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

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8 The application of the extraterritoriality decision tree: Case studies of environmental trade measures

8.1 INTRODUCTION

The previous chapter has proposed an extraterritoriality decision tree, developing a systematic approach to assess environmental npr-PPMs with an extraterritorial effect under Article XX GATT. The tree raises a number of challenges and dilemmas, both on a practical and on a more conceptual level. Practically, the functioning of the tree is dependent on choices made with regard to scientific measurement methods and benchmarks, to determine the existence of environmental effects and of international support.[307] Conceptually, one is faced with certain questions, such as: what to do with little known concerns? Could npr-PPMs play a role in regime formation and norm creation?[308] How to operationalize the principle of common but differentiated responsibilities?[309] How to incorporate the precautionary principle?[310]

This chapter will illustrate the application of the proposed decision tree in concrete cases. The tree will first be applied to the *US-Shrimp* case, discussed at multiple stages throughout this thesis and to date still the landmark judgment with regard to npr-PPMs and extraterritoriality. Faced with the opportunity to shed light on the jurisdictional limitation of Article XX GATT, the AB in *US-Shrimp* only very briefly addressed whether the US could exercise jurisdiction over threatened sea turtles within and outside US waters. The AB referred to some sea turtle species traversing, at one time or another, waters subject to US jurisdiction and found that this led to a 'sufficient nexus' between the turtles and the US, without further defining such nexus.[311] This decision has received its share of criticism over the years, mainly because of the *ad hoc* reasoning with regard to swimming turtles and the vagueness of what could qualify as a 'sufficient nexus'. Applying the extraterritoriality decision tree to the *US-shrimp* case will test whether this model can systematize and substantiate the AB's nexus test to assess measures protecting environmental concerns (partly) outside the territory of the regulating state.

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307 See chapter 7.2.2.2; 7.2.3.
308 See chapter 7.6.3.6.
309 Ibid.
310 See chapter 7.2.2.2; 7.2.3.6.
311 AB Report *US-Shrimp* 1998, para.133.

Following the case study of *US-Shrimp*, the decision tree will be applied to three examples of EU environmental law: first, the Illegal, Unreported and Unregulated Fishing (IUU Fishing) Regulation; second, the aviation measures in light of the European Emission Trading System (EU ETS); and third, the Timber Regulation as part of the EU's Forest Law Enforcement, Governance and Trade (FLEGT) Action Plan.[312] Pursuant to Article 11 TFEU, 'environmental protection requirements must be integrated into the definition and implementation of the Union policies and activities, in particular with a view to promoting sustainable development'. Due to this integration requirement, environmental protection forms an important element in the EU's trade policy and vice versa.[313] The examples discussed in this chapter aim to further detect the challenges posed by the interplay between trade and environment, and develop possible amendments to the extraterritoriality model. The purpose of the chapter is not to offer a comprehensive analysis or a normative view of the environmental policies at issue, but rather to focus on how trade law interacts with environmental policy, and how extraterritorial effects of measures addressing transboundary environmental concerns could be assessed in practice.

8.2 *US-Shrimp* revisited

8.2.1 Measure and Context

The *US-Shrimp* case has been extensively discussed throughout this thesis, mainly focusing on the AB's reasoning of a sufficient nexus between the regulat-

312 This list is not exhaustive. More examples of environmental measures with an extraterritorial element can for instance be found in the sustainability criteria for biofuels (see e.g. Emily Barrett Lydgate, 'Biofuels, Sustainability, and Trade-related Regulatory Chill' 2012, 15 Journal of International Economic Law 157; Mairon G. Bastos Lima and Joyeeta Gupta, 'The Extraterritorial Dimensions of Biofuels Policies and the Politics of Scale: Live and Let Die?'35:3 (2014) Third World Quarterly 391; Allan Swinbank and Carsten Daugbjerg, 'Improving EU Biofuels Policy? Greenhouse Gas Emissions, Policy Efficiency, and WTO Compatibility' 2013, 47 Journal of World Trade 813.), animal welfare standards (Howse and Langille (2012); AB Report *EC-Seal Products* 2014; CJEU, *Zuchtvieh-Export GmbH v Stadt Kempten* Fifth Chamber 23 April 2015, C-424/13.) or border carbon adjustments (see e.g. Quick(2011); de Cendra (2006); Sarah Davidson Ladly, 'Border Carbon Adjustments, WTO-Law and the Principle of Common but Differentiated Responsibilities' 2012, 12 International Environmental Agreements 63.) For an interesting overview of policy with a 'territorial extension', see Scott (2014).

313 See also Article 207 TFEU, reiterating the need for the EU's common commercial policy to be conducted 'in the context of the principles and objectives of the Union's external action' and requiring that trade agreements be 'compatible with the internal Union policies and rules'. See also for an interesting overview of policy coherence between EU environmental policy and other policy areas, Marisa Cremona, 'Coherence and EU Environmental Policy' in Elisa Morgera (ed), *The External Environmental Policy of the European Union* (Cambridge University Press 2012) 25; Marin Duran and Morgera(2012).

ing state and the concern addressed by a trade measure. Revisiting the case, this section will take a closer look at the specific measure and its context before applying the extraterritoriality decision tree. This exercise purports to determine whether the decision tree, if it had been available to the AB at the time, would have been of any use in substantiating the AB's decision. Where relevant, the decision tree will be applied to the state of affairs of 1996 (i.e. the existing legal framework at the time of the dispute).

Sea turtles are vulnerable animals, whose existence is being threatened by a number of human causes, such as the destruction of nesting and feeding habitats through coastal development, ocean pollution, entanglement in marine debris, or incidental capture in commercial fisheries, also called bycatch.[314] Shrimp fishers often use a process called bottom trawling, whereby a large net is dragged across the ocean floor.[315] Many sea turtles are accidentally caught in these shrimp trawl nets, and as sea turtles need to reach the surface to breathe, they often drown once caught in the nets.[316] Sea turtles are a fundamental link in marine ecosystems. They help maintain the health of sea grass beds and coral reefs that benefit commercially valuable species such as shrimp, lobster and tuna,[317] and facilitate nutrient cycling from water to land.[318] In addition to their intrinsic value as contributors to biodiversity, sea turtles thus play an important role in marine and terrestrial ecosystems.[319] There are seven recognized sea turtle species, all of which are included in Appendix I of the CITES Convention, and listed on the International Union for Conservation of Nature (IUCN) Red List as vulnerable, endangered or critically endangered.[320] Sea turtles are migratory species and can be found

314 See among others Rebecca L. Lewison and others, 'Understanding Impact of Fisheries Bycatch on Marine Megafauna' 2004, 19 Trends in Ecology & Evolution 598. (identifying fisheries bycatch as a primary driver of population declines); Bryan P. Wallace and others, 'Impacts of Fisheries Bycatch on Marine Turtle Populations Worldwide: Toward Conservation and Research Priorities' 2013, 4 Ecosphere 40; Bryan P. Wallace and others, 'Global Patterns of Marine Turtle Bycatch' 2010, 3 Conservation Letters 131. (providing a comprehensive overview of reported data on sea turtle bycatch in fisheries worldwide from 1990 to 2008. The total reported turtle bycatch was appr. 85000 turtles, with less than 1% of total fishing fleets observed and reported, so very the true total is very likely to be much higher).

315 The Humane Society, Fact sheet on sea turtle excluder devices, at http://www.humanesociety.org/issues/fisheries/facts/turtle_excluder_device_ted.html.

316 World Wildlife Fund (WWF) on sea turtles, at http://www.worldwildlife.org/species/sea-turtle.

317 Ibid.

318 See e.g. E.G. Wilson and others, *Why Healthy Oceans Need Sea Turtles: The Importance of Sea Turtles to Marine Ecosystems* (2010) 5.at http://oceana.org/sites/default/files/reports/Why_Healthy_Oceans_Need_Sea_Turtles.pdf.

319 US Department of State on sea turtles, at http://www.state.gov/e/oes/ocns/fish/bycatch/turtles/.

320 International Union for Conservation of Nature and Natural Resources, at www.IUCNredlist.org. Looking at regional subpopulations of particular species, a more accurate picture of threats and conservation priorities can be formed, see WWF and Zoo-logical Society of London, *Living Blue Planet Report: Species, Habitats and Human Well-Being* (2015) 11.

throughout the world; five species have been known to nest on US coasts or traverse through US waters.[321] The fact that turtle species are found throughout the world does not mean that all turtles actually migrate worldwide. While some species can travel from Japan to Mexico or from Asia to the US West Coast, other species migrate rather regionally.[322]

The US Endangered Species Act of 1973 (ESA) lists the sea turtle species that occur in US waters as endangered or threatened species, thereby prohibiting their taking within the US, within US territorial waters and the high seas.[323] Research subsequently conducted by the United States National Oceanic and Atmospheric Administration (NOAA) National Marine Fisheries Service (NMFS) during the 1970s and 1980s led to the conclusion that drowning of sea turtles in mechanical shrimp trawls was a major factor in the decline of sea turtle populations worldwide[324] and shrimp trawling operations had been shown to have the greatest impact on sea turtle populations in the Gulf of Mexico.[325] Driven by these findings, NOAA developed fishing gear technology called Turtle Excluder Devices (TEDs) aimed at reducing the catch of sea turtles. TEDs both allow turtles to escape shrimp trawls, and shrimpers to retain their catch.[326] The TED is a metal grid of bars that attaches to a shrimp trawling net. It has an opening at either the top or the bottom, which creates a hatch to allow larger animals such as sea turtles, sharks, and larger fish to escape while keeping shrimp inside. When a heavy object hits the device, the hatch opens, providing an escape route.[327] In 1983, a formal NOAA programme was introduced to encourage shrimp fishermen to use TEDs voluntarily. However, the programme was not successful on a voluntary basis, resulting in the 1987 ESA regulations, requiring all shrimp trawlers to use TEDs in specified areas with high sea turtle mortality.[328]

In 1989, Section 609 of Public Law 101-162 was enacted, providing that shrimp harvested with fishing technology that may adversely affect sea turtles

321 Sea Turtle Conservancy, at http://www.conserveturtles.org/seaturtleinformation.php?page=species_world.

322 SEE Turtles Org., at http://www.seeturtles.org/sea-turtle-migration/. For an example of a sea turtle tracking program, see http://www.conserveturtles.org/satellitetracking.php.

323 ESA 1973 Section 4 (the listed species to be found at http://www.nmfs.noaa.gov/pr/species/esa/listed.htm#turtles); Panel report *US-Shrimp* 1998, para.14.

324 US Department of State on sea turtles, at http://www.state.gov/e/oes/ocns/fish/bycatch/turtles/.

325 Southeast Fisheries Science Centre of the US National Marine Fisheries Service (National Oceanic and Athmospheric Administration – US Department of Commerce), at http://www.sefsc.noaa.gov/labs/mississippi/ted/history.htm.

326 US Department of State, Under Secretary for Economic Growth, Energy and the Environment, at http://www.state.gov/e/oes/ocns/fish/bycatch/turtles/; Panel report *US-Shrimp* 1998, para.15.

327 NGO Humane Society, at http://www.humanesociety.org/issues/fisheries/facts/turtle_excluder_device_ted.html.

328 52 Fed Reg 24244 (29 June 1987).

could not be imported into the US.[329] The import ban did not apply if the US President certified on an annual basis that the harvesting nation had a regulatory programme and an incidental take rate comparable to that of the US.[330] In order for a foreign regulatory programme to be considered comparable to the US programme, it needed to be required for foreign shrimp trawlers to use TEDs at all times.[331] The import ban did thus not apply to shrimp harvested by fishermen using TEDs, nor did the ban apply to shrimp harvested in countries that by policy or law required the use of TEDs. The US Court of International Trade ruled in October 1996 that the US had to apply the import ban as long as the country concerned had not been certified, even when the shrimp had been harvested by TED-equipped trawlers.[332] In other words, according to the ruling, the US had to ban the import of shrimp from any country not meeting US-determined policy conditions.

8.2.2 Extraterritorial Effect

The US measure aims to protect five sea turtles species that are are known to occurr in US waters. However, these species equally live beyond US waters, and might never even cross them. The US measure is equally targeting those turtles that are not found in US waters, by prohibiting the import of shrimp that were not harvested using TEDs in shrimp trawls. By not only looking at the fishing method of the individual fisherman, but also requiring policy changes by the exporting countries, the US measure has an impact on third countries.

329 Fish and Fishing, Maritime Affairs, 16USC 1537, Public Law 101-162 Section 609(b)(1).

330 Section 609 (b)(2).

331 1991 Guidelines, 56 Federal Register 1051 (10 January 1991), and subsequently 1993 Guidelines, 58 Federal Register 9015 (18 February 1993). The scope of Section 609 was originally limited by the 1991 and 1993 Guidelines to specific countries in the wider Caribbean/western Atlantic region, however, in 1995 the US Court of International Trade found this limitation of geographical scope illegal. The 1996 Guidelines extended the scope of Section 609 to shrimp harvested in all countries.

332 The court later clarified that shrimp harvested by manual methods which do not harm sea turtles, by aquaculture and in cold water, could continue to be imported from non-certified countries. (*Earth Island Institute v Warren Christopher*, 948 Fed. Supp. 1062 (CIT 1996)).

8.2.3 The decision tree applied

8.2.3.1 Inconsistency with substantive obligations under GATT

In *US-Shrimp*, a violation of Article XI GATT was not disputed by the US,[333] and the case thus focused on the analysis of Article XX GATT. Article XI GATT provides for the general elimination of quantitative restrictions on import and export restrictions. Quotas or restrictions through import licenses are prohibited and as Section 609 prohibits the import of shrimp and shrimp products from countries that are not certified, the US did not contest that the import ban was inconsistent with Article XI GATT. The required certification of countries could be considered a type of import license. Once a measure infringes upon Article XI, the analysis will turn to the general exceptions under Article XX GATT.

While not argued by the parties, the US measure could also be inconsistent with Article III GATT. It has been discussed previously that the idea that npr-PPMs fall outside the scope of Article III GATT stems from the first non-adopted *Tuna-Dolphin* GATT panel Report.[334] Even if they could be considered under Article III, the second *Tuna-Dolphin* GATT panel found that 'likeness' of products should be determined based on the physical characteristics of a product and not on the manner in which they are processed or produced.[335] The relationship between Article III GATT and Article XI GATT is partly addressed in the Interpretative Note ad Article III. The Ad Note to Article III appears to exclude a simultaneous application of both provisions.[336] Different aspects of a measure may be scrutinized under both articles, however.[337] According to the Ad Note, two conditions must be met for a measure to fall under Article III: firstly, the measure must apply to imported and like domestic products; and secondly, the measure must be enforced at the time or point of importation of the imported product. Domestic measures, even if applicable at the border, remain covered by Article III.[338] If a measure is applied exclusively to imported products and is solely a border measure, then the relevant provision is Article XI.

In the case at hand, the US has domestic laws in place requiring the use of TEDs for shrimp trawlers,[339] and Section 609 extends the domestic rule to foreign fisheries. The import ban on shrimp harvested without the use of TEDs could thus also be considered under Article III GATT. In order to establish a violation under Article III GATT, the products at issue must be like, and less favourable treatment must be accorded to imported products compared to

333 Panel report *US-Shrimp* 1998, para.169.
334 See chapter 2.4. See GATT Panel *US-Tuna (Mexico)* 1991, para.5.14.
335 GATT panel *US-Tuna (EEC)* 1994, para.5.8.
336 See also Panel Report *EC-Asbestos* 2001, paras.8.91.
337 Panel Report *India-Autos* 2001, para.7.224.
338 Mavroidis(2012), 66.
339 16 USC 1531; 50 CFR 223.205.

domestic products. Treatment less favourable entails a modification of the conditions of competition to the detriment of the imported products. Determining likeness can be a crucial point for environmental measures: is shrimp harvested in a turtle-friendly manner like or unlike shrimp harvested in a turtle-unfriendly manner?[340] If likeness is determined through a competitive relationship, it may well be that physically identical products are nevertheless not considered 'like' when consumer preferences point to the contrary.[341] Are turtle-unfriendly shrimp an alternative for turtle-friendly shrimp? This seems very difficult to prove, as identical products are usually in a competitive relationship because they, at least potentially, compete with each other as substitutable products.[342] If turtle-friendly and turtle-unfriendly shrimp are considered like products, treatment no less favourable requires effective equality of opportunities for imported products to compete with like domestic products.[343] Such distinction in treatment can be formal or factual. Arguably, a *de facto* distortion exists due to the more developed US regulations on TEDs, including the voluntary programme on TEDs and the familiarity of US fishermen with the device; in contrast to fishermen in other countries that have no experience with TEDs, nor the financial capacities to develop them.[344] Such distortion would be sufficient to find an inconsistency with Article III, requiring justification under Article XX GATT.

