the measure could thus be considered a technical regulation and fall within the scope of the TBT, then with regard to the non-discrimination obligations under Article 2.1 TBT a similar logic as under Articles I and III GATT must be followed. Firstly, are the relevant products like, i.e. in a sufficiently strong competitive relationship?[257] If so, are imported products treated less favourably compared to domestic products, and does that impact stem exclusively from a 'legitimate regulatory distinction'?[258] At this point we are confronted with the extraterritoriality question again: could such legitimate regulatory distinction also be based on concerns located outside the territory of the regulating state? Is there a territorial limitation to the legitimate regulatory distinctions under Article 2.1 TBT? Or should this question not be considered under Article 2.1 TBT?

I submit that the reasoning of the decision tree as proposed under Article XX GATT can be applied to a TBT context as well. The main question whether states can use trade measures to protect 'extraterritorial' concerns remains the same. Article 2.1 TBT entails the MFN and national treatment obligations. The context of Article 2.1 TBT, among which Article 2.2 TBT and the preamble of the TBT Agreement, supports a finding that technical regulations may pursue legitimate objectives when they are not applied in a manner that would constitute a means of arbitrary or unjustifiable discrimination.[259] When ascertaining whether a technical regulation modifies the conditions of competition to demonstrate less favourable treatment with regard to the national treatment obligation under Article 2.1 TBT, a panel must analyse whether the detrimental impact on the imported products stems exclusively from a legitimate regulatory distinction.[260] Article 2.2 TBT establishes an additional obligation that technical regulations shall not be more trade-restrictive than necessary to fulfil a legitimate objective. Article 2.2 TBT resembles the sub-paragraphs of Article XX GATT, with a (non-exhaustive in case of Article 2.2) list of objectives, as well as a necessity test.[261] Technical regulations have to conform to the requirements of Article 2.2 though, irrespective of whether a measure was found to be inconsistent with Article 2.1 TBT: Article 2.2 is thus not a justification provision for inconsistencies found with other substantive obligations. This distinction between Article XX GATT and Article 2.2 TBT may have important consequences for the burden of proof: the respondent bears the burden under Article XX GATT

257 AB Report *US-Clove Cigarettes* 2012, para.120.

258 Ibid para.271.

259 AB Report *US-Tuna II* 2012, para.213; AB Report *US-Clove Cigarettes* 2012, para.182; AB Report *US-COOL* 2012, para.240.

260 AB Report *US-Clove Cigarettes* 2012, para.182.

261 AB Report *US-Tuna II* 2012, para.322. As under Article XX GATT, environmental concerns are explicitly mentioned in Article 2.2 TBT.

to justify its measures, whereas the complainant likely bears the burden under Article 2.2 TBT.[262]

I submit that, *if* npr-PPMs would fall within the scope of the TBT Agreement, the decision tree should be applied within the analysis of Article 2.2 TBT, similar to its application under the paragraphs of Article XX GATT. Thus, with regard to 'legitimate objective', a panel would first need to look at the location of the concern to determine whether the production process that is targeted through the technical regulation leads to environmental effects within/upon the territory of the regulating state or whether the impact is discernible solely outside the territory of the regulating state. Secondly, with regard to necessity, a panel would need to scrutinize the level of international support for the measure. The more common and important the interest, the more easily a measure will be deemed necessary. Broader acceptance of a norm also reduces the potential trade restrictive effect of measures incorporating such norm and potential trade barriers for producers: having to comply with a multilaterally supported norm or standard is less of a burden than having to comply with an infinite number of different norms or standards.

7.5.2 Article III GATT

The extraterritoriality decision tree purports to answer the question whether countries can impose npr-PPMs in order to protect environmental concerns partly or fully outside of their territory. As has been discussed in chapter 2, under GATT environmental concerns that are not related to the physical characteristics of the end product, only become relevant when a violation with the substantive obligations of GATT has been established (among which Article III or Article XI).[263] If a npr-PPM were to be considered a restrictive border measure under Article XI GATT, the analysis will turn to Article XX. If a npr-PPM were to be considered an internal regulation under Article III, it has been the subject of much debate whether legitimate reasons to impose differential treatment between imported and domestic products can play a role in the analysis of Article III GATT.[264] That debate has revived after the 2012 TBT cases, where the AB interpreted Article 2.1 TBT to include a consideration of regulatory objectives when determining treatment less favourable, in the absence of a provision equivalent to Article XX GATT.[265] The AB stated that a panel must

262 Green (2005), 174.

263 Even though these concerns may be relevant for consumer preferences and could arguably (though unlikely) lead to a finding of unlikeness of the domestic and imported products, the extraterritorial character is not an issue at that stage. See chapter 2.