8.2.3.2 Environmental objective and location of the concern

If a violation of substantive GATT obligations is established, justification can be sought under Article XX GATT. The analysis of the paragraphs of Article XX GATT consists of a two-tier test: firstly, the objective must be listed; and secondly, with regard to the relationship between the measure at issue and the societal value pursued, a degree of necessity – depending on the wording of the particular paragraph – must be shown. As explained in chapter 7, the proposed extraterritoriality decision tree finds its legal basis in these criteria. Firstly, when looking at the environmental objective, the question is whether the environmental exception grounds under paragraphs (b) and (g) of Article XX GATT are limited to concerns within the territory of the imposing Member, or whether Members can also rely on the exceptions to address environmental concerns outside their territory. As there is no explicit jurisdictional restriction in Article XX GATT, it has been submitted that it should first be determined whether a measure is inward-looking (environmental harm fully within the territory of the regulating state), outward-looking (environmental harm fully

340 See chapter 2.4.1.2.1.
341 Quick and Lau (2003), 431.; Bronckers and McNelis(2000).
342 Quick and Lau (2003), 432. See also chapter 6.3. on consumer behaviour.
343 Panel Report *US-Gasoline* 1996, para.6.10.
344 Panel report *US-Shrimp* 1998, para.107. See also expert opinions at paras. 5.142-5.168.

outside the territory of the regulating state) or a combination of both.[345] Purely inward-looking measures will have a strong territorial connection and there is little doubt that states can take action to address environmental harm within their territory.[346] Measures addressing a concern outside their territory could still be based on a territorial connection when the environment of the regulating state is substantially affected (inward/outward-looking or environmental effects both within and outside the territory). Without environmental effects on the territory, measures exclusively addressing outward-looking concerns will not pass the threshold for accepted extraterritoriality.

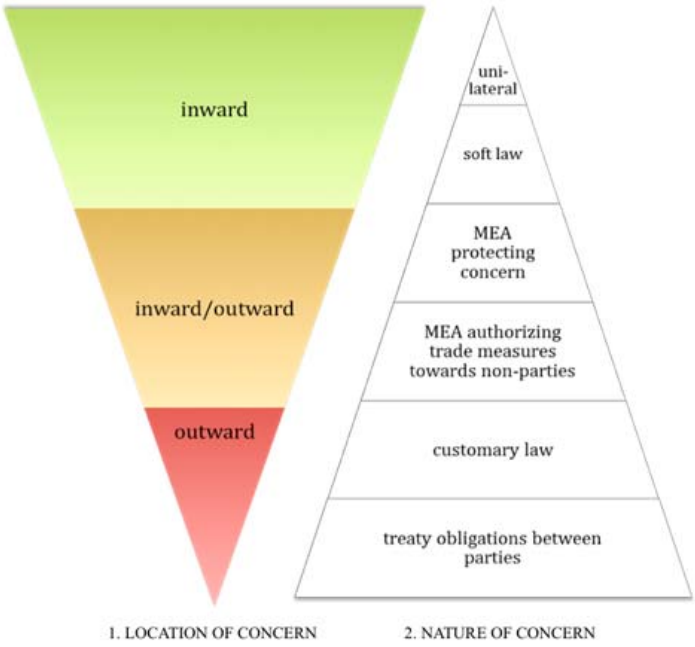

Figure 4. Step 1

Sea turtles are migratory species. Five (out of seven recognized) species of sea turtles are considered as possibly living in US waters and fall under the US regulation. However, even though those species are known to traverse US

345 See chapter 7.2.2.

346 See Lin (2006); Horn and Mavroidis (2008), 1133; Jansen (2000), 312. See also 2001. Environmental damage can lead to state responsibility. During the drafting of the ARSIWA, there was some discussion to include massive environmental pollution among the provisions that would call for universal jurisdiction as violations of *jus cogens*. Such reference was nevertheless not included in the final draft.

waters, not all sea turtles traverse the world, and migration is often regional.[347] While some of the sea turtles in foreign waters as protected by the US measure might traverse US waters, the measure equally covers sea turtles that might not ever do so.[348] The US measure can thus be classified as a partly inward/partly outward looking measure. The AB found a 'sufficient nexus' between the US and the sea turtles – 'some of the turtles swim in US waters some of the time' –, but it failed to further define that requirement (when is a nexus 'sufficient' and why would turtles sometimes swimming in US waters be sufficient). The AB did not require an explicit or strong territorial link as per general international law principles, but applied a less stringent test – without expounding its reasoning. With regard to a required nexus it is submitted that considering the environmental effects of a decreased sea turtle population on the US's territory and/or biodiversity allows for a more systematic and substantiated analysis – an approach particularly relevant when addressing environmental concerns that are less tangible, such as climate change. Furthermore, in line with the AB's implicit acceptance of a weaker link than normally required under public international law,[349] it has been advanced that the requirements of environmental effects to justify environmental trade measures are less stringent than under public international law and competition law.[350]

When simply transposed from those areas of law, the effects doctrine would require environmental effects on the territory to be direct, substantial and foreseeable (in order for an importing country to appeal for a justification under Article XX GATT). However, these requiremens can be more flexible, i.e. less present, in an environmental context due to the international support a concern may find through international environmental law.[351] In contrast to effects under competition law, where national rules are applied extraterritorially in the absence of relevant international rules, there is a body of international (largely soft) environmental law that can support a justification of extraterritoriality for npr-PPMs, in addition to environmental effects on the territory of the regulating state.[352] Thus, even when environmental effects are weaker or more indirect, the additional international recognition of a substantive environmental norm could still lead to a permissible extraterritoriality claim under WTO law. This international characterization is assessed

347 NGO See Turtles, at http://www.seeturtles.org/sea-turtle-migration/; For an example of a sea turtle tracking program, see http://www.conserveturtles.org/satellitetracking.php.

348 See for instance the examples given by the appellees of green turtles in Pakistani waters or olive ridley turtles in Thai waters: Panel report *US-Shrimp* 1998, paras.64. See also the expert opinions, paras. 5.255-5.276.

349 see chapter 4.

350 See chapter 7.2.2. See also chapters 4 and 5 on public international law and competition law.

351 See chapter 7.2.2.2.

352 Ibid.

in the second step of the decision tree.[353] Any justification of an extraterritorial npr-PPM needs a combination of both elements, which can be seen as communicating vessels: stronger effects need less international support, whereas strong international support can make up for weaker effects. In any event, no matter how strongly a state would feel about diversity in the marine ecosystem worldwide, these concerns could not justify restrictions on shrimp imports caught with turtle-unfriendly methods if that state's environment is not affected by a decrease in sea turtle populations. Npr-PPMs addressing environmental concerns located outside the territory of the regulating state without effects on its territory cannot be justified under Article XX GATT, irrespective of the existing international support.

To what extent would a decrease in population or even extinction of sea turtles species affect biodiversity within the US? Scientific expertise is required to answer that question. Sea turtles are said to play an important role in ocean ecosystems by maintaining healthy sea grass beds and facilitating nutrient cycling from water to land.[354] Nevertheless, according to sea turtle experts, our understanding of the ecological functions and impacts of sea turtles is a long way from providing clear answers to the question of their precise effects on biodiversity. There are many differing opinions, but there is little actual evidence to measure the environmental effects of a decline in sea turtle population, both globally and in the US.[355] While it can be assumed that a threat to those sea turtle species that are known to traverse US waters (and might nest on US shores[356]) would lead to more direct and substantial effects to the US ecosystem than to the ecosystems of countries whose waters are not crossed, this cannot be said with certainty. The impact of a decline in sea turtle population can only be considered in the long term. Confirming possible findings on environmental effects by demonstrating a reversal of effects after an increase of sea turtle populations requires even more time: it has been estimated that with consistent use of TEDs, it would take approximately 70 years for threatened sea turtle populations in the southeastern US to increase with an order of magnitude.[357] Where it is unclear how exactly and to what extent ecological damage will materialize, states could rely on a precautionary approach as recognized in international environmental law to act even in cases

353 See below at 8.2.3.3.

354 See e.g. Wilson and others (2010), 5.at http://oceana.org/sites/default/files/reports/Why_Healthy_Oceans_Need_Sea_Turtles.pdf.

355 Interview with Dr. Jack Frazier, Smithsonian Institute, National Zoological Park, Conservation and Research Center, October 2015. For an interesting study on the environmental effects of a decline in sea animals on the earth's nutrient cycle, see Christopher E. Doughty and others, 'Global Nutrient Transport in a World of Giants' 2015, 112 Proceedings of the National Academy of Sciences of the United States (PNAS).

356 See for an overview of nesting sites, http://www.conserveturtles.org/seaturtleinformation.php?page=nestingmap.

357 Larry B. Crowder and others, 'Predicting the Impact of Turtle Excluder Devices on Loggerhead Sea Turtle Populations' 1994, 4 Ecological Applications 437.

of uncertainty.[358] Environmental risks can be very difficult to predict and can often not be specified by a few precisely determined variables, but may instead be driven by the interaction of changes taking place at very different temporal and/or spatial scales.[359] Even though the precise magnitude of the impact of sea turtle extinction is yet unknown, it is clear that sea turtles do play an important role in the marine ecosystem, and not protecting these species will disrupt that natural system. It is likely that a decreased sea turtle population indeed affects the US marine (and possible terrestrial) ecosystem; however, uncertainty remains on how direct or substantial such effects are.[360]

In conclusion, the US TED measure is an inward/outward-looking measure. Sea turtles are migratory species, playing an important role in ocean ecosystems. Whereas there is insufficient evidence today to determine the actual effects of declines in sea turtle populations on the US ocean or terrestrial ecosystem, it is plausible that the US is affected by declines of those turtle species that are known to occur in US waters and may nest on US shores. In case of weaker – i.e. less present – effects, a npr-PPM may find further support in international environmental law in order to be justified under Article XX GATT, as will be discussed in the following section. Should doubts remain about the requisite level of effects, in light of the complexity and long-term materialization of environmental effects, an additional appeal to the precautionary principle could reinforce the justification of the contested measure under Article XX.

358 See chapter 7.2.2.2. The precautionary principle has not yet been recognized by panels or AB as customary international law. Due to the differing views on the matter by scholars, the AB has left the matter unsettled. The AB did recognize the principle as a principle of international environmental law. See AB Report *EC-Asbestos* 2001, paras.123; Panel report *EC-Biotech* 2006, paras.7.87.

359 Cooney and Lang (2007).

360 Interview with Dr. Jack Frazier, Smithsonian Institute, National Zoological Park, Conservation and Research Center, October 2015.

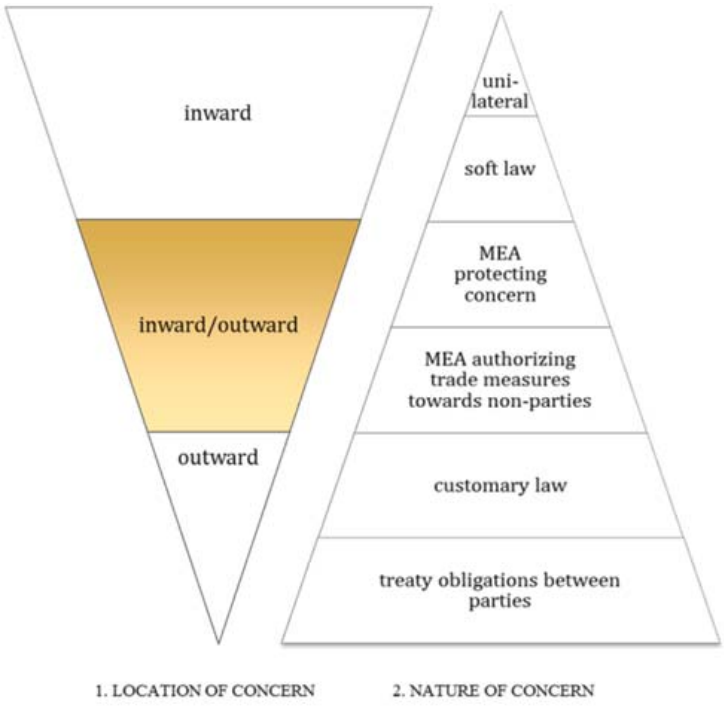

Figure 5. Step 1 US-Shrimp

8.2.3.3 Necessity and recognition of the concern

The second element that needs to be assessed under the paragraphs of Article XX GATT is the degree of necessity.[361] This necessity test involves a three-stage analysis: first, the measure must be suitable to achieve the objective; second, the measure must be necessary to attain the objective; and third, determining the degree of necessity involves a process of weighing and balancing a series of factors, which results in an ad hoc, contextual assessment of each measure.[362] This includes among others a consideration of the trade-restrictiveness of the measure. Necessity takes different forms in the different paragraphs of Article XX GATT. Article XX(b) demands that measures are *necessary* to protect

361 See chapter 7.2.1.2; 7.2.3.

362 See AB Report *Korea-Various Measures on Beef* 2000, para.164; AB Report *EC-Asbestos* 2001; AB Report *Brazil – Retreaded Tyres* 2007, para.182; AB Report *EC-Seal Products* 2014, para.5.169.

the environment, whereas Article XX(g) requires a measure to be *related to* the protection of an exhaustible resource. As argued in chapter 6, international support can be considered as part of the necessity test.[363] Assessing the nature of the concern, or in other words, the level of recognition of a particular concern and/or substantive norm, is helpful to determine the acceptability of the measure at issue. The more common and important the interest, the more easily a measure will be deemed necessary.[364] The more international support for an environmental concern, the easier a measure will 'relate' to that policy objective.[365] As noted by the AB, the WTO agreements are not to be read 'in clinical isolation' from public international law,[366] and the exceptions of Article XX GATT should be interpreted in light of contemporary concerns, which can be evidenced by international instruments of environmental law.[367] The international support found in international environmental legal instruments is considered in combination with the environmental effects on the territory of the regulating state: stronger effects can be justified even with weaker international support, such as soft law instruments; whereas weaker environmental effects require more international support in order to pass the extraterritoriality threshold. States cannot adopt npr-PPMs with extraterritorial effects when the concern at issue is not yet recognized by any international instrument (i.e. unilateral norms).[368]

363 See chapter 7.2.3.

364 AB Report *Korea-Various Measures on Beef* 2000, para.162.

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

366 AB Report *US-Gasoline* 1996, p.17. See also a recent example where the AB interpreted external treaty provisions in order to interpret WTO law: WTO, *Peru-Additional Duty on Imports of Certain Agricultural Products* AB Report 2015, WT/DS457/AB/R; James Mathis, 'WTO Appellate Body, *Peru-Additional Duty on Imports of Certain Agricultural Products*, WT/DS457/AB/R, 20 July 2015' 2016, 43 Legal Issues of Economic Integration 97, 105.

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

368 See chapter 6.2.3.6.

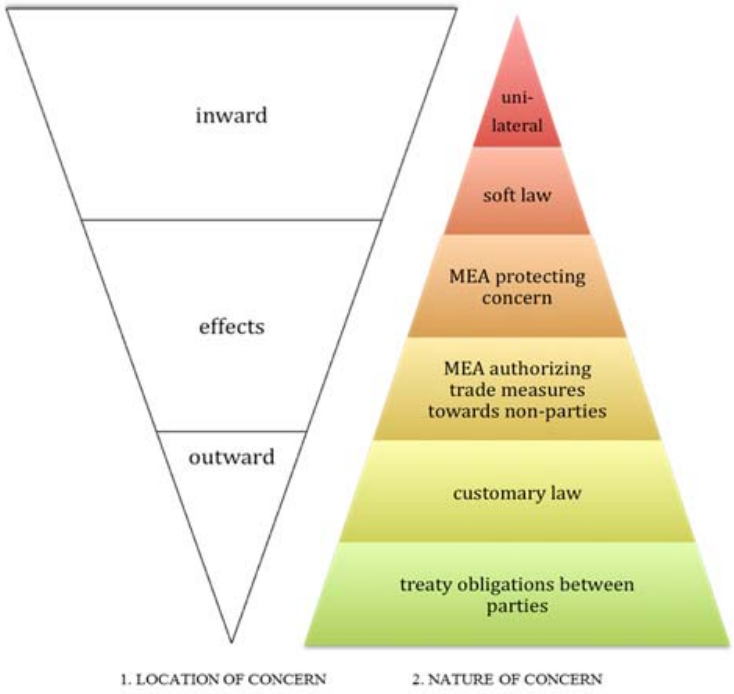

Figure 6. Step 2

In the case at hand, the US measure aimed to protect sea turtles from bycatch of commercial fisheries by requiring the use of TEDs. Thus, firstly, can international support be found for the protection of sea turtles; and secondly, for the use of TEDs? The AB noted when assessing necessity under Article XX(g) (whether the measure related to the conservation of exhaustible natural resources) that the policy of protecting sea turtles is 'shared by all participants and third participants in this appeal, indeed, by the vast majority of nations in the world', referring to the, at the time, 144 parties to CITES, which included the complainants.[369] While CITES recognizes sea turtles as an endangered species, it does not oblige the adoption of specific conservation or protection measures.[370] CITES supports the concern addressed by turtle protection measures, but does not offer support for the specific method of using TEDs. The Convention on the Conservation of Migratory Species and Wild Animals (CMS) recognizes the need to protect sea turtles but emphasizes the importance

369 AB Report *US-Shrimp* 1998, para.135.
370 CITES, 1973, Appendix I.

of cooperation and concerted action with all respective states.[371] The CMS equally does not address specific protection measures.