264 See chapter 2.

265 AB Report *US-Clove Cigarettes* 2012, paras.93; AB Report *US-COOL* 2012, para.271. A provision similar to Article XX GATT can be found in the Preamble of the TBT though (recital 2, recital 5 and recital 6).

analyse whether the detrimental impact on imports stems exclusively from a legitimate regulatory distinction rather than reflecting discrimination against the group of imported products.[266] Following this reasoning, it has been proposed to include national regulatory autonomy in the analysis of Article III as well, rather than limit it to Article XX. This argument has been discussed earlier and will not be repeated.[267] However, if such approach were accepted – which is unlikely in view of the AB's rejection in *EC-Seal Products*[268] –, this could have consequences for the extraterritoriality assessment. Answering whether a disparate impact stems from a legitimate regulatory distinction requires the respondent to demonstrate the non-protectionist purpose of the measure and a genuine link between the purpose and the measure. Similar to Article XX, the question of jurisdictional limitation to acceptable, *legitimate*, regulatory purposes would arise under Article III as well: can a regulatory distinction be considered legitimate when this is based on a concern that is located outside the territory of the regulating state?

I submit that *if* an interpretation of Article III including the regulatory purpose of a measure were to be accepted, the decision tree as proposed under Article XX GATT can be applied to Article III as well. The text of Article III does not offer any textual support for the tree, but the reasoning is built by analogy: the AB's interpretation of Article 2.1 TBT and Article 2.2 TBT relies heavily on its interpretation of Article XX GATT.[269] As discussed above, Article 2.1 TBT entails the non-discrimination obligations, in combination with the 'legitimate regulatory distinction'-test bearing resemblance to the chapeau of Article XX GATT. Under the TBT, however, whether an inconsistency with Article 2.1 TBT is found or not, Article 2.2 imposes an additional obligation of legitimacy and necessity. Article 2.2 TBT resembles the paragraphs of Article XX GATT, with the difference that Article 2.2 does not serve as a justification to Article 2.1 TBT (or any other TBT obligation for that matter). Any finding under Article 2.1 TBT is thus independent from a finding under Article 2.2 TBT. In that light, I have argued above that *if* npr-PPMs would fall within the scope of the TBT Agreement, the decision tree should be applied within the analysis of Article 2.2 TBT, similar to its application under the paragraphs of Article XX GATT. However, this reasoning cannot be transposed to Article III GATT because of

266 AB Report *US-Clove Cigarettes* 2012, para.271.
267 See chapter 2.
268 AB Report *EC-Seal Products* 2014, para.5.117. According to the AB, 'a panel is not required to examine whether the detrimental impact of a measure on competitive opportunities for like imported products stems exclusively from a legitimate regulatory distinction'. Note the AB's particular wording of 'not required to' rather than 'should not' or 'cannot'. Further clarification on the issue is needed.
269 The AB stated in *US-Clove Cigarettes* that 'in the GATT 1994 this balance is expressed by the national treatment rule in Article III:4 as qualified by the exceptions in Article XX, while, in the TBT Agreement, this balance is to be found in Article 2.1 itself, read in the light of its context and of its object and purpose'. (AB Report *US-Clove Cigarettes* 2012, para.109.)

the different legal relationship between Article III and Article XX GATT. Only when a violation is found with a substantive obligation under the GATT, will a respondent have to turn to Article XX GATT. If a legitimate regulatory distinction would be read into the assessment for less favourable treatment, and that would lead to a finding of consistency with Article III GATT, there is no longer any need to turn to Article XX, and the jurisdictional scope or limitation of regulatory autonomy will not be considered. Intuitively, transposing the reasoning of Article 2.1 TBT to Article III GATT can only make sense when this includes both the consideration of regulatory purpose as well as the related safeguards to maintain a balance between the right of Members to invoke exceptions (or regulatory distinctions) and the substantive rights of the other WTO Members. Thus, I thereby submit that if regulatory space can be taken into account in a determination of treatment less favourable under Article III, any assessment of a legitimate regulatory distinction should include looking at the location of the concern that a measure purports to protect (jurisdictional limitation to legitimate objectives), as well as international support for the concern at issue (necessity). *De lege lata* the tree is only applicable under Article XX GATT though.

7.6 The dilemmas of trade leverage for environmental protection

This chapter has proposed an extraterritoriality decision tree, building upon positive law from other fields of law, with the purpose of coming to a more systematic assessment of extraterritoriality claims under Article XX GATT. However the use of npr-PPMs to further environmental protection also raises certain dilemmas. For instance, there is an inherent inequity to trade leverage as large, powerful markets will be more able to make use of PPMs than smaller markets. Also, little known or newly emerging environmental concerns could not be addressed through npr-PPMs under the current legal framework, even though these threats might be in most need for alternative solutions for lack of multilateral recognition. The following section will expound these dilemmas and make suggestions where relevant.

7.6.1 Market power and the unfairness of PPMs

Is the proposed legal framework of the decision tree able to guarantee fair and equal opportunities for WTO members to indeed make use of npr-PPMs to attain environmental objectives? In principle, every WTO Member can make use of PPMs and these will be subjected to the same legal assessment in order to test their WTO-consistency. The impact of PPMs, however, will depend on a number of factors, such as market power of the imposing country relative to that of the exporting country, trade dependence of the specific industry,

the volume and direction of trade in the affected product, supply and demand, the type and combination of instruments used, and the appropriateness and feasibility of the requirement imposed.[270] The most crucial factor seems to be the market power: can the exporter divert exports to another market? Foreign producers that are forced to comply with higher standards in order to gain market access, can either choose voluntarily to converge to the required standard; try to compel the market power change its rules through for instance diplomacy, WTO complaints or sanctions; seek a cooperative solution; or choose not to export to that market.[271] If exporters have no alternative strategy that is economically viable, they will need to adapt to the PPM-prescibed standards, which may instigate a positive change with regard to the allegedly harmful activity. The size and attractiveness of the market will thus be important factors for a PPMs' success.[272]

Grewal has argued in his theory on network power that in order to enjoy the benefits of globalization one sometimes has no choice but to accept a specific set of dominant standards. These standards are not in the traditional way determined by one actor, nor are they 'forced' upon others, but they become more valuable when more actors use them. In a way, the free choice over alternatives decreases if one wants to take part in the network (the 'unfreedom of globalization'). While participation is a choice, and acceptance of standards is driven by consent, some form of 'informal power' or unequal dependence can be discerned.[273] Acceptance of standards can then serve as the criteria by which a group governs access to an activity.[274] If standards become more valuable the more actors use it, then large trading blocks, such as the EU, have a valuable asset for which actors would be 'willing' to adopt standards, namely access to the EU market (also named the Brussels effect).[275] The purpose of unilaterally imposed PPMs in the absence of international agreements is precisely to serve as an incentive for enhanced international cooperation.[276] Seeking access to a market is a choice made by exporters. However, in the case of the EU, for example, one can wonder whether there really is a choice still, or whether that choice is constrained? For instance, in the EU's attempt to include foreign airlines into the EU emission trading system, could one argue that there was a choice for foreign airlines to no longer service

270 OECD (1997), 32.
271 Bradford (2012), 50.
272 This question differs from the question whether the environmental policy prescribed by a PPM is effective from an environmental perspective, as that will depend on the substance of the measure.
273 See Grewal(2008).; Grewal (2006).
274 Grewal (2006), 91.
275 Bradford (2012); Meunier and Nicolaidis (2006), 907.
276 See also *infra* at 7.6.2.