The use of TEDs is required by the Inter-American Convention for the Protection and Conservation of Sea Turtles (IAC), a Caribbean/Western Atlantic regional agreement with 12 signatories at the time, including the US; but to which none of the complainants were signatory.[372] Next to the IAC parties, a few other countries have opted to require the use of TEDs on shrimp trawl vessels subject to their jurisdictions.[373] Even though the US identified 19 countries in total using TEDs, the fact that the complainants and third parties to the dispute objected to the use of TEDs led the panel to find that the mandatory use of TEDs could not be considered as a customarily accepted multilateral environmental standard.[374] Despite the emphasis of the CMS on concerted action and the provisions of Section 609 calling for the initiation of negotiations to conclude bilateral and multilateral agreements for the protection of sea turtles, the US failed to undertake such negotiations for an agreement on sea turtle conservation techniques with countries outside the Caribbean/Western Atlantic region before the imposition of the import ban.[375]

Applying the decision tree to this case, the international support at the time was limited to MEAs recognizing the need to protect sea turtles as threatened species (CITES, CMS). The US could not rely on the IAC with regard to the complainants, even though the IAC can be taken into account to demonstrate a wider use of TEDs beyond the US. However, in the absence of binding agreements between the US and the complainants on the matter, the question is why such agreement did not exist. Failure to conclude an agreement can be due to a number of reasons, and as the AB later held, it cannot be required that an agreement be *concluded*, rather, the emphasis must be on the efforts

371 Convention on the Conservation of Migratory Species of Wild Animals, UNTS 1651, 1979. In 2001 the Indian Ocean – South-East Asian Marine Turtle Memorandum of Understanding came into effect, as a non-binding intergovernmental agreement to protect sea turtles in the Indian Ocean and the South-East Asia region. The MoU falls under the auspices of the Convention on the Conservation of Migratory Special of Wild Animals (Article IV, para.4).

372 Inter-American Convention (IAC) for the Protection and Conservation of Sea Turtles, 1996, Annex III para.3. The signatories at the time were Mexico, Venezuela, The Netherlands (Antilles), Peru, Brazil, Belize, Costa Rica, Ecuador, Honduras, Nicaragua and Uruguay. Later Argentina, Chile and Panama have joined. The treaty entered into force upon the ratification of the eighth state in 2001. The Convention is open for accession by any state in the Americas and the Caribbean.

373 Panel report *US-Shrimp* 1998, para.123; para.7.57. Next to the signatories of the Inter-American Convention the US identified Colombia, El Salvador, Guatemala, Guyana, Indonesia, Nigeria, China, Thailand, Trinidad and Tobago as countries requiring the use of TEDs, and 'other nations in Asia and Africa had informed the US of their intention or desire to establish TEDs programmes'.

374 Ibid para.7.59. The use of TEDs was also supported by the NGO WorldWildLife (WWF), at http://www.worldwildlife.org/species/sea-turtle.

375 Ibid para.7.56; AB Report *US-Shrimp* 1998, para.166. The AB considered the negotiation efforts under the chapeau, see ibid para.172.

being made in negotiations.[376] Requiring that a multilateral agreement be *concluded* rather than displaying one's good faith in terms of efforts, would give any country party to the negotiations in effect a veto over the other country's actions, which would be unreasonable.[377] However, in the original proceedings no evidence was presented of any US attempts to negotiate such an agreement with the complainants. The fact that the US did not undertake any such efforts weakens a finding of necessity, as the PPM in question could be seen as a circumvention of the multilateral decision-making process. Nonetheless, the existing MEAs offer support for the US to undertake measures with regard to sea turtle protection.

Later, when the panel considered the Article 21.5 DSU claim by Malaysia, the panel found that the US had engaged in negotiations with the complainants and other countries in the Indian Ocean.[378] The US reached agreements with a number of countries, including three out of the four complainants (not Malaysia). In 2000, 24 countries, including the US, adopted the text of the South-East Asian Memorandum of Understanding as a non-binding instrument.[379] The panel noted that the US was in favour of a legally binding agreement, but that it could not be held liable for the fact that other parties favoured a non-binding text.[380] Even though the US measure was found justifiable under Article XX GATT in the compliance proceedings, the US still had the continuing obligation to make serious efforts towards arriving at a binding agreement, to promote further international cooperation and agreement on the protection and conservation of sea turtles.

In conclusion, in light of the existing MEAs recognizing the threat to sea turtles combined with the likelihood of environmental effects on the US ecosystem, the US could indeed undertake action to protect migratory sea turtles that are at least partly located outside US territory. This outcome does not differ from the AB's outcome, which confirms that the AB's analysis was intuitively correct by not requiring a strong territorial link as per general international law principles. However, by considering scientifically determinable effects in combination with the international environmental legal framework, the decision tree has systematized and substantiated the AB's nexus test, providing for a rigorous assessment of environmental npr-PPMs. This two-tier test of effects and legal support warrants a wider scope for states to address extra-

376 As argued in chapter 7.2.3.6, in *US-Shrimp* the AB addressed this point under the *chapeau* as an aspect of the good faith test implied in the *chapeau* prohibition on arbitrary and unjustifiable discrimination. However, I submit it is more appropriate to consider at this stage of the decision tree whether attempts to international negotiations have been made.

377 AB Report *US-Shrimp (Article 21.5 Malaysia)* 2001, para.123.

378 WTO, *United States – Import Prohibition of Certain Shrimp and Shrimp Products, Recourse to Article 21.5 of the DSU by Malaysia* Panel Report 2001, WT/DS58/RW.

379 Under the auspices of the CMS. See Indian Ocean – South-East Asian Memorandum of Understanding, at http://www.ioseaturtles.org/.

380 Panel Report *US-Shrimp (Article 21.5 Malaysia)* 2001, para.5.83.

territorial concerns under Article XX GATT, as it stands, than would be permitted under public international law or competition law.[381]

The finding that the US could adopt measures with regard to sea turtle protection does not necessarily mean that the US could adopt a requirement for the use of TEDs. While the general threat to sea turtles is recognized in international instruments, there is less international support for the binding requirement to use TEDs, which makes it more challenging to accept that part of the measure as necessary. However, the question of the prescribed protection method must be considered separately from the question whether the US can protect sea turtles, even when located outside its territory (i.e. the extraterritorial element): both are subject to a necessity test. Having passed the extraterritoriality threshold, a Member still needs to comply with the other requirements of Article XX, including demonstrating why (the design of) the chosen measure is the least trade restrictive. The US would thus still need to demonstrate that the import ban on shrimp not harvested with TEDs was the least trade restrictive measure to reach the objective of turtle protection. With regard to the contribution of a measure to achieving its stated goal, the AB stated in *Brazil-Tyres* that even where the contribution of a law to protecting an environmental concern such as climate change is not immediately obvious because it is part of a broader program of which the impact can only be evaluated over time, that should not prevent a finding that measure is necessary.[382] In the case at hand, the contribution can indeed only be evaluated over time. Assessing the contribution of TEDs to the protection and conservation of sea turtles remains very challenging: not only due to the lack of systematic data collected,[383] but also due to other factors such as discrepancies between certification and the actual use of TEDs, and the political implications of trade embargoes, making it very difficult to attribute observations such as an increase in sea turtle populations to specific factors.[384]

381 See chapters 3 and 4 for a study on extraterritoriality under public international law and competition law.

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

383 There are a few exceptions, such as a study in northern Australia by David Brewer and others, 'The Impact of Turtle Excluder Devices and Bycatch Reduction Devices on Diverse Tropical Marine Communities in Australia's Northern Prawn Trawl Fishery' 2006, 81 Fisheries Research 176.

384 Interview with Dr. Jack Frazier, Smithsonian Institute, National Zoological Park, Conservation and Research Center, October 2015.

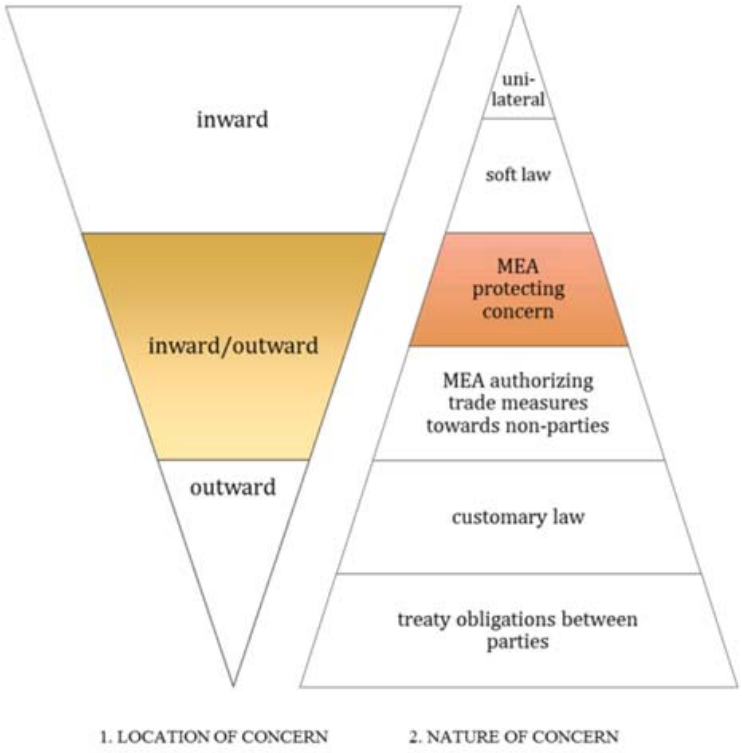

Figure 7. Full model US-Shrimp

8.2.3.4 Chapeau

Following the extraterritoriality analysis, a npr-PPM, like any other trade measure seeking justification, still needs to comply with the good faith requirements of the *chapeau* of Article XX. The analysis of the *chapeau* is thus not specific to npr-PPMs with an extraterritorial objective, but can offer additional safeguards against a possible overreach or abuse. This analysis of the *chapeau* does not form part of the decision tree, but is included in this assessment for the sake of completeness.

In its analysis under the *chapeau*, the AB in *US-Shrimp* focused on the inflexible nature of the measure,[385] the coercive effect of a country-based measure,[386] as well as the failure to engage in serious negotiations with countries

385 AB Report *US-Shrimp* 1998, para.177.
386 Ibid para.162.

other than the IAC parties.[387] Because of these elements, the US measure could not be justified under Article XX GATT. In the compliance proceedings, both the panel and the AB held that due to the good faith efforts by the US to reach multilateral agreement and the increased flexibility of the measure, the measure was compliant with the chapeau and thus could be justified under Article XX.[388]

With regard to the coercive effect on other states, the import ban was first phrased as a combination of a country-based and a process-based measure: either shrimp was harvested by commercial shrimp trawl vessels using TEDs or in countries that were certified by the US government.[389] Such certification could be granted where countries had adopted a regulatory programme for the protection of sea turtles that was comparable to that of the US and where the average take rate of bycatch was comparable to the US rate.[390] The US Court of International Trade ruled in October 1996 that the US had to apply the import ban to all shrimp imports as long as the country of origin had not been certified, thus including to TED-caught shrimp. In other words, the US had to ban the import of shrimp from any country not meeting certain policy conditions.[391] The US measure thus became a purely country-based or government-policy measure.[392] The panel reasoned that country-based measures cannot be accepted under the *chapeau* of Article XX, because 'if one WTO Member were allowed to adopt such measures, then other Members would also have the right to adopt similar measures on the same subject but with differing, or even conflicting, requirements', which would be a serious threat to the multilateral trading system.[393] For that reason the panel found the country-based measure to fall outside the scope of Article XX.[394] The AB did not fully agree with the panel's reasoning and emphasized that government-policy standards could in principle be justified under Article XX; however, the measure must be sensitive to the conditions in each country and the administrative process must meet minimum standards of transparency and procedural fairness. In complying with the AB decision, the US measure was revised to permit shrimp imports so long as the shrimp are harvested under conditions that do not adversely affect sea turtles, and to provide more flexibil-

387 Ibid para.166. The parties to the Inter-American Convention were at the time apart from the US: Brazil, Costa Rica, Mexico, Nicaragua and Venezuela.

388 Panel Report *US-Shrimp (Article 21.5 Malaysia)* 2001, paras.5.42;5.84;5.104. ; AB Report *US-Shrimp (Article 21.5 Malaysia)* 2001, para.144. Revised guidelines for the implementation of section 609 of Public Law 101-162.

389 See chapter 7.4.2.

390 1996 Guidelines, 61 Federal Register 17342 (19 April 1996), Pub L 101-162 para 609(b)(1), (b)(2), 103 Stat 1038.

391 Panel report *US-Shrimp* 1998, paras.7.6; 7.16.

392 Charnovitz (2002), 95.

393 Panel report *US-Shrimp* 1998, para.7.45.

394 Ibid para.7.51.

ity in the recognition of foreign programmes eligible for US certification.[395] Under the revised guidelines, it became possible to acquire shrimp from countries that had not received a country-wide certification under the government policy standard, when harvested using TEDs, allowing for a process-based standard in combination with the country-based standard.[396] Since every fisherman could in principle choose to use TEDs and export, the US measure should mainly be considered as a process-based measure.

With regard to the flexibility of a measure, the AB noted that conditioning market access on the adoption of a programme *comparable in effectiveness* (rather than *essentially the same)* can be allowed under Article XX as it allows the exporting Member to adopt a regulatory programme that is suitable to the specific conditions prevailing in his territory.[397] Discrimination results 'when the application of the measure at issue does not allow for any inquiry into the appropriateness of the regulatory program for the conditions prevailing in exporting countries'.[398]

8.2.4 Challenges

The main challenge for the extraterritoriality decision tree emerging from the analysis of the US sea turtle measure is the difficulty to determine environmental effects in light of insufficient scientific evidence. The number of factors and complex interaction to be considered in marine ecosystems, the challenge of systematic data collection, and the time span required for this type of research (long-term observations) make it an extremely difficult and enormous task to collect and present conclusive evidence. If there is a lack of scientific evidence demonstrating or rebutting the existence of environmental effects on the territory, and states were to adopt a precautionary approach to the conerns at issue, they must act with caution when the adopted measures affect other states. The wide international support for the conservation of sea turtles shows that even with the limited available knowledge, the international community is concerned about protecting the species. Even without knowing the exact magnitude of environmental effects, in light of what is known about the role of sea turtles in marine ecosystems, it is plausible that marine (and possibly also terrestrial) ecosystems will suffer. As already noted above, due

395 Revised Guidelines for the Implementation of Section 609 of Public law 101-162, 64 Federal Register 3086 (8 July 1999). The US Court of Appeals for the Federal Circuit issued a ruling in June 1998 that vacated the CIT decision of 1996 that would not allow the import of TED-harvested shrimp in countries that were not certified under Section 609.

396 Panel Report *US-Shrimp (Article 21.5 Malaysia)* 2001, para.5.107; Charnovitz (2002), 98.

397 AB Report *US-Shrimp (Article 21.5 Malaysia)* 2001, para.144.

398 AB Report *US-Shrimp* 1998, para.165. See for the expert opinions on the socio-economic factors that need to be taken into account when requiring the use of TEDs, Panel report *US-Shrimp* 1998, paras.5.142.

to the fact that the targeted sea turtle species are known to occur in US waters, it is similarly plausible that the US ecosystem will be affected. US action with regard to sea turtles, even those located outside its territory, can thus be permitted under the decision tree. However, in light of the lack of evidence and uncertainty about the environmental effects of different protection methods, it is crucial to put strong emphasis on international cooperation and deliberation, as well as consideration of alternative measures. In the absence of strong international support and agreement, the flexibility of a measure, and accepting alternative protective initiatives, is key. Environmental protection measures should be adaptable to the environmental, social and economic conditions prevailing in the countries or areas where they are to be applied.[399] The safeguards of the paragraphs of Article XX with regard to the design of the measure as well as the *chapeau* of Article XX play an important role in protecting against overreach by WTO Members, even where the extraterritoriality threshold is passed.

The outcome from the application of the decision tree to *US-Shrimp* does not differ from the AB's findings. However, where the AB relied on the 'sufficient nexus' between the US and the turtles, an approach that has been criticized for its ad hoc approach that might not hold in disputes dealing with less tangible environmental concerns, the decision tree allows for a more systematic and robust assessment of trade measures with extraterritorial effects. Where environmental effects on the territory of the regulating state are weaker, additional support for action can be found in international instruments of hard and/or soft law. A precautionary approach could furthermore be adopted where effects are still uncertain in light of the complexity and long-term materialization of environmental effects. *US-Shrimp* was already considered good precedent from an environmental perspective; but the current analysis has demonstrated that the AB's position was – despite its shortcomings – commendable from a legal perspective as well. The AB was correct in accepting weaker territorial effects within the regulating state under WTO law than would be required under public international law (and competition law), but should have expressed more clearly that and why it did so. The application of the decision tree to *US-Shrimp* has not only confirmed the AB's position but has been strengthened and systematized it by considering environmental effects on the territory in combination with support for the concern at issue in international environmental law.

399 Rio Declaration of Environmental and Development, UN Doc A/CONF151/26 (vol I) / 31 ILM 874 (1992), 1992, Principle 2. See also Panel report *US-Shrimp* 1998, para.7.52.

8.3 Illegal, Unreported and Unregulated Fishing

8.3.1 Measure and Context

The international community has increasingly realized the damaging economic, social and environmental impacts of illegal, unreported and unregulated fishing[400] (IUU Fishing). Illegal fishing activities include fishing activities by vessels that have no permission from the state in whose waters they are fishing; or, fishing vessels flying the flag of states that are party to a relevant regional fisheries management organization, but operating in contravention of the measures adopted by that organization; or, fishing vessels acting in violation of national laws applicable in maritime waters or international obligations held by the flagstate.[401] Unregulated fishing means fishing activities in the area of application of a relevant regional fisheries management organization by fishing vessels flying the flag of a state not party to that organization, contravening the measures of that organization; or in areas where there are no applicable measures in force, but where vessels are acting in a manner not consistent with responsibilities of the flag state for the conservation of living marine resources under international law.[402]

IUU Fishing constitutes a threat to the sustainable exploitation of living aquatic resources and to marine biodiversity, jeopardizing international efforts to promote better ocean governance.[403] Destructive fishing methods cause damage to fisheries habitats and result in high levels of by-catch of non-target species, such as marine mammals, turtles and seabirds.[404] Furthermore, IUU Fishing also has an impact on the socioeconomic situation of those fishermen who do abide by the rules on conservation and management of fisheries resources.[405] High demand for specific seafood products (e.g. shark fin), the global character of fisheries production chains allowing for money laundering, and the anonymity and transactional speed that exists within global markets for vessel flags, crews and vessels allow in particular for IUU Fishing. IUU

400 IUU fishing encompasses a wide range of fishing activities which can be considered in violation of or without regard to applicable international, regional or national fisheries regulations and standards. For a comprehensive definition and scope of illegal, unreported and unregulated fishing, see Mary Ann Palma, Martin Tsamenyi and William Edeson, *Promoting Sustainable Fisheries: The International Legal and Policy Framework to Combat Illegal, Unreported and Unregulated Fishing* (Brill/Nijhoff 2010) Chapter 2; Jens Theilen, 'What's in a Name? The Illegality of Illegal, Unreported and Unregulated Fishing' 2013, 28 International Journal of Marine and Coastal Law 533.

401 Council Regulation (EC) No 1005/2008 of 29 September 2008 Establishing a Community System to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing (IUU Regulation), 2008, Article 2(2).

402 Ibid Article 2(4).

403 Ibid recital (3).

404 Palma, Tsamenyi and Edeson(2010), 11.

405 IUU Fishing Regulation, 2008, recital (6).

Fishing can even overlap with other forms of maritime crime such as piracy and drug smuggling.[406] IUU Fishing can have negative consequences for food security as it can lead to the collapse of fisheries resources.[407] In light of these concerns, the Food and Agriculture Organization (FAO) adopted an international plan of action in 2002 to prevent, deter and eliminate IUU Fishing.[408] This voluntary Action Plan provides for a toolbox with measures with regard to e.g. monitoring, enforcement and economic incentives that can be used by flag states, coastal states and market states to combat IUU Fishing within their jurisdiction.[409] Overall, governance of the global fisheries economy is a decentralized, but relatively coherently coordinated, system of treaties and non-binding international and regional fisheries instruments and private initiatives by NGOs such as WWF and Greenpeace.[410]

Traditionally flag states have held a prominent position with respect to fisheries regulation and enforcement.[411] However, fishing vessels can circumvent IUU Fishing obligations by flying the flag of state that is not party to any regional agreement (this can be a flag of convenience, without any genuine link to the flag state). Flag states that are unwilling or unable to regulate vessels flying its flag considerably complicate fisheries management.[412] Indeed, if all flag states would adopt and implement principles contained in the United Nations Convention on the Law of the Sea (UNCLOS), the UN Fish Stocks Agreement,[413] the FAO Compliance Agreement and the FAO Code of Conduct, IUU Fishing would not be as problematic as it is today. Trade

406 Martin Tsamenyi and others, *Fairer Fishing: The Impact on Developing Countries of the European Community Regulation on Illegal, Unreported and Unregulated Fisheries* (Commonwealth Secretariat 2009) 7.

407 Palma, Tsamenyi and Edeson(2010), 4.

408 FAO, International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing, 2001. The Action Plan was adopted within the framework of the 1995 FAO Code of Conduct for Responsible Fisheries.

409 FAO International Plan of Action, Title IV.

410 See e.g. the setting up of a vessel black-list by Greenpeace at http://www.greenpeace.org/international/en/campaigns/oceans/pirate-fishing/Blacklist1/ or the development of tracking technology for vessels on onboard surveillance by WWF at https://www.worldwildlife.org/threats/illegal-fishing.

411 Olav Schram Stokke, 'Trade Measures and the Combat of IUU Fishing: Institutional Interplay and Effective Governance in the Northeast Atlantic' 2009, 33 Marine Policy 339, 340.

412 Ibid 341.

413 This agreement strengthens the duty to cooperate with other states on high seas fisheries by providing that only states that are members of a regional fisheries regime, or that agree to apply the conservation and management measures taken under such a regime, shall have access to the fishery. Enforcement mainly lies with flag-state responsibilities, such as preventing its vessels from engaging in high-seas fishing without a permit. Under the agreement, port states can conduct inspections of vessels and port states can prohibit landings or transshipment when it has been established that the catch has been taken in a manner contrary to the conservation and management measures on the high seas.

measures can be effective tools in finding a solution to this problem.[414] Rather than focusing on flag states, trade measures will focus primarily on port states, particularly on port control where access to the market can be limited or prohibited. While fishing vessels may avoid the authorities of flag states and coastal states, they must come into port to bring their fish to market, so port state measures may be more effective in deterring IUU Fishing because of their commercial importance.[415] The port is the market entry point, so it is a crucial economic choke point in the IUU Fishing supply chain. Whereas vessels could easily fly under a convenient flag to circumvent national or international regulation, the market choice is of great economic importance.

The EU is the world's largest importer of fish and fish products.[416] In an effort to improve global fisheries' sustainability and address IUU Fishing, the EU adopted the IUU Fishing Regulation 1005/2008 which stated explicitly that, as the world's largest market for fishery products, the 'Community has a specific responsibility in making sure that fishery products imported into its territory do not originate from IUU Fishing'.[417] The IUU Fishing Regulation provides for a range of control and enforcement measures primarily aimed at keeping illegally caught fish off the EU market and has been designed to ensure proper control of the supply chain for imported fishery products. The regulation applies to all IUU Fishing 'within the territory of the EU Member States, within Community waters, within maritime waters under the jurisdiction or sovereignty of third countries and on the high seas'.[418] In other words, all fishing activities on sea fall within the scope of the regulation, but fishing activities in internal waters of third states seem to be excluded.

Key elements of the IUU Fishing Regulation with trade implications are port control over third country fishing vessels, catch certification requirements, the establishment of a Community IUU vessel list, and the establishment of a list of non-cooperating third countries. The port control of third country vessels entails that landings or transshipments will only take place in desig-

414 Linda Chaves, *Illegal, Unreported and Unregulated Fishing: WTO-Consistent Trade Related Measures to Address IUU Fishing* (2000) para.14.

415 Blaise Kuemlangan and Michael Press, 'Preventing, Deterring and Eliminating IUU Fishing: Port State Measures' 2010, 40 Environmental Policy and Law 262, 264.

416 Developed states absorb more than 80% of total world fisheries imports in value terms, of which the EU accounts for appr. 40%, and Japan and the US for around 35%. Developing states are the largest exporters, at around 60% in quantity of total fish exports. Cumulative net exports of fisheries products from developing states far exceed export earnings from major commodities such as coffee, bananas, and rubber. See UN, FAO, Fact Sheet, the International Fish Trade and World Fisheries, June 2008, www.fao.org.

417 IUU Fishing Regulation, 2008, recital (9). The regulation was adopted in the framework of the Common Fisheries Policy and the Community Plan of Action for the Eradication of IUU Fishing, COM(2002) 180 final. The Regulation entered into force in 2010.

418 Ibid Article 1(3).

nated ports and upon presentation of a catch certificate.[419] Such catch certificate must be validated by the flag state of the fishing vessel, certifying that catches have been made in accordance with the applicable laws, regulations and international conservation and management measures[420] – as any flag state has a duty under international law that fishing vessels flying its flag comply with international rules on conservation and management of fisheries resources. Flag states that want to grant certificates must notify the European Commission on their applicable law and the necessary checks their public authorities can carry out.[421] The Commission shall cooperate with third countries to facilitate this process. Without a valid catch certificate, fishery products cannot be imported into the EU.

The Commission can furthermore put vessels suspected of IUU Fishing on a 'black list', including both vessels flying the flag of third countries and EU member states. This blacklist results among others in a prohibition to fish in Community waters and no authorization will be granted to enter into a port of a member state, except in case of *force majeure* (EU flagged vessels may only access their home port). EU member states shall also refuse the granting of their flag to IUU Fishing vessels.[422]

Next to the IUU vessel list, the European Commission can establish a list of non-cooperating third countries. A country may be identified as such if it 'fails to discharge the duties incumbent upon it under international law as flag, port, coastal or market State and to take action to prevent, deter and eliminate IUU Fishing'.[423] This duty includes ratification of the international IUU Fishing instruments, as well as membership to regional fisheries management organizations.[424] The importation into the EU of any fishery products caught by fishing vessels flying the flag of such countries shall be prohibited and catch certificates by that flag state will not be accepted.[425] It may be that the import ban only applies to a particular species or stock. The Commission can grant cautionary 'yellow cards', after which it engages in dialogue and

419 Such certificate must contain the name of the fishing vessel, home port and registration number, call sign, license number, information about the fishery product (type of species, catch areas, dates, weight, applicable conservation and management measures) and a declaration on export and import of the fishery product (if applicable). Catch documents and related documents validated in conformity with catch documentation schemes adopted by an RFMO will be accepted by the EU as catch certificates. Ibid Article 13.

420 Ibid Article 12.

421 Ibid Article 20.

422 Vessels can ask to review their status and to be removed from the list if evidence can demonstrate that the vessel did not engage in IUU fishing. Otherwise, a vessel can only be removed from the list if at least 2 years have lapsed since its listing during which time no further reports of alleged IUU fishing have been received (ibid Article 28.).

423 Ibid Article 31(3). Specific constraints of developing countries, the capacity of the competent authorities, the circumstances, the gravity of the IUU fishing manifestation etc. are taken into account by the Commission (ibid Article 31 (4.).

424 Ibid Article 31(5).

425 Ibid Article 38(1).

cooperation, before handing out the actual 'red card' that puts a third country on the list of non-cooperating third countries (thereby banning all imports from fishing vessels flying their flag). Countries such as Fiji, South Korea and Philippines have been yellow-carded, but were delisted after adopting new legislation and improving their monitoring and control systems. Belize was red-carded but also saw the threat of sanctions lifted after making the required changes. Sri Lanka, Cambodia and Guinea among others were red-carded in 2014, and their fisheries products are still banned from import.[426]

8.3.2 Extraterritorial effect

The extraterritorial effect of the EU IUU Fishing Regulation is apparent from the fact that EU port and market access is made dependent on fishing activities occurring in the High Seas or in the maritime waters of other states.[427] The EU thereby extends her prescriptive jurisdiction beyond the vessels flying an EU flag and vessels fishing in EU waters and Exclusive Economic Zones (EEZ). Surely, the measure is only activated once port or market access is sought. So are all npr-PPMs with an extraterritorial effect, which makes that element of little help in determining whether this extension of European jurisdiction is justified.

8.3.3 The decision tree applied

8.3.3.1 Inconsistency with substantive obligations under GATT

The IUU Fishing Regulation raises several questions under GATT. The prohibition of the importation or exportation on the basis of non-compliance with the catch certification requirement could be seen as a quantitative restriction under Article XI GATT, leading to an inconsistency and requiring the need for justification under Article XX. The catch certificate, containing information on

426 Fiji, Panama, Togo, and Vanuatu were yellow carded in 2012, South Korea in 2013, Philippines in 2014. Belize was red carded in 2014. All were delisted and had the threat of sanctions lifted (October 2013; South Korea and Philippines in April 2015). Sri Lanka, Cambodia and Guinea were also red carded in 2014, and their fisheries products are still banned from import. Ghana and Curacao received a yellow card in November 2013, and are developing new legislation and improving their monitoring, control and inspection systems. As a result, the process of dialogue and cooperation with these three countries is still ongoing. Papua New Guinea received a formal warning by the Commission in June 2014, whereas Solomon Islands, Tuvalu, Saint Kitts and Nevis and Saint Vincent and the Grenadines were formally warned in December 2014. Thailand was yellow carded in April 2015.

427 Theilen (2013), 548.

e.g. vessel, catch area and date, authorizations, etc.,[428] must be validated by the flag state. This certificate could be considered as a (non-automatic) import licensing requirement under Articles 1(1) and 3 of the WTO Import Licensing Agreement, as the submission of documentation is required as a prior condition for importation.[429] The competent authorities of the importing member states (mostly fisheries agencies or services[430] rather than customs) must check the certificate.[431] Import licenses are considered quantitative restrictions, incompatible with Article XI GATT.[432] Likewise will the import ban pursuant to the flag state black list result in a violation of Article XI GATT.

However, even if enforced at the border, the IUU Fishing Regulation could also be considered an internal measure under Article III GATT, if the Regulation were applicable to both imported and domestic products.[433] The Regulation applies to fishing within and outside the EU, and to EU and third country fishing vessels.[434] In order to determine whether it violates Article III:4 GATT, likeness of the products and less favourable treatment of the imported products must be established. With regard to likeness, IUU Fish products and non-IUU Fish products (i.e. legally harvested fish) can be considered directly competitive or substitutable. It could perhaps be argued that based on consumer preferences (depending on evidence and market research) these products are not like,[435] or an argument could be made based on compliance with international obligations: illegally harvested products cannot be like legally harvested products.[436] In the absence of any conclusive guidance on those points, based on the other criteria such as physical characteristics, tariff classification and end use, illegal and legal fish can be considered directly competitive. The group of imported products (products that seek importation) is like the group of domestic products (products that seek market access domestically) as both include in principle illegally and legally harvested fish products. Imports of

428 IUU Fishing Regulation, 2008, Annex II.

429 Despite this finding, the catch certificate requirement has not been notified by the EU to the Committee on Import Licensing.

430 List of Member States and their competent authorities concerning Articles 15(2), 17(8) and 21(3) of Council Regulation (EC) No 1005/2008 (OJ 2015/C 93/07).

431 IUU Fishing Regulation, 2008, Article 17.

432 The exemptions for fisheries under Article XI:2(c) GATT do not apply to the catch certificates at hand. See also WTO, *India – Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products* Panel Report 1999, WT/DS90/R, para.V.75.

433 Ad Note to Article III GATT.

434 IUU Fishing Regulation, 2008, Article 1.

435 See chapter 2.

436 See for an argumentation on likeness of legal and illegal products in the context of Timber, Duncan Brack, Alexander Chandra and Herjuno Kinasih, *The Australian Government's Illegal Logging Prohibition Bill: WTO Implications* (2012) 9; Dylan Geraets and Bregt Natens, 'The WTO Consistency of the European Union Timber Regulation' 2014, 48 Journal of World Trade 433, 443; Andrew Mitchell and Glyn Ayres, 'Out of Crooked Timber: The Consistency of Australia's Illegal Logging Prohibition Bill with the WTO Agreement' 2012, 29 Environmental and Planning Law Journal 462, 468.

IUU Fish products are prohibited, as is bringing domestically caught IUU Fish products on the market. The question is whether the IUU Fishing Regulation then accords less favourable treatment to the group of imported products, so as to protect domestic products. Treatment no less favourable requires an effective equality of competitive opportunities, or in other words, a determination whether the conditions of competition are modified to the detriment of the group of imported products.[437] As the regulation applies both to imported and domestic fish products, there is no *de jure* violation. As the catch certification requirement applies both to vessels flying EU and third country flags, and all vessels can be blacklisted, there is no a *de facto* violation either. All certificates must be validated by the flag state, and refer back to among other international and regional conservation and management measures.[438] While there might be differences in the particular procedures in the flag state, the EU measure does not accord protection to domestic products. With regard to inspections and port measures for EU vessels, that are not included in the regulation, differentiation between EU vessels and third country vessels does not lead to less favourable treatment of the third country vessels either, as the member countries are already subject to at least equally strict rules for inspection and reporting.[439] Accordingly, the IUU Regulation is unlikely to violate Article III GATT.

An argument could be made that the EU rules violate Article V GATT on freedom of transit. The EU herself brought that argument in a dispute with Chile over swordfish: Chile prohibited the transshipment of swordfish catches (taken from the High Seas bordering Chile's EEZ) from foreign and Chilean vessels in Chile's ports when the catches were made in contravention of Chile's swordfish conservation rules.[440] The prohibition to unload the fish in Chile's ports was seen as a significant obstacle to further export. The EU is now imposing a similar measure: fish cannot be unloaded or transshipped in EU ports without a valid catch certificate in order to deter and prevent IUU Fishing. Because of the reference to international obligations in the catch certificates, the EU could argue that the regulations imposed are nevertheless 'reasonable' under Article V:4 GATT. If that is not the case, the denial of port access for transshipment without a valid certificate could be considered a violation of Article V GATT.