European airports?[277] This reveals the inherent economic inequity of PPMs: only those states with substantial market power will reasonably be able to take advantage of PPMs.[278] In light of this equity concern one can understand the opposition by developing countries to PPM-based measures and other analogous 'product' requirements such as environmental packaging and eco-labelling.[279] While the power of markets is an unavoidable reality, the decision tree's emphasis on international support and multilateral solutions with regard to the concern to be protected is one contributing element to strenghten a rules-based approach to trade relations.[280]

However, a powerful market could also entail a responsibility, or even a duty,[281] of the larger states: protection of the commons, of a public good, might require leadership. States who can might have a moral duty to act when others cannot.[282] States might be morally obliged to for instance impose trade restrictions aiming at environmental protection. Caney identifies two types of responsibilities: first-order responsibilities, the obligation for an agent to do its fair share; and second-order responsibilities, responsibilities that seek to induce agents that fail to comply with their first-order responsibilities to step into line.[283] Second-order responsibilities would operate on the principle that 'with power comes responsibility', whereby power can be defined as 'A has power over B to the extent that he can get B to do something that B would not otherwise do'.[284] A strong market can thus become a powerful tool to incentivize conduct through market access, because of a moral responsibility to exploit that power. However, the concept of second-order responsibilities should not be abused by free-riders who want to evade their own first-order responsibilities.

277 Grewal makes the distinction between 'freedom to choose'- the freedom of choice without an acceptable alternative- from the 'freedom to choose freely'- the freedom of choice over viable alternatives. One could then argue that choice in the absence of acceptable alternatives is equivalent to coerced choice. In the case of aviation, it is very unlikely that cancelling all flights to and from Europe would be a viable alternative for most airlines. Looking at a trade in goods context, the situation is different. While Europe is definitely still one of the major trading blocks, it would really depend on the good in question whether the EU is still the most dominant market.

278 Gaines (2002), 427.

279 Ibid 623; Shaffer (2000).

280 Jonathan Skinner, 'A Green Road to Development: Environmental Regulations and Developing Countries in the WTO' 2010, 20 Duke Environmental Law & Policy Forum 245, 265.

281 Francesco Francioni, 'Extraterritorial Application of Environmental Law' in Karl M. Meessen (ed), *Extraterritorial Jurisdiction in Theory and Practice* (Kluwer 1996) 132.

282 Anne Schwenkenbecher, 'Bridging the Emissions Gap: A Plea for Taking Up The Slack' 2013, 3 Philisophy and Public Issues (New Series) 271.

283 Simon Caney, 'Two Kinds of Climate Justice: Avoiding Harm and Sharing Burdens' 2014, 22 Journal of Political Philosophy 125, 134. See also Joanne Scott, 'The Geographical Scope of the EU's First-Order and Second-Order Climate Responsibilities: An Exploration' 2015, 17 Cambridge Yearbook of European Legal Studies 92.

284 Caney (2014), 141.

The responsibility of the regulating states to 'use' their market for better environmental protection would need to be closely linked with an obligation to ensure that the imposed regime provides the necessary management elements for success for producers that are not able to comply with higher standards, such as technical and possibly financial assistance.[285] Such assistance of developed countries helping developing countries implement environmental policy could be seen as an implementation of the common but differentiated responsibilities principle, recognizing the different responsibilities of developed and developing states in light of common responsibilities.[286] This is not only relevant for the foreign producers, but also an element that can impact the effectiveness of PPMs in contributing to better environmental protection: effective environmental protection strategies need to take into account the availability of resources and ecological conditions, which will vary by country.[287] The current Article XX GATT does not include such a duty for positive obligations, even though positive action in combination with negative action (trade restrictions) can be taken into account in a good faith assessment.[288] Any legal enforceable duty (as opposed to a mere moral duty) would need to agreed upon by the international community of states.

7.6.2 The necessity of environmental trade leverage

An important question in addition to the legal assessment of extraterritorial npr-PPMs is whether the environment can indeed be adequately protected through the use of unilateral trade leverage. Whether PPMs will be effective in addressing environmental concerns, i.e. whether they will indeed lead to better/more protection of the environment, depends on firstly, whether trade leverage is an appropriate tool for environmental protection; and secondly, the specific design, content and feasibility of the measure.[289] As the latter element requires a substantive analysis and scientific expertise that would go beyond my capabilities, the former element deserves closer attention.

In a study on the use and abuse of trade leverage, Parker identifies situations in which outside enforcement is more, or less, needed. He argues that when natural resources are used by a limited group, that are equally dependent on the resource, these users are often able to manage themselves the shared

285 Thomas Cottier, *Renewable Energy and Process and Production Methods* (The E15 Initiative: Strengthening the Global Trade and Investment System for Sustainable Development, 2015) 5; Parker (1999), 119; Charnovitz (2002), 74.