437 See chapter 2.

438 IUU Fishing Regulation, 2008, Articles 15.

439 For all EU fisheries legislation, see http://ec.europa.eu/fisheries/cfp/index_en.htm.

440 WTO, *Chile – Measures Affecting the Transit and Importing of Swordfish* withdrawn, WT/DS193. The case was withdrawn in 2010 after mutual agreement between the parties was reached after a decade of negotiations. See e.g. Peter-Tobias Stoll and Silja Vöneky, 'The Swordfish Case: Law of the Sea v Trade' 2002, 65 Zeitschrift für Ausländisches Öffentliches Recht und Völkerrecht 21, 21.

8.3.3.2 Environmental objective and location of the concern

Assuming that a violation of substantive WTO rules is established, the extraterritoriality question arises when seeking justification under Article XX GATT. Measures aiming to protect fish stocks could fall both within Article XX(b) and XX(g) as necessary for the protection of animal life and health, and relating to the conservation of exhaustible resources.[441] The question is whether there is a jurisdictional limitation to these environmental objectives: are paragraphs (b) and (g) limited to environmental concerns within the territory of the regulating state, or can members also rely on these exceptions to address concerns outside their jurisdiction?

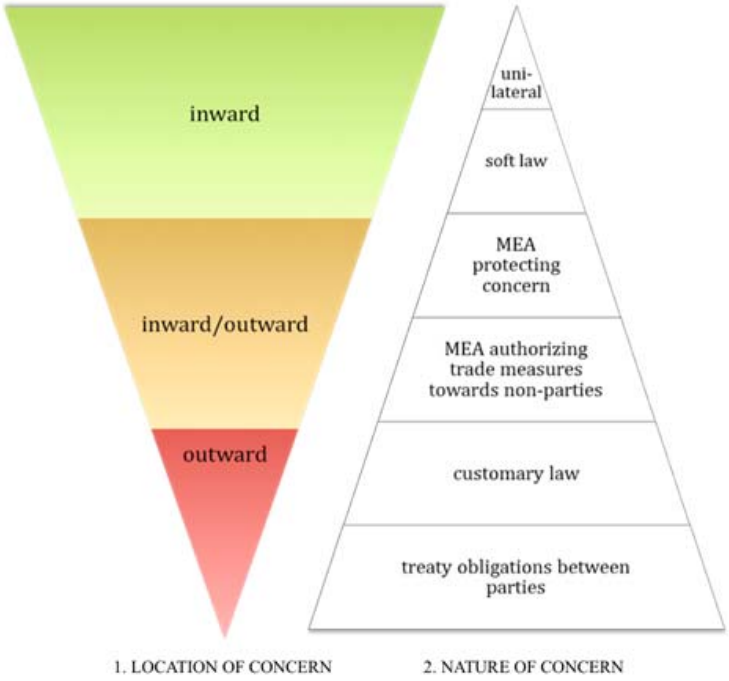

Figure 8. Step 1

The proposed extraterritoriality decision tree first considers the location of the concern. The IUU Fishing Regulation has an inward- and an outward-

441 FAO, *The State of World Fisheries and Aquaculture: Opportunities and Challenges* (2014). According to the report fish stocks are exhaustible. See also AB Report *US-Shrimp* 1998; GATT Panel *US-Tuna (Mexico)* 1991; GATT panel *US-Tuna (EEC)* 1994.

looking purpose, as it addresses both the depletion of fish within EU waters and outside EU waters. Following the AB's reasoning in *US-Shrimp*, finding a 'sufficient nexus' due to the some sea turtles traversing US waters, all migratory fish stock and species which may at one time or another traverse EU waters would lead to the establishment of a sufficient nexus. In response to the unconvincing sufficient nexus requirement, I propose to look at the environmental effects on the territory of the imposing country. In this case, evidence would need to demonstrate that the depletion of certain fish stock has an impact on biodiversity, marine ecosystems or has, for instance, affected EU food supply, thus leading to direct, substantial and foreseeable effect on EU environment. If fishing resources are shared and clearly present in EU waters, evidencing an impact on biodiversity should not be a big hurdle.[442] If no direct and substantial environmental effects on EU territory could be demonstrated (for instance when a certain species is concerned that is not migratory and has little impact on global biodiversity), the measure will be considered outward-looking and will not pass the extraterritoriality threshold. In such case, states must seek other means to incentivize others states as well as producers to take action against IUU Fishing.

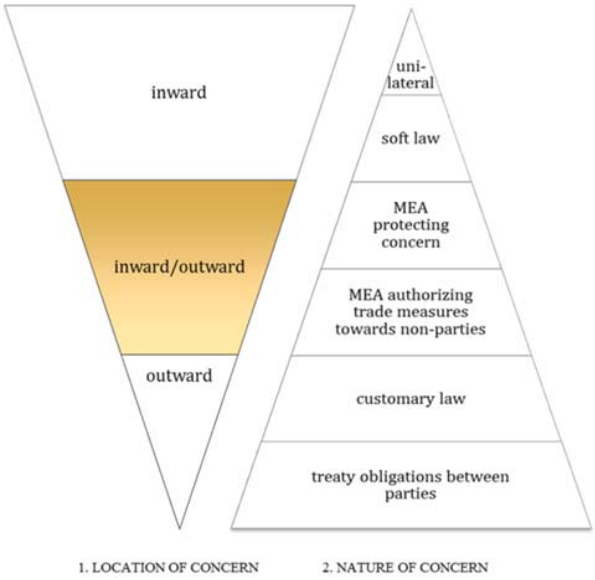

Figure 9. Step 1 IUU Fishing

442 See for instance FAO, 'The State of World Fisheries and Aquaculture: Opportunities and Challenges', 2014; FAO/UNEP, Report of the Expert Meeting on Impacts of Destructive Fishing Practices, Unsustainable Fishing, and Illegal, Unreported and Unregulated (IUU) Fishing on Marine Biodiversity and Habitats, September 2009, FAO report nr 932, FIRF/R932; Africa Progress Panel, 'Protect our Fisheries', at www.africaprogresspanel.org/fishing; WWF on overfishing, at www.worldwildlife.org/threats/overfishing.

8.3.3.3 Necessity and recognition of the concern

With regard to requirement of 'related to' or necessity, determining the degree of necessity involves a process of weighing and balancing a series of factor, which results in an ad hoc, contextual assessment of each measure.[443] In *Korea-Beef*, the AB stated that the more vital or important the concerns are that a measure is intended to protect, the easier it would be accept that measure as necessary.[444] In that light, the necessity requirement is linked to the international support for an international concern.[445] The more common the interest, the more easily a measure will be considered necessary. Necessity refers to the question whether less-trade restrictive measures can reach the same objective. A measure adopted by a WTO Member based upon or suggested by international instruments would find additional support for deeming a measure necessary. If a measure goes beyond what is proposed by international instruments, the imposing Member would need to demonstrate why it opted for this specific measure in order to demonstrate necessity.[446]

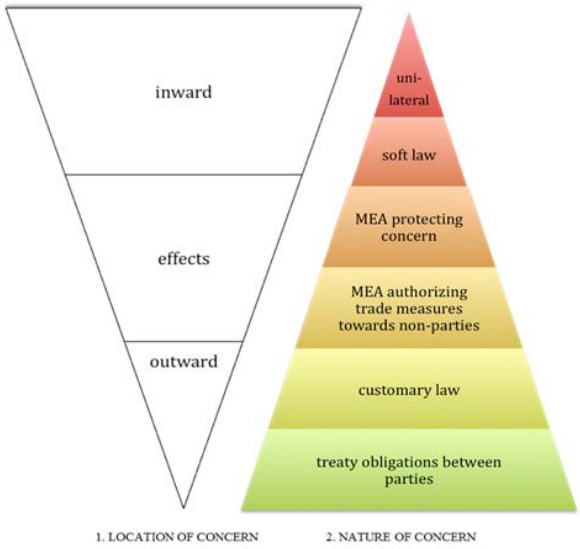

Figure 10. Step 2

443 AB Report *Korea-Various Measures on Beef* 2000; AB Report *EC-Asbestos* 2001; AB Report *Brazil – Retreaded Tyres* 2007.

444 AB Report *Korea-Various Measures on Beef* 2000, para.162.

445 See chapter 7.2.3.

446 The burden of proof to come up with less-trade restrictive alternatives is on the complaining party. See AB Report *Brazil – Retreaded Tyres* 2007, para.156. AB Report *US-Gambling* 2005, para.309; AB Report *EC-Tariff Preferences* 2004, para.88; AB Report *Thailand-Cigarettes (Philippines)* 2011, para.180.

The general concern about sustainable fish resources management and IUU Fishing is widely recognized through international and regional instruments, some of which are binding while others are non-binding. UNCLOS provides for the principles of sustainable and shared use of the high seas.[447] The FAO Compliance Agreement[448] and the UN Fish Stocks Agreement[449] are both binding instruments in a broader fisheries framework. Soft-law instruments include the FAO Code of Conduct for Responsible Fisheries[450] and different UN resolutions on sustainable fisheries.[451] Whereas these instruments do not deal directly with IUU Fishing, many issues dealt with in these instruments are related to IUU Fishing, providing the catalyst for the development of more specific instruments to address IUU Fishing, starting with the 2001 FAO Plan of Action (IPOA-IUU).[452] There are also environment-related instruments of relevance to combating IUU Fishing, such as CITES,[453] CMS,[454] the Convention of Biological Diversity (CBD)[455] and the Agenda 21.[456]

The FAO IPOA-UU is the most specific international instrument to IUU Fishing. It is a voluntary, non-binding agreement, but many of its provisions have been given binding legal effect through their incorporation in national, regional and international legal instruments. Furthermore, even if the instrument was initially non-binding, some norms could develop into customary international law. International instruments forming part of the broader framework to implement the IPOA-IUU include the FAO 2005 Rome Declaration on IUU

447 United Nations Convention on the Law of the Sea, UNTS 1833; 21 ILM 1261, 1982, Part VII

448 FAO, Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas, UNTS 2221; 33 ILM 968, 1993. This agreement focuses among others on the issue of reflagging.

449 UN, Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, 2167 UNTS 88; 34 ILM 1542 1995.

450 FAO, Code of Conduct for Responsible Fisheries, Adopted at the 28th Session of the FAO Conference, Rome, 31 October 1995.

451 See e.g. Resolution 46/215 on a global moratorium on large-scale pelagic drift-net fishing; Resolution 49/116 on unauthorized fishing in zones of national jurisdiction and its impact on the living marine resources; Resolution 49/118 on fisheries by-catch and discards and their impact on the sustainable use of living marine resources.

452 FAO International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing, 2001. See also Palma, Tsamenyi and Edeson(2010), 57.

453 CITES, 1973.

454 Convention on the Conservation of Migratory Species of Wild Animals, 1979.

455 UNCED, Statement of Principles for a Global Consensus on the Management, Conservation and Sustainable Development of All Types of Forest, 1992.

456 United Nations Conference on Environment and Development, Agenda 21, 1992, Chapter 17 (Protection of the Oceans.

Fishing,[457] the FAO Model Scheme of Port State Measures[458] and the binding Agreement on Port State Measures to Combat IUU Fishing.[459]

Next to the international instruments, a number of regional instruments also regulate IUU Fishing through regional fisheries management organizations (RFMOs). States can either become a member of RFMOs or agree to apply their conservation and management measures. Non-members or non-participants in RFMOs are still under the international obligation to cooperate in the conservation of straddling and migratory fish stock, as laid down by other agreements.[460] Relevant RFMOs[461] include the Commission for the Conservation of Southern Bluefin Tuna (CCSBT), the Northwest Atlantic Fisheries Organisation (NAFO), the Northeast Atlantic Fisheries Commission (NEAFC[462]), the Commission for the Conservation of Antarctic Marine Living Resources (CCAMLR), the Indian Ocean Tuna Commission (IOTC), the Inter-American Tropical Tuna Commission (IATTC), the Western and Central Pacific Fisheries Commission (WCPFC) and the International Commission for the Conservation of Atlantic Tunas (ICCAT). The measures adopted by these RFMOs include the establishment of IUU vessel lists (for vessels flying the flag of non-contracting parties, as well as contracting and cooperating non-contracting parties), monitoring systems, port inspection schemes and trade-related measures such as prohibition of fish landings from IUU vessels.

The specific measures adopted by the EU IUU Fishing Regulation are mostly based on the mentioned international and regional instruments. For instance, the port state measures find support in the binding FAO Agreement on Port State Measures, as well as a number of RFMOs.[463] These port state measures include specific designation of ports, advance notice of port entry, vessel inspections and prohibition of landing and transshipment of vessels engaged

457 The 2005 Rome Declaration on Illegal, Unreported and Unregulated Fishing, Adopted by the FAO Ministerial Meeting on Fisheries, Rome, 12 March 2005. The Declaration was adopted to enlist the commitment of states to fully implement international fisheries instruments.

458 FAO, Model Scheme on Port State Measures to Combat Illegal, Unreported and Unregulated Fishing, 2007.

459 FAO, Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing, Appendix V of the FAO Council, Hundred and Thirty-Seventh Session, Rome, 28 September-2 October 2009, Report of the 88th Session of the Committee on Constitutional and Legal Matters (CCLM), 23-25 September 2009, CL 137/5, 2009 2009.The Agreement will enter into force thirty days after the twenty-fifth instrument of ratification, acceptance, approval or accession.

460 UN Fish Stocks Agreement, 1995, Article 17; 1993, preamble; Agenda 21, 1992, para.17.60.; FAO Code of Conduct, Article 7.1.5.

461 There are over forty regional fisheries organizations, of which ten have been established under FAO and the others created under international agreements between three or more contracting parties. These organizations can be divided into scientific research organizations, advisory and regional coordination organizations and management organizations (RFMOs).

462 For discussion of the NEAFC regime, see Stokke (2009).

463 See among others ICCAT, NAFO, NEAFC, CCAMLR and IOTC.

in IUU Fishing.[464] Furthermore, similar measures have been adopted by a range of developed and developing countries in their national legislation,[465] as well as in Plans of Action of regional cooperation.[466]

Catch certifications or other documentation that is required to accompany fish in order to identify its origin is commonly used in RFMOs. ICCAT, IATTC, IOTC and CCSBT have trade documentation schemes in order; CCAMLR requires catch documentation; NAFO and NEAFC have requirements for product labeling similar to a catch certification.[467] The vessel black list is a common and effective measure adopted by RFMOs to combat IUU Fishing.[468] Members and cooperating non-members of the RFMOs shall take the necessary measures to ensure that no business is conducted with these black listed vessels and that proper actions are taken. ICCAT, NEAFC, CCAMLR, IATTC and IOTC require their members and cooperating non-members to prohibit the imports of fish from vessels on the IUU list.[469]

The non-cooperating states black list could be seen as more trade-restrictive, as such a measure discriminates against vessels that operate consistently with international regulations but fly a 'wrong' flag.[470] However, similar measures

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464 Interestingly it almost came to a WTO dispute between Chile and the EU on port access restrictions, but the case was withdrawn after mutual agreement was reached (DS193). In 1991 Chile unilaterally banned imports of swordfish to protect dwindling South Pacific stocks. In 2000 the EU requested consultations with Chile on the issue. One of the claims of the EU was precisely the lack of international agreement supporting the Chilean measure.

465 See for an overview of national legislation on port state measures, FAO Database on Port State Measures (Portlex), at http://www.fao.org/legal/databases/portlex/en/. See for instance US Magnuson-Stevens Fishery Conservation and Management Reauthorisation Act prohibits import of fishery products from offending countries (16 USC 1826(a), (b)(3) and (b)(4)); New Zealand fisheries Act 1996, Amendment Act no 2 1999, Art113A; Australia, Fisheries Management Act 1991, Division 5A, Subdivision AA; Norway, Legal Order 6 August 1993.

466 For instance the Lake Victoria Fisheries Organization adopted a Plan of Action in 2004; the Southern African Development Community has made a statement of Commitment in 2008; the Southeast Asian Region adopted a Regional Plan of Action to Promote Responsible Fishing in 2007.

467 See also IPOA-IUU, 2001, para.69.

468 For instance ICCAT, IATTC, IOTC, WCPFC, SEAFO, NEAFC, NAFO and CCAMLR have established IUU vessel lists. See also ibid para.81.4. Several regional regimes for tuna management (ICCAT, IOTC) have even introduced white lists (as opposed to black lists), whereby only explicitly named vessels are allowed to land or transship their catches in member-state ports.

469 ICCAT, Recommendation by ICCAT to establish a list of vessels presumed to have carried out IUU Fishing activities in the ICCAT Convention Area, 02-23 GEN, 2003, para.9(e); NEAFC, Scheme of Control and Enforcement, Article 45(2)(e); CCAMLR, Conservation Measure 10-07 (2006), Article 11(f); CCAMLR, Conservation Measure 10-06 (2008), Article 18(vii); IATTC, Resolution C-05-07, Article 9(e); IOTC, Resolution 09/03, para.12(e).