286 Elisa Morgera, 'Ambition, Complexity and Legitimacy of Pursuing Mutual Supportiveness through the EU's External Environmental Action' 2012, 2012/02 Edinburgh School of Law Research Papers, 7. See also for a further discussion of the principle, chapter 7.

287 OECD (1997), 32.

288 Shaffer (2000), 626.

289 OECD (1997), 30; Gaines (2002), 405.

resources, what can be seen in, for instance, regional agreements for managing regional seas. For the (relatively small group of) states involved, there is reciprocity of advantage in seeing that conservation works, and no pressing need for use or threat of leverage.[290] On the other hand, there are the truly global challenges, an example of which can be found in high-seas, distant-water fisheries. Global horizons, changing players, not being dependent on one type of fisheries, high competition: under these circumstances distant water fleets can be expected to devalue long-term, systemic conservation benefits. There is a risk of free-riding: if others make conservation efforts, free-riders can reap the gains without enduring the costs. This applies equally to other global challenges, such as climate change and ozone depletion.[291] In these examples trade leverage (especially by powerful trading partners) can then offer a useful incentive to comply with environmental norms (see for instance the trade measures foreseen in the Montreal Protocol or CITES). However, trade leverage without management regimes does not work. Rather the effectiveness of trade leverage is the degree to which it supports, and is supported by, effective management approaches.[292] Equally, global commons management regimes without trade leverage have been less successful, as illustrated by the ineffectiveness of most high seas fisheries management regimes,[293] or climate treaties.[294] Parker lists a number of global commons management options such as issue linkage (dense interrelationships between countries that permit making tit-for-tat deals); capacity building through technical and financial assistance (especially from developed to developing states);[295] compensation for those who must make most efforts (which can have adverse effects leading to over-production of harm-causing products or producers lining up for incentive payments); high quality regime design (finding the right point of technique and regulation, which will be determinant for the outcome and effectiveness of the policy);[296] or monitoring, reporting and verification of compliance by an international secretariat.[297] Trade leverage and global management of environmental concerns must thus go hand in hand, and trade leverage can be a tool to enforce existing commitments under international (binding or non-binding) regimes.

This thesis has started from the premise that in certain areas international agreement is lacking or has insufficient tools to ensure better environmental protection. Can npr-PPMs be a tool to stimulate better global management? Can PPMs serve as regime generators or norm creators? Can they be a step

290 Parker (1999), 100.
291 Ibid 101.
292 Ibid 107.
293 According to the FAO, approximately 70% of the world's fish stocks are overfished.
294 Parker (1999), 104.
295 See also Cottier (2015), 5.
296 See also OECD (1997), 35.
297 Parker (1999), 104.

towards more international cooperation in preserving environmental concerns? Greater awareness, triggering national and international discourse on the issue, deterring harmful production practices, encouraging international cooperation and participation in increased monitoring of risks and developing environmental risk reduction programs: these elements as recognized in the extraterritoriality decision tree can give a boost to collective decision-making, lead to regime-building and environmental progress.[298] According to Hakimi, trade leverage can help to 'develop new norms, prevent existing norms from eroding, reconcile competing objectives, and strengthen or recalibrate regimes'.[299] The practice and experience of trade leverage measures can also furnish experience upon which other states (and the international community) can usefully draw,[300] and can help to clarify 'gray areas' in international law.[301] Unilateral trade measures are alternatives to an ineffective or non-existent global regime can be very useful and effective to incentivise states to get involved in the development of an international regime to govern the environmental problem concerned. Such involvement would allow states a say in the decision-making (rather than being subject to unilateral measures), and economic disadvantages for producers and exporters can be avoided if the country of export has legislation similar to the country of import. Where legislation between countries of import and export differs, an incentive can be created to discuss and share practices, and increase cooperation. Hakimi has termed this behaviour 'unfriendly unilateralism',[302] which can help to overcome inaction and give a boost to collective decision-making. Depending on the existing international legal framework, trade leverage could be adopted with the objective of enforcing an existing international norm, furthering and strengthening an existing norm, or could serve to create a norm.