470 Stokke (2009), 346. While this is true, in practice states can very easily reflag, and those vessels who are sincere in there intentions and indeed comply with IUU obligations could reflag to another state that is not blacklisted. Surely, there might be other considerations taken into account by vessels when deciding under which flag to fly, however, flags of

have been adopted by, for instance, the ICCAT, and thus find at least some international support. According to the IPOA-IUU, 'trade-related measures should only be used in exceptional circumstances, where other measures have proven unsuccessful to prevent, deter and eliminate IUU Fishing, and only after prior consultation with interested States'.[471] The EU clearly refers to international obligations before blacklisting a non-cooperating country. In light of the multiple negotiations and available instruments, the EU could argue that other measures have proven unsuccessful when a country fails to respect its international obligations with regard to IUU Fishing. A country is only blacklisted after at least six months of formal dialogue and consultation between the European Commission and the affected state after being yellow-carded. Nevertheless, due to the limited international support, this part of the measure will be under closer scrutiny under the extraterritoriality decision tree, even if inward environmental effects of IUU activities outside the EU can be shown within the EU.[472]

Applying the extraterritoriality decision tree to this analysis, the broad international support can be classified within the categories of treaty obligations between parties, MEAs authorizing trade measures towards non-parties, MEAs protecting the concern at issue as well as soft law. As the key elements and trade-related measures of the IUU Regulation find their support in binding treaty obligations, as well as MEAs recognizing trade measures, it can be concluded that the international support for and recognition of the concern would further justify the extraterritorial effects of the measure, and the extraterritoriality threshold would be passed for the IUU Fishing Regulation. This conclusion carries most weight for measures taken against imports of fish species explicitly covered under a treaty or RFMO, but similar measures taken on the basis of MEAs, recognizing the concern of species not covered by RFMOs, would also seem to have sufficiently widespread support through the more general agreements on IUU Fishing.

Specific elements in the design of the IUU Fishing Regulation, unrelated to the extraterritorial nature of the regulation, that could furthermore come up in a necessity assessment,[473] can for instance relate to port control require-

convenience with suboptimal environmental standards should not be actively supported. Such a blacklist can thus act as an incentive, either for the vessels to pressure the flag state to adapt its legislation if they want to fly that flag, or for the flag state to take action if they do not want to lose vessels flying their flag. It could also be argued that controlling each vessel is more resource-intensive than blocking all vessels flying a certain flag, and thus less effective. The sole measure of checking vessels would thus not reach the same objective to effectively combat IUU fishing.

471 IPOA-IUU, 2001, para.66.

472 See *infra* at 8.3.4. Tsamenyi and others(2009), xiv.

473 See chapter 7. The extraterritoriality threshold finds its legal basis in the paragraphs of Article XX, but passing the threshold does not invalidate the rest of the analysis of Article XX, whereby the measure as a whole must not be more trade-restrictive than necessary, as well as the conditions of the chapeau of Article XX.

ments for vessels, whereby one could wonder whether the IUU Fishing Regulation foresees in sufficient safeguards to protect third country vessels against delays in the procedures. A requirement that inspections 'cause minimum disturbance to the vessel's activities and cause no deterioration in fish quality' was proposed by the Commission but not included in the final IUU Fishing Regulation. Clear and transparent procedures must be developed, in order to avoid inconsistencies and discrimination in the implementation of port state measures.[474] The FAO Agreement on Port State measures also recognizes that a balance must be sought between combating IUU Fishing and appropriate safeguards against abuse of port state powers. Furthermore, with regard to the blacklisting of IUU vessels, whereas this listing is in line with international fisheries agreements, the application of interim measures may be necessary to ensure procedural fairness.[475]

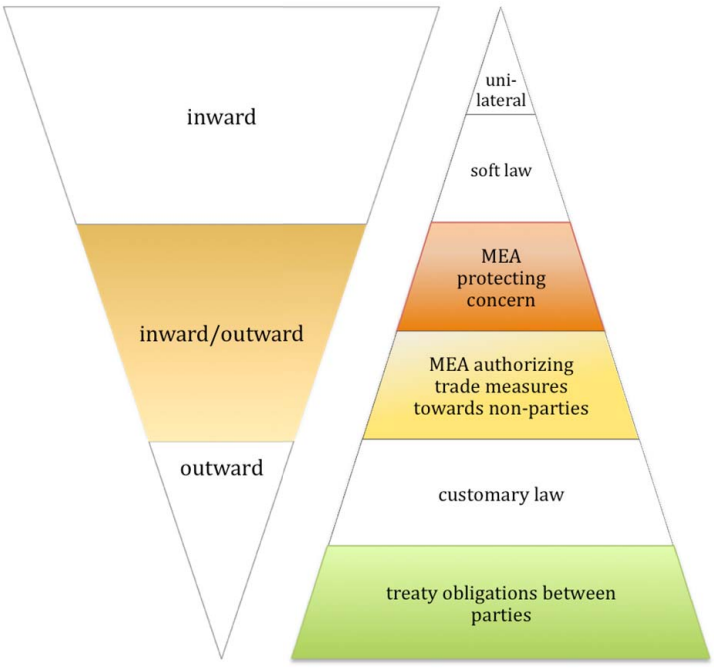

Figure 11. Full model IUU Fishing

474 Tsamenyi and others(2009), 46.
475 Ibid 50.

8.3.3.4 Chapeau

Even if a measure passes the extraterritoriality threshold, and the extraterritorial aspect of the measure is no impediment for justification of a measure, a trade measure seeking justification still needs to comply with the conditions of the *chapeau* of Article XX GATT. The *chapeau* consists of three elements, which can be interpreted both together and apart: a measure shall not discriminate arbitrarily nor unjustifiably between countries where the same conditions prevail, nor shall the measure be a disguised restriction on international trade. These conditions can be seen as an expression of the principle of good faith,[476] which in this context can be reflected in a duty to cooperate and show respect for multilateral and international interests. In *US-Shrimp*, the AB emphasized the need for flexibility in a measure, as rigid and coercive measures are considered inconsistent with the *chapeau*.[477]

With regard to international interests and respect for multilateralism, the IUU Fishing Regulation follows up on multiple attempts at the regional and international level to come to agreement to combat IUU Fishing, whereby trade-restrictive measures have only been adopted after less restrictive measures have failed (such as control and inspection measures by the flag state). As has been outlined above, a range of binding and non-binding instruments prescribe actions against IUU Fishing. The EU in its Regulation has mainly implemented these obligations. Trade restrictions embedded in a multilateral framework make it more difficult to tailor provisions for protectionist reasons.

The measure can be considered coercive in the sense that it refers to the international obligations, and expects third country flag states and fishing vessels to comply with these obligations. These obligations are thus not unilaterally imposed – rather the EU acts as an enforcer of these international norms through its IUU Fishing Regulation. The flag state blacklist in particular is coercive in the sense that it requires countries to adapt their policies (rather than only target fishing vessels), and bring them in line with their international obligations. Non-cooperating states whose imports will be banned are identified based on transparent, clear and objective criteria relying on international standards,[478] whereby specific circumstances related to the resources and development level of the country can be taken into account. Depending on the transparent and objective application of these criteria, this would not lead to discrimination between countries where the same conditions prevail. However, for reasons of effectiveness and the fact that these countries are 'coerced' into 'adopting' their own international obligations rather than unilaterally imposed requirements, it can be argued that a country-based measure could be accepted in this case. Any blacklisting is furthermore combined with assist-

476 AB Report *US-Shrimp* 1998, para.158.
477 See chapter 2 and chapter 7.
478 IUU Fishing Regulation, 2008, recital (31).

ance and cooperation between the EU and the affected states and a state will first be warned by a yellow card before an import ban (red card) is made effective. The IUU Fishing Regulation has been mentioned in the WTO's Trade Policy Review, but no aspect has been indicated as potentially problematic.[479]

The vessel black list, leading to port measures against vessels, is not arbitrary as objective and well-defined criteria can be determined in order to place vessels on the list. However, at this point the EU vessel list is solely based on vessel lists of RFMOs. In that regard it should be noted that each RFMO has its own procedures and criteria in placing vessels on a list, which at times can be politically motivated.[480] It is important that objective criteria are applied and provisions for transparency are respected. Where the Regulation is more specific in its requirements, the Regulation allows for sufficient flexibility: for instance, with regard to the required catch certificates, the EU will also accept similar catch documentations and related documents that are in conformity with catch documentation schemes by RFMOs.[481]

8.3.4 Challenges

The main challenge for the extraterritoriality discussion in the IUU Fishing case study is to what extent states can, through trade measures, enforce international obligations held by other states. The flag state blacklist as established by IUU Fishing Regulation goes beyond what is required by international law and is only rarely applied by RFMOs. As has been explained above, all imports from states on this blacklist are banned by not accepting any catch certificate issued by that state. As no fish or fish products can be imported without such a catch certificate, all imports from those states are effectively banned. In order to be delisted, the EU requires states to implement their international obligations related to sustainable and IUU Fishing and adopt the necessary legislation. By targeting states rather than fishing vessels, the purpose of the measure is to create an effective incentive for the state to adapt its legislation. The EU is not just demanding that fish are being harvested with respect to certain standards, but is demanding real legislative change. As the EU only requires the implementation of existing international obligations of the targeted states,[482] and does not force them to implement new and/or EU-imposed (higher) norms

479 See e.g. Trade Policy Review European Union, WT/TPR/S/284, 28 May 2013, p.129; Trade Policy Review European Communities, WT/TPR/S/214, 6 April 2009, p.114.

480 Isabella Lövin, *European Parliament Report on Combating Illegal Fishing at the Global Level – The Role of the EU* (2011) 14. However, regional schemes are open to regime outsiders (cooperating states) and a trend can be discerned that provisions for transparency are more respected. Stokke (2009), 347.

481 IUU Fishing Regulation, 2008, Article 13.

482 As outlined in e.g. the FAO Compliance Agreement, the UN Fish Stocks Agreement, the relevant RFMOs etc. See *supra* at 8.3.3.3.

(norm creation), the EU is acting with the objective of international norm enforcement and regime support.[483]

While this blacklisting is indeed proving to be rather effective, in light of the number of states that have been yellow- or red-carded in recent years and have effectively adapted their legislation,[484] such actions remain controversial. Can the EU act as an enforcer of international obligations? Is it a duty of powerful markets, to use their commercial weight to the benefit of the global environment?[485] If it can be accepted that states have the right not to use their market for detrimental effects on health or environment, can it then also be accepted that states will use their market as an incentive for other states to take positive action? If powerful states act upon such duty or responsibility, they should also have the responsibility to ensure that the targeted states are able to comply with the requirements, by offering assistance and the necessary management tools. In the case at hand, that is indeed what the EU has been doing: countries can ask for assistance at any stage, but after receiving a formal warning (yellow card), the Commission will engage in formal assistance and cooperation to help the targeted countries, in order to avoid a red card. Also after a country has received a red card will the EU assist that country in taking the necessary measures so that the ban can be lifted.

Applying the decision tree to cases of norm enforcement, I would propose the following. Firstly, how strict is the requirement of norm enforcement? Does a measure require that products are produced in line with international standards? If so, the regular steps of the decision tree can be followed: if a measure is inward-looking or there are environmental effects on the territory of the regulating state, and the required standards find support for the concern in international instruments, the measure would pass the extraterritoriality threshold. Does the measure, however, require a legislative change, in other words coerce another country into changing its laws (country-based measure),

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483 Unilateral trade measures as critical elements of a solution to the global fisheries problem, such as the EU's IUU Fishing Regulation, are suggested by Rashid Sumaila, *Trade Policy Options for Sustainable Oceans and Fisheries* (The E15 Initiative: Strengthening the Global Trade and Investment System for Sustainable Development, 2016) 17; Margaret A. Young, *Trade-Related Measures to Address Illegal, Unreported and Unregulated Fishing* (The E15 Initiative: Strengthening the Global Trade and Investment System for Sustainable Development, 2015).

484 Fiji, Panama, Togo, and Vanuatu were yellow carded in 2012, South Korea in 2013, Philippines in 2014. Belize was red carded in 2014. All were delisted and had the threat of sanctions lifted (October 2013; South Korea and Philippines in April 2015). Sri Lanka, Cambodia and Guinea were also red carded in 2014, and their fisheries products are still banned from import. Ghana and Curacao received a yellow card in November 2013, and are developing new legislation and improving their monitoring, control and inspection systems. As a result, the process of dialogue and cooperation with these three countries is still ongoing. Papua New Guinea received a formal warning by the Commission in June 2014, whereas Solomon Islands, Tuvalu, Saint Kitts and Nevis and Saint Vincent and the Grenadines were formally warned in December 2014. Thailand was yellow carded in April 2015.

485 See chapter 7.6.1.

then I would argue that such a measure could be accepted only to the extent that what is required is already a binding obligation on the targeted country. The country black list as regulated by the EU IUU Fishing Regulation, could thus be accepted to the extent that the required legislative changes are based solely upon binding international obligations under international and regional fisheries agreements.

8.4 Aviation in the European Emission Trading System

8.4.1 Measure and Context

One example of EU environmental regulation that has received a lot of attention since its adoption is the inclusion of aviation emissions into the European Emission Trading System (EU ETS).[486] The EU's rule that required emissions of all flights departing from or arriving at a European airport to be included in the EU ETS has led to strong international protests[487] which eventually urged the Commission to put a hold on the full application of the Directive, limiting its scope to intra-EEA flights.[488] To allow time for negotiations on a global-market-based measure applying to aviation emissions under the ambit of the International Civil Aviation Organization (ICAO), the EU ETS requirements are currently suspended for flights to and from non-European countries.[489]

The inclusion of aviation into the EU ETS will be studied as the main example of the extraterritorial reach of measures taken in light of climate change action. In April 2015, a Regulation was adopted to monitor and report emissions from shipping, in order to contribute to designing an international system to reduce emissions in the maritime sector.[490] From 1 January 2018,

486 Directive 2008/101/EC of the European Parliament and of the Council of 19 November 2008 amending Directive 2003/87/EC so as to Include Aviation Activities in the Scheme for Greenhouse Gas Emission Allowance Trading within the Community, 2008.

487 See Grand Chamber, *Air Transport Association of America and Others v Secretary of State for Energy and Climate Change* CJEU 21 December 2011, C-366/10. See below: New Delhi Declaration; China's threat to cancel Airbus order; The US adopted the 'European Union Emissions Trading Scheme Prohibition Act' in 2011.

488 Decision No 377/2013/EU of the European Parliament and of the Council of 24 April 2013 derogating temporarily from Directive 2003/87/EC establishing a scheme for greenhouse gas emission allowance trading within the Community, 2013.

489 The Commission is to report back on the issue after the 2016 ICAO Assembly. Ibid Article 5.

490 Regulation (EU) 2015/757 on the monitoring, reporting and verification of carbon dioxide emissions from maritime transport, and amending Directive 2009/16/EC, 2015. See Article 1, 'This Regulation lays down rules for the accurate monitoring, reporting and verification of carbon dioxide (CO2) emissions and of other relevant information from ships arriving at, within or departing from ports under the jurisdiction of a Member State, in order to promote the reduction of CO2 emissions from maritime transport in a cost effective manner.'

companies will have to monitor CO_2 emissions for each ship[491] and from 2019, they will have to submit an emissions report concerning the CO_2 emissions for each ship.[492] Market-based mechanisms to reduce emissions would then only be foreseen in the medium to long term, with a strong preference for finding a multilateral solution.[493] As the monitoring obligations extend to all distances covered, also those outside waters under EU jurisdiction, a similar extraterritorial element as under the aviation directive is present. However, the nature of the obligations differs ships are only subject to a minotoring requirement at this state, whereas aviation submissions were already to be included into the EU ETS. I will refer back to the shipping example where relevant. The scope of the EU ETS might be broadened in the future, an example of which may be found in the Commission proposal to require emission allowances for importers of goods that would take emissions of the production process into account, so as to address carbon leakage.[494] No legislative proposal has yet been drafted in this respect.

The issue of climate change needs little introduction. While scientists differ on the exact scope of the consequences of climate change and on the required contributions, there is no doubt that too little is being done today, while emissions continue to increase globally.[495] Climate change is an outstanding example of a global concern, affecting us all, but some countries and people

491 Ibid Article 8. Companies are free to determine the monitoring method, as long as the method is consistent and accurate.

492 Ibid Article 14. Member States shall set up a system of penalties for failure to comply with the monitoring and reporting obligations (ibid Article 20.).

493 European Commission, *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: Integrating Maritime Transport Emissions in the EU's Greenhouse Gas Reduction Policies* (2013) 8. There is currently no international agreement on shipping emissions, but the International Maritime Organization (IMO) adopted in 2011 the Energy Efficiency Design Index (EEDI), which sets compulsory energy efficiency standards for new ships aiming to prevent air pollution from ships, and the Ship Energy Efficiency Management Plan (SEEMP), a management tool for shipowners. There is no agreement yet on any market-based measure to limit or reduce emissions. The Commission's 2011 White Paper on transport puts forward that the EU's emissions from maritime transport should be cut by at least 40% of 2005 levels by 2050. International shipping is not yet covered by the EU's emission reduction target.

494 Directive 2009/29/EC of the European Parliament and of the Council of 23 April 2009 amending Directive 2003/87/EC so as to improve and extend the greenhouse gas emission allowance trading scheme of the Community, 2009, recital (25); European Commission, *Analysis of Options to Move Beyond 20% Greenhouse Gas Emission Reductions and Assessing the Risk of Carbon Leakage* (2010) 11; Kati Kulovesi, Elisa Morgera and Miquel Munoz, 'Environmental Integration and Multi-Faceted International Dimensions of EU Law: Unpacking the EU's 2009 Climate and Energy Package' 2011, 48 Common Market Law Review 829, 860; Nicole Ahner, 'Final Instance: World Trade Organization – Unilateral Trade Measures in EU Climate Change Legislation' 2009, EUI Working Papers; Quick(2011); Yassen Spassov, 'EU ETS: Upholding the Carbon Price Without Incidence of Carbon Leakage' 2012, 24 Journal of Environmental Law 311.

495 Intergovernmental Panel on Climate Change, *IPCC Fifth Assessment Report* (2013-2014). The IPCC reports can be found at http://www.ipcc.ch/. See also Bacchus (2016), 10.

considerably more than others. The most affected victims are not necessarily the largest emitters (rather the opposite) and those who are less affected cannot be allowed to ignore the effects of their actions. Every state has the responsibility to take action in accordance with its capabilities, as recognized in a number of international agreements, starting with the United Nations Framework Convention on Climate Change of 1992 (UNFCCC).[496]

International negotiations to mitigate the effects of climate change have been developed under the multilateral framework established by the UNFCCC.[497] Under this agreement, the Kyoto Protocol was adopted in 1997 (entered into force in 2005), by which a number of industrialized countries[498] agreed to reduce their greenhouse gas emissions by an average of 5,2% below 1990 levels in the period 2008-2012.[499] The Kyoto Protocol distinguishes between developed countries carrying a heavier burden (Annex I countries) and non-Annex I countries, because the former are considered principally responsible for the high level of historical greenhouse gas emissions, and because they have greater capacity to take actions to reduce emissions. This distinction is an expression of the principle of 'common but differentiated responsibilities and respective capabilities' (CBDRRC).[500]

In December 2012, the Doha Amendment to the Kyoto Protocol was adopted, introducing commitments for a second commitment period running from 2013 to 2020. The parties[501] agreed to reduce emissions by at least 18%

496 UNFCCC, 1992. The notion that a state is responsible for pollution originating within its borders but traversing into another jurisdiction is also one of the most developed principles of international environmental law. See Nash(2012), 167.

497 UNFCCC, 1992.

498 37 countries and the EU committed to these reductions. For a list of participants, see http://maindb.unfccc.int/public/country.pl?group=kyoto. A significant absentee is the US.

499 Kyoto Protocol, 1997. The Kyoto Protocol was adopted in Kyoto, Japan, on 11 December 1997 and entered into force on 16 February 2005. The detailed rules for the implementation of the Protocol were adopted at COP 7 in Marrakesh, Morocco, in 2001, and are referred to as the 'Marrakesh Accords.' Its first commitment period started in 2008 and ended in 2012.

500 UNFCCC, 1992, preamble; Article 4. The principle of CBDR-RC is one of the biggest challenges of environmental law, because it is debated how to best interpret and apply this principle of differentiation. The distinction between Annex 1 and non-Annex 1 countries can said to be no longer a reflection of the actual situation today, especially in light of emission contributions by countries such as China or India. See below for a further discussion.

501 All 192 Parties to the Kyoto Protocol have agreed to the Doha Amendment establishing the second commitment period. However, only developed country Parties listed in the Kyoto Protocol's Annex B take on emission commitments under the Protocol. 38 developed country Parties, including the EU, its Member States and Iceland, have taken on legally-binding emission commitments for the second period. Japan, New Zealand and the Russian Federation, which did have commitments for the first period, have not taken on commitments for the second period. This means that the second commitment period covers a much smaller share of global emissions – around 14-15% – than the first. 38 countries have ratified the Amendment by July 2015. The EU has not yet ratified the Amendment, but the necessary

below 1990 levels.[502] In December 2015, a new binding[503] (albeit obligations of conduct rather than strictly of result so it will be very hard to enforce) agreement on climate change was adopted at the COP21 in Paris (due to enter into force in 2020).[504] Rather than a top-down agreement, prescribing national measures, the Paris deal is based on bottom-up contributions by individual countries. Before Paris, countries have agreed to publicly outline what post-2020 climate actions they intend to take, known as their 'Intended Nationally Determined Contributions' (INDCs).[505] These national contributions now carry the name of NDC's under the Agremeent.[506] The Paris Agreement has set out that the parties will pursue efforts to limit the increase in the global average temperature to 1,5ºC of pre-industrial levels.[507] However, the irony of this ambitious target is that two of the most polluting sectors, aviation and shipping, have been excluded from the Agreement – which may seriously jeopardize the fulfillment of the objective to limit the temperature increase to 1,5ºC or keep it well below 2ºC.

In light of the commitments made under Kyoto, the EU launched its ETS in 2005, as the first and biggest emissions trading scheme in the world.[508] The EU ETS is a cap-and-trade system aimed at reducing greenhouse gas emissions cost-effectively. The total amount of greenhouse gases that can be emitted by factories, power plants and other installations in the system is 'capped' or limited.[509] Participants receive a number of emission allowances

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legislation was adopted by the Council on 13 July 2015. The EU Member States will need to ratify the Amendment nationally in parallel. For an overview see http://unfccc.int/kyoto_protocol/doha_amendment/items/7362.php.

502 The EU and Iceland committed to a reduction of 20%.

503 For a discussion of the legal form of the Agreement, see Joost Pauwelyn and Lilliana Andonova at http://www.ejiltalk.org/a-legally-binding-treaty-or-not-the-wrong-question-for-paris-climate-summit/; Jorge Vinuales at http://www.ejiltalk.org/the-paris-climate-agreement-an-initial-examination-part-iii-of-iii/; and Annalesi Savaresi at http://www.ejiltalk.org/the-paris-agreement-a-rejoinder/.

504 The agreement was prepared by the Ad Hoc Working Group on the Durban Platform for Enhanced Action (ADP). For updates, see http://unfccc.int/bodies/body/6645.php. The Agreement can be found at http://unfccc.int/resource/docs/2015/cop21/eng/l09r01.pdf; For an analysis of the engagements, see http://paristext2015.com/.

505 For an overview of all INDCs, see http://www4.unfccc.int/submissions/indc/Submission%20Pages/submissions.aspx. The US for instance aims at reducing its emissions by 26-28% below 2005 levels by 2025. China wants to lower carbon dioxide emissions per unit of GDP by 60% to 65% from 2005 levels by 2030.

506 Paris Agreement, 2015, Articles 3;4.

507 Ibid Article 2(1)(a).

508 Directive 2003/87/EC of the European Parliament and of the Council of 13 October 2003, establishing a scheme for greenhouse gas emission allowance trading within the Community and amending Council Directive 96/61/EC 2003. (EU ETS Directive).

509 From the start, a number of energy-intensive industrial sectors were covered by the scheme, such power stations, combustion plants, oil refineries, steel works, as well as factories making cement, glass, bricks, etc. Altogether the EU ETS covers around 45% of total greenhouse gas emissions from the 28 EU countries. The EU ETS now covers more than

based on historical emissions (benchmarks of sectoral best performing installations)[510] that they can trade on the emissions market: to sell, if they have a surplus, or to buy additional allowances when needed (either from participants in the EU ETS or other international credits created by the Kyoto Protocol). In the first years of the EU ETS the majority of emission allowances was given for free to the participants, but auctioning is becoming the main method of allocating allowances.[511] Businesses now have to buy an increasing proportion of their allowances at auction. The limit on the total number of allowances available ensures that the allowances have a value. Installations must measure and report their emissions and surrender one allowance for every tonne of CO_2 emitted during annual compliance periods. They will be heavily fined upon failure to do so. The total number of allowances is gradually reduced so that total emissions will drop: in 2020 emissions should be 21% lower than in 2005. The proportion of free allowances also decreases over time (so the proportion of needed allowances to be purchased will increase), thereby providing the financial incentive to participants to cut emissions. The goal is that the EU ETS as the largest cap-and-trade scheme worldwide can serve as a model and that over time similar national or regional schemes can be linked to the EU scheme.[512]

The aviation (and shipping) sectors are major contributors emitters of greenhouse gases.[513] Even though aviation emissions only account for 3%

11,000 power stations and industrial plants in 31 countries, as well as emission from aviation. See http://ec.europa.eu/clima/policies/ets/index_en.htm.

510 Commission Decision of 27 April 2001 determining transitional Union-wide rules for harmonized free allocation of emission allowances pursuant to Article 10a of Directive 2003/87/EC (2011/278/EU).

511 See http://ec.europa.eu/clima/publications/docs/factsheet_ets_en.pdf.

512 The EU ETS is a complex scheme that is currently in phase 3, after a three-year pilot period (phase one – 2005-2007), and phase two coinciding with the first commitment period of the Kyoto Protocol (2008-2012). The European Commission is currently revising the system for phase 4 (2021-2030), see http://ec.europa.eu/clima/policies/ets/revision/index_en.htm. For an overview of its flaws and successes, see e.g. A. Denny Ellerman and Paul L. Joskow, *The European Union's Emissions Trading System in Perspective* (2008); Martijn Verdonk and others, *Evaluation of Policy Options to Reform the EU Emissions Trading System: Effects on Carbon Price, Emissions and the Economy* (2013); Tim Laing and others, *Assessing the Effectiveness of the EU Emissions Trading System* (2013); Friends of the Earth Europe, *The EU Emissions Trading System: Failing to Deliver* (2010); Stefan Weishaar, *Emissions Trading Design: A Critical Overview* (Edward Elgar Publishing Ltd 2014).. For an overview of the current linking negotiations, see http://ec.europa.eu/clima/policies/ets/linking/index_en.htm.

513 Someone flying from London to New York and back generates roughly the same level of emissions as the average person in the EU does by heating their home for a whole year. Direct emissions from aviation account for about 3% of the EU's total greenhouse gas emissions. The large majority of these emissions comes from international flights. By 2020, global international aviation emissions are projected to be around 70% higher than in 2005 even if fuel efficiency improves by 2% per year. ICAO forecasts that by 2050 they could grow by a further 300-700%. Shipping accounts for around 4% of EU emissions. (European Commission at http://ec.europa.eu/clima/policies/transport/aviation/index_en.htm).

of EU emissions, and 2% of global emissions, air transport remains the least environmental-friendly transport method, and the ICAO estimates that these numbers can increase to 15-20% of global emissions by 2050.[514] By including global aviation emissions into the EU ETS, the EU has the potential to cover almost 60% of international aviation emissions.[515] No binding commitments were made for either aviation or shipping under the Kyoto Protocol, even though domestic aviation emissions were taken into account under the binding emission reduction targets. However, states failed to agree on how to tackle international aviation emissions mainly because they disagreed on how to allocate responsibility for these emissions. Annex I countries did agree to pursue the 'limitation or reduction of emissions of greenhouse gases from aviation through the International Civil Aviation Organization' but have been unable to do so.[516] The ICAO is a specialized UN Agency that serves as a forum for cooperation on civil aviation matters for its 191 members. Even though there has been discussion on environmental protection measures and emission reduction schemes ever since the 1990s, in 2004 the ICAO still had not come any closer to agreement on how to limit or reduce emissions from aviation. It adopted a resolution, endorsing the development of a global emissions trading scheme for aviation, as well as the idea of including aviation in existing emission trading schemes, but also urging states to refrain from unilateral action awaiting further discussions.[517]

The EU acted upon this ICAO 'proposition' by including aviation in its emission trading scheme: in 2009, Directive 2008/101 was adopted on aviation into the EU ETS. From 1/1/2012 onwards, emissions from all domestic and international (commercial) flights arriving at or departing from European airports (EU+EFTA) were to be covered by the EU ETS. Not only emissions from within EU airspace, but from the entire flight, including over the high seas and airspace of third countries, would be covered.[518] The entire flight refers to an uninterrupted flight, thus for flights that transit only the last leg of the journey counts.[519] Under the system, operators would only be allowed to fly as many ton-kilometers as are covered by the allowances allocated to them, or acquired on the market. Airlines' allowances would be allocated based on the historical emissions from the period 2004-2006 and calculated through a formula taking account of fuel consumption. A percentage of allowances would

514 The UK Committee on Climate Change, 'International Aviation', at www.theccc.org.uk.
515 Scott and Rajamani (2012), 474.
516 Kyoto Protocol, 1997, Article 2.
517 ICAO Assembly Resolution A35-5 (2004), Appendix I, paragraph 2(c).
518 There is a *de minimis* exception for commercial air transport operators operating 2 flights a day or less, or emitting less than 10000 tonnes of CO2/year.
519 Under this system 75 states have no operator with flights to the EU, and 23 have commercial operators that qualify under the *de minimis* exception. (See presentation by A. Runge-Metzger, Aviation and Emission Trading, ICAO Council Briefing (29 Sept 2011), 24, at http://ec.europa.eu/clima/policies/transport/aviation/docs/presentation_icao_en.pdf).

be auctioned. Free allocations were to be given to new entrants and to existing airlines that are experiencing considerable growth. If a third state would have measures in place for reducing emissions from aviation, the Commission would be obliged to seek to achieve an 'optimal interplay' between the EU and the foreign measures, in close consultation with the third state. This could then, for instance, lead to an exemption from the Directive.[520]

Despite the ICAO's 2004 endorsement of the idea to include emissions from aviation in emission trading systems, this unilateral EU action was raised great controversy among states or airline operators.[521] In 2009, the US Air Transport Association of America together with American, Continental and United Airlines (ATA and others) challenged the validity of (the implementing measures of) Directive 2008/101 and their inclusion in the EU ETS through a British Court,[522] which turned to the Court of Justice of the European Union (CJEU) for a preliminary ruling.[523] They claimed the Directive was unlawful as it was in breach of international treaties (the 1944 Chicago Convention on International Civil Aviation, the Kyoto Protocol and the EU-US Open Skies Agreement) because the EU ETS imposed a form of tax on fuel consumption; as well as principles of customary international law because the EU was seeking to apply the EU ETS beyond the EU's territorial jurisdiction.[524] The CJEU, in

520 Aviation Directive, 2008, Article 25a.

521 In September 2007 (after the Commission's proposal) a resolution was passed at the ICAO Assembly urging its members 'not to implement an emissions trading system on other contracting states' aircraft operators except on the basis of mutual agreement between those states'. See ICAO Assembly, A36-22: Consolidated Statement of Continuing ICAO Policies and Practices Related to Environmental Protection.; A coalition of 26 countries opposing the EU ETS signed the New Delhi Agreement, including India, the US, China, the Russian Federation, Japan, Brazil and Saudi Arabia. ('coalition of the unwilling'); The US adopted the 'European Union Emissions Trading Scheme Prohibition Act' in 2011, making it illegal for US airlines to comply with the EU ETS requirements; China as well has forbidden its airlines to comply with EU ETS obligations, after blocking a billion dollar order of Airbus aircrafts by Hong Kong Airlines, citing that as a retaliatory measure against the EU ETS. See also Schiano di Pepe(2014), 292.