However, even if PPMs can be a tool to develop new norms, the current tree might not allow the promotion of little known or newly emerging environmental needs (if there is no international support yet). Even though arguably PPMs are most needed in cases of these 'new' yet unsupported concerns, states should commit to multilateralism, and involve other states before imposing trade measures that will affect other countries and their producers. If states and/or their consumers are genuinely concerned about a concern that does not find international support, a measure could seek justification under the public morals exception of Article XX(a).[303] Notwithstanding its benefits, unilateral action in the form of PPMs can only be a second-best alternative, in the absence of strong international action. Apart from the positive effects that PPMs

298 Ibid 110.
299 Hakimi (2014), 107.
300 Bilder (1981), 80.
301 Schoenbaum (1997), 299.
302 Hakimi (2014), 107.
303 See *supra* at 7.3.

may have on the development of international norms, unilateral environmental action is inherently limited in its efficiency and effectiveness: concerted action is required to achieve a more effective solution.[304] This is particularly true in light of global environmental challenges: in order to protect resources in the global commons, a multilateral solution is optimal.[305]

7.7 CONCLUSION

The main question of this thesis is whether states can make use of npr-PPMs to address transboundary environmental challenges, or whether WTO law forms a stumbling block for this type of measures with an extraterritorial effect. This chapter has proposed an extraterritoriality decision tree building on lessons learned from other fields of law that can serve as a systematic step-by-step plan to assess extraterritoriality claims within the scope of Article XX GATT.

The following points are worth noting. First, as the basic economic rationale of the WTO is free trade, accepting that countries can have a competitive advantage over others is 'part of the deal'. If states want to address environmental concerns through trade measures, they need to ensure that the measures are based upon legitimate environmental objectives as laid down in the general exceptions. Second, in addition to a territorial link through market access, in order to justify the extraterritorial reach of npr-PPMs, states must demonstrate that their environment is affected by the activities abroad (inward or inward/outward-looking). Based upon the effects doctrine, such environmental effects must be direct, substantial and foreseeable. In contrast to competition law, where there is no relevant body of international competition rules, determining effects in an environmental context can be more lenient: international (soft and hard) environmental law can be taken into account to support state action through trade measures, where the effects are weaker or uncertain in light of environmental complexity. When a measure is fully outward-looking, or a state is only very indirectly affected, the extraterritorial reach of the trade measure cannot be permitted, irrespective of the international support for the norm at issue. Third, when a measure is partly outward-looking but addressing a concern that finds no support yet in any international instrument (soft of hard law), the extraterritorial effect cannot be permitted either so as to respect the multilateral character of the WTO. The only option remaining would then to seek justification under the public morals exception of Article XX(a), of which it has been argued that there is no jurisdictional limitation, but where a thorough assessment of the actual existence (evidence) of the public moral is required. Fourth, the *chapeau* plays an important role, even if the *chapeau* analysis does not form part of the extraterritoriality assessment and is common

304 Bilder (1981), 85.
305 Skinner (2010), 265.

to all trade measures seeking justification. It is under the *chapeau* that the legitimacy of the measure will be determined, taking into account the flexibility of the measure, responsiveness to international actions and good faith. Measures accompanying the PPM such as management tools and technical assistance can be crucial for the success of a PPM. Lastly, despite the structured legal framework, there is no one-size-fits-all model. Due to the nature of environmental concerns, as well as the particularities of the international legal framework, a contextual case-by-case analysis, with respect for the interests of importing and exporting countries, as well as producers and public, is key when assessing the different criteria. Such a contextual analysis can be seen as a continuing duty of reasoned justification on the regulating state in order to demonstrate that the imposed npr-PPMs do meet the set standards.[306]

In conclusion, the WTO does allow for states to impose environmental npr-PPMs where these PPMs either do not violate any of the substantive obligations of the GATT or the other WTO Agreements; or if they do, where they comply with the conditions of the decision tree and the further conditions of the paragraphs and the *chapeau* of Article XX. In other words, extraterritorial environmental trade measures are not automatically inconsistent with WTO law. The WTO rules allow for sufficient regulatory space for states to address their environmental concerns, even when these are located outside the territory of the regulating state, where these concerns lead to environmental effects in the regulating country and where multilateral efforts support the (unilateral) protection of the environmental concern in question.

In the following chapter the decision tree will first be applied to the facts of *US-Shrimp*, in order to determine whether the decision tree could be of added value to the AB's reliance of a 'sufficient nexus'. The tree will furthermore be applied to different examples of EU environmental law. Where relevant, suggestions to further clarify the decision model and/or WTO law will be made.

306 Scott (2014), 26.