522 High Court of Justice of England and Wales, Queen's Bench Division, preliminary reference to CJEU on 8 July 2010.

523 CJEU *ATAA-case* 21 December 2011.

524 In particular, the Chicago Convention is claimed to forbid states to impose taxes, duties and charges on airline operators; the Kyoto Protocol requires aviation emissions to be addressed through the UN's International Civil Aviation Authority (ICAO); the Open Skies Agreement states that aircraft that enter, depart from or are within the territory of a party, are governed by the laws and regulations of that party (Art.7); that fuel load is exempted from taxes, duties or charges (Art.11); and that there shall be no discrimination between EU and US airlines when it comes to the adoption of environmental measures, as to ensure fair competition (Art.15(3)).
The principles of customary international law referred to by the claimants are the sovereignty of states over their airspace, the illegitimacy of claims to sovereignty over the high seas, the freedom to fly over the high seas and that aircraft flying over the high seas should be governed by the laws of the country in which they are registered, save as expressly provided for by international treaty.

a controversial and much criticized judgment, rejected all claims and found the Directive to be valid and compatible with international law.[525] Nevertheless, in 2012 the EU decided to 'stop the clock' on international aviation[526] into the EU ETS for one year to allow for a constructive dialogue within the ICAO, showing that the EU would not be the one to stand in the way of an international agreement.[527] The ICAO set up a high-level policy group tasked with proposing options for a market-based emission reduction measure. The Commission's decision to postpone the application of the EU ETS to aviation was conditional upon results coming out of the ICAO negotiations by the end of 2013. Reactions to the decisions were mixed: while European airline carriers feared a two-tier system, other airline associations reacted more positively.[528] Others still opposed the inclusion of intra-EU flights.[529] For the period 2013-2016 the legislation has been amended so that only emissions from flights within the European Economic Area fall under the EU ETS.[530] In October 2013,

525 CJEU *ATAA-case* 21 December 2011. The Court observed that the directive is not intended to apply as such to aircraft flying over the high seas or over territory of the EU or third states and does not infringe the principle of territoriality nor the sovereignty of third states, as the scheme is only applicable when aircraft are physically in the territory of the EU, where they are subject to unlimited jurisdiction of the EU (para.124). Rather, it is only if the operators of such aircraft choose to operate a commercial air route arriving at or departing from an airport situated in the EU that they are subject to the EU ETS (para.127). Nor is the directive in breach with the customary principle of freedom to fly over the high seas since an aircraft only flying over the high seas is not subject to the EU ETS (only when it touches ground in the EU) (para.126). As for the fact that the entire flight is covered by the EU ETS, and not only the distance within EU airspace, the Court states that the EU aims at a high level of environmental protection (Art.191(2) TFEU) and that therefore, the EU legislature may decide to only permit commercial activities if they comply with criteria established by the EU, designed to fulfill such environmental objectives – in particular when such objectives follow from international agreements such as the Kyoto Protocol. (para.128) Furthermore, certain factors contributing to pollution of air, sea or land territory of the MS can originate from activities occurring partly outside of that territory (para.129).
Much has been written about the judgment, see among others Christina Voigt, 'Up in the Air: Aviation, the EU Emissions Trading Scheme and the Question of Jurisdiction' 2011-2012, 14 Cambridge Yearbook of European Legal Studies 475; Sanja Bogojevic, 'Legalising Environmental Leadership: A Comment on the CJEU's Ruling in C-366/10 on the Inclusion of Aviation in the EU Emissions Trading Scheme' 2012, 24 Journal of Environmental Law 345.

526 EU ETS obligations for intra-EU flights were not suspended, also with regard to non-EU based airlines.

527 European Commission Memo, 12 November 2012, 'Stopping the clock of ETS and aviation emissions following last week's ICAO Council'.

528 Holman Fenwick Willan LLP, Aerospace EU & Regulatory, 'EU ETS Update: Stopping the Clock – Where Do We Go From Here?', February 2013, p.2.

529 The US for instance passed into law its anti-ETS bill (approved by the House of Representatives the day after the Commission announced the suspension).

530 'Stop the Clock' Decision, 2013.; The first fine was imposed by the Belgian government on a Saudi airline in May 2015, see http://www.euractiv.com/sections/transport/first-major-airline-fined-breaking-aviation-ets-law-314673?utm_source=EurActiv+Newsletter&utm_

the ICAO Assembly reached agreement to develop a global market-based mechanism by fall of 2016 that would be applied by 2020. In 2017, the Commission will need to report to the European Parliament and the Council on the temporary modification to the inclusion of aviation into the EU ETS, in light of the ICAO 39th Assembly outcome in fall 2016.[531]

8.4.2 Extraterritorial effect

The extraterritorial effect of the original aviation Directive (which is currently 'on hold' for those flights to and from non-European countries) lies in the fact that airlines have to participate in the EU ETS whereby emissions from the entire flight are covered, thus including those emissions of the part of the flight that falls outside EU jurisdiction (EU airspace). Airline operators that fail to comply with the ETS requirements will be fined. The CJEU's main argument to reject any extraterritoriality claims was that the measure is only activated through physical presence in the EU, i.e. by landing at or departing from a EU airport. As the aircraft are at that point physically in the territory of the EU, they are subject to unlimited jurisdiction of the EU.[532] While that is true, it has been indicated on multiple occasions in this thesis that that trigger does not negate the extraterritorial effect of the measure. The decision tree will be applied to see whether this extension of European jurisdiction is justified.

What is peculiar in the example of climate change is that despite the (almost) general recognition of the seriousness of the climate threat, it has proven to be very difficult to agree upon stringent and binding commitments, and there are plenty of 'excuses' (and undoubtedly, plenty of pressure from powerful actors) to avoid responsibility.[533] In that regard, states can feel

campaign=cf33f9ad3a-newsletter_daily_update&utm_medium=email&utm_term=0_bab5f0ea4e-cf33f9ad3a-245619626.

531 Regulation 421/2014 of the European Parliamant and the Council of 16 April 2014 amending Directive 2003/87/EC establishing a scheme for greenhouse gas emission allowance trading within the Community, in view of the implementation by 2020 of an international agreement applying a single global market-based measure to international aviation emissions, Article 1.

532 CJEU *ATAA-case* 21 December 2011, para.124. AG Kokott argued that the EU merely induced or influences behaviour abroad, but does not compel certain behaviour and the Aviation Directive is therefore compatible with international law. (para.50)

533 Despite the difficulties that need to be overcome regarding scientific measuring methods etc, states' political preferences play an important role as well. This is of course inherent to the international legal system. However, the example of climate change shows particularly well the conflict between different approaches. The EU for instance advocates a top-down, multilateral and internationally driven model with binding targets, while the US for instance favours a bottom-up approach, whereby parties can define their own commitments and actions unilaterally. See Kati Kulovesi, 'Climate Change in EU External Relations: Please Follow My Example (or I Might Force You)' in Elisa Morgera (ed), *The External Environmental Policy of the European Union* (Cambridge University Press 2012) 121.

compelled to complement the insufficient actions taken at the international level with domestic measures. However, numerous studies show that isolated action will not only lead to negative economic consequences domestically, but can also have a negative impact on the climate globally through carbon leakage.[534] In that regard, in order to reach the most effective outcome through unilateral action from an environmental perspective, all states *need* need to get involved. By doing so, the effect of any environmental action will be more significant, creating an incentive for other countries to commit to environmental commitment themselves (domestically, bilaterally and/or multilaterally), if only to have a say in the decisions made. The unilateral actions taken by the EU in the Aviation Directive (as in the Shipping Regulation) encourage such action, and are even contingent upon it. The extension of the EU ETS, or in other words the extraterritorial effect, can be avoided if other states take action, and if the goods or services are subject to adequate climate change regulation in those states or through an international system.[535]

8.4.3 The decision tree applied

8.4.3.1 Inconsistency with substantive obligations under GATT and GATS

The first question that arises with regard to aviation is whether the EU measure illegally restricts airline services, or in other words: is there an inconsistency with GATS? Airline services provide a Mode 1 supply of a service, which is the supply of a service from the territory of one Member into the territory of another Member.[536] The GATS Annex on Air Transport Services exempts any measures affecting 'traffic rights' or 'services directly related to the exercise of traffic rights' from the application of the GATS.[537] Traffic rights are defined as the right to 'operate and/or to carry passengers, cargo and mail for remuneration (…) within or over the territory of a Member, including points to be served, routes to be operated, types of traffic to be carried, (…) tariffs to be charged'.[538] The Aviation Directive does not directly affect traffic rights, it imposes an additional condition that airline operators need to comply with when landing or departing from EU airports. While arguably related to the

534 Joshua Meltzer, 'Climate Change and Trade – The EU Aviation Directive and the WTO' 2012, 15 Journal of International Economic Law 111, 119.

535 Aviation Directive, Article 25a. Scott and Rajamani (2012), 472.

536 GATS, Article I:2(a).

537 GATS, Annex on Air Transport Services, para.2.

538 GATS, Annex on Air Transport Services, para.6(d). These have been laid down in the 1944 Chicago Convention on International Civil Aviation, as well as the multilateral Transit Agreement and Transport Agreement, and over 2500 bilateral agreements. See WTO, Air Transport and the GATS, Documentation for the First Air Transport Review under the GATS, 2006, pp192-216. See also Meltzer (2012), 125.

terms of authorization to operate air services in a WTO Member's territory,[539] it is unclear to what extent this really affects or directly relates to traffic rights. Furthermore, the Directive does not impose a tariff, as was held by the CJEU,[540] because the costs (or possibly the gains for well-performing operators) depend on the airline's performance, as well as whether the home state has an emission reduction scheme in place.[541] Thus, GATS might still apply to the Directive, despite the Annex on Air Transport Services.

The Annex also stipulates that the GATS does not reduce or affect obligations under bilateral and multilateral agreements[542] and that the DSB may only be invoked when dispute settlement proceedings in bilateral and other multilateral agreements have been exhausted.[543] The point is to ensure the primacy of the ICAO system over WTO rules, where there is overlap.[544] However, that requires that the relevant dispute settlement bodies have competence over the matter, and that a dispute must arise with regard to their respective agreements. The only ruling on this matter by the CJEU did not find any violations of ICAO obligations.[545]

If the GATS were to apply and dispute settlement were available, it could be argued that the EU measure violates the MFN obligation under Article II:1 GATS. The measure can have a disproportionate effect on services and service suppliers in certain countries: the longer the distance covered, the higher the costs. The advantage granted would thus be directly linked to origin.[546] Furthermore, the exemption for airline operators whose home state has equivalent measures in place could violate the requirement to grant any advantage immediately and unconditionally to all WTO Members. Most of the other obligations under the GATS only apply to the extent that a Member has made specific commitments. Bartels has argued that the EU's commitments in Mode 2 (consumption abroad) in tourism services could be relevant, which could lead to a possible inconsistency with the national treatment obligation under Article XVII GATS, as flight ticket prices might become more expensive for flights

539 Article 6 of the Chicago Convention lays down the right to fly into or transit third states' territories, or to land for technical reasons, but any air services over the territory must be authorized by that state, and must be operated 'in accordance with the terms of such authorization'.

540 CJEU *ATAA-case* 21 December 2011.

541 Aviation Directive, 2008, Article 25a.

542 Annex on Air Transport Services, para.1.

543 Annex on Air Transport Services, para.4.

544 Lorand Bartels, 'The Inclusion of Aviation in the EU ETS: WTO Law Considerations' 2012, ICTSD Programme on Trade and Environment, 23. Lorand Bartels, 'The WTO Legality of the Application of the EU's Emissions Trading System to Aviation' in CL Lim and Bryan Mercurio (eds), *International Economic Law After the Global Crisis: A Tale of Fragmented Disciplines* (Cambridge University Press 2015).

545 CJEU *ATAA-case* 21 December 2011.

546 Bartels (2012), 24.

originating outside the EU, compared to intra-EU flights.[547] If an inconsistency is established, justification can be sought under the environmental exception of Article XIV(b) GATS.[548]

The EU aviation scheme also has implications for goods transported by airplanes and could thus be governed by GATT as well.[549] The CJEU determined that the EU's aviation scheme is not a tax measure[550] or any type of fiscal measure. The measure is not a charge either, as it will depend on the performances of the airline operators whether they will be charged, or be able to sell surplus allowances. In order to fall within the scope of Article III:2 GATT, the measure must be an internal charge: as airline operators are only charged upon entry or departure from EU airports, the charge incurs only within the EU. The imported and domestic goods must furthermore be like or directly competitive which will depend on the facts of the case and the specific goods in question, but there is little reason that the use of airfreight will make them unlike. Furthermore, the charge applied to imported goods must be in excess of that applied to like domestic goods, for which the smallest amount of excess is too much.[551] Non-EU flights might cover longer distances, and depending on their performance, are thus likely to emit more CO_2, an excess cost that the airline operator may pass through to cargo rates. However, the distance from North-Africa to Southern Italy might be much shorter than from the North of Sweden to Greece. Airline operators may also decide to make a stop-over at an airport close to Europe, thereby limiting the application of the aviation scheme to only the last distance covered. Nevertheless, overall, it is likely that the costs for non-EU flights will be higher than for intra-EU flights, and that when they are passed through on cargo rates, non-EU goods will indirectly be charged higher.

If the aviation scheme were considered a non-fiscal measure, the measure might be considered a quantitative restriction under Article XI GATT as a border measure, or under Article III GATT as an internal measure.[552] Under Article III:4 GATT, it could be argued that increased cargo rates would affect the internal sale of imported goods. If the imported and domestic products are

547 Ibid 25.

548 For the purpose of the analysis, justification will only be dealt with under Article XX GATT. However, the extraterritoriality decision tree can be transposed to Article XIV(b) GATS.

549 The same regulatory scheme can be affect trade in goods and services, see AB *EC-Bananas III* 1997, para.211.

550 CJEU *ATAA-case* 21 December 2011. The Court found that the scheme was not a tax or a charge because it was 'not intended to generate revenue for the public authorities, does not in any way enable the establishment, applying a basis of assessment and a rate defined in advance, of an amount that must be payable for tonne of fuel consumed for all the flights carried out in a calendar year'. Furthermore the EU ETS requires airlines to purchase carbon emission allowances through which the airlines gain a tradable property right. That is rather different form imposing a fiscal charge. See also Bartels (2012), 9.

551 AB *Japan-Alcoholic Beverages II* 1996, para.23.

552 Bartels(2015); Meltzer (2012), 135.

like, treatment less favourable of the imported products must be established. As imported goods might be subject to additional costs due to the distance covered, the scheme might have a *de facto* detrimental impact on imported products, even though that is not necessarily the case for all imported products: if the country of origin of the airline operator has a comparable emissions system in place, those flights would not be covered, hence no additional costs would be borne under the EU ETS. In that regard, a finding that the scheme protects domestic products to the detriment of imported products is not obvious.

With regard to Article XI GATT, measures that have the effect of restricting imports and exports of products are prohibited. In *Colombia – Ports of Entry*, the panel found that a measure that restricted the ports of entry could be seen as a quantitative restriction if the measure affected the cost of shipping products from the port of origin to the place of sale.[553] The question is whether the measure can have a restrictive *effect* on the importation of any given product, and not whether it concerns a right of importation.[554] This reasoning could be applied with regard to goods being imported through air transport,[555] as transport costs will likely increase through participation in the scheme, the costs of which are furthermore unpredictable depending on the price of allowances.[556] In that regard, it could be said that the aviation directive has a restrictive effect on imports within the meaning of Article XI:1.

Questions can also arise with regard to the freedom of transit under Article V GATT. Bartels has argued that the EU measure is not an 'unnecessary restriction' (Article V:3) or 'unreasonable regulation' (Article V:4) as it is unclear what the benchmarks are for necessary and reasonable. The scheme could be considered necessary or reasonable to implement the polluter pays principle in light of the climate change threat.[557] However, Article V:6 prohibits discrimination against products because they have transited via the territory of another WTO Member. If products from the same origin would be subject to different charges depending on whether they transited through a non-EU airport or not, a possible discrimination could be established. However, as it is likely that those products who transited would be subject to lower costs, and Article V:6 requires 'treatment no less favourable' goods in transit, it is unlikely that the Aviation Directive would amount to a violation of Article V:6 GATT.[558]

553 WTO, *Colombia-Ports of Entry* Panel Report 2009, WT/DS366/R, paras.7.258.
554 Bartels (2012), 9.
555 35% of global cargo by value occurs through air transport (IATA Data). While air cargo can be transported using dedicated freighter flights, approximately 50% of air cargo is carried on passenger flights.
556 Bartels (2012), 10.
557 Ibid 14.
558 Meltzer (2012), 140.

8.4.3.2 Environmental objective and location of the concern

The environmental objective of the Aviation Directive and the EU ETS is clear: combating climate change and preventing the environmental damage that could arise as a consequence. Both Article XX(g) (the atmosphere is an exhaustible natural resource,[559] as is air or are the oceans, deserts, forests and the other living and non-living resources that would be affected by climate change) and XX(b) (e,g. the threat to biodiversity and extinction of plant species)[560] are very likely to qualify as valid grounds for environmental protection under Article XX GATT. The fact that the Aviation Directive might also address competitiveness concerns and serve to level the playing field is not necessarily an impediment: these objectives are not conflicting,[561] and it is inherent to complex regulation that multiple objectives can be addressed.[562] The regulating country needs to demonstrate though that the main objective of the measure is indeed protection of the environment.[563]

Even though these environmental concerns could fall within the material scope of Article XX, the question is whether there is a jurisdictional limitation to these environmental objectives: are paragraphs (b) and (g) limited to environmental concerns within the territory of the regulating state, or can members also rely on these exceptions to address concerns outside their jurisdiction?

559 Ahner (2009), 13.

560 See for examples of research on the effects on climate change on plant species: Botanic Gardens Conservation International at https://www.bgci.org/policy/climate-change-and-plants/; Northern Arizona University at https://nau.edu/research/feature-stories/how-climate-change-affects-plants/.

561 There has been more debate about multiple conflicting objectives, a possibility that the AB seemed to reject in the *EC-Seal Products* case. For some commentaries on this position, see Donald Regan, 'Measures with Multiple Purposes: Puzzles from EC-Seal Products' 2015, AJIL Unbound; Julia Qin, 'Accomodating Divergent Policy Objectives under WTO Law: Reflections on EC-Seal Products' 2015, AJIL Unbound; Bartels (2015).

562 Panel Report *EC-Seal Products* 2013, paras.7.399; AB Report *US-Clove Cigarettes* 2012, paras.113.

563 This can be done through an assessment of the text, legislative history, structure and design of the measure. Panel Report *EC-Seal Products* 2013, paras.7.401; Howse and Regan (2000), 280.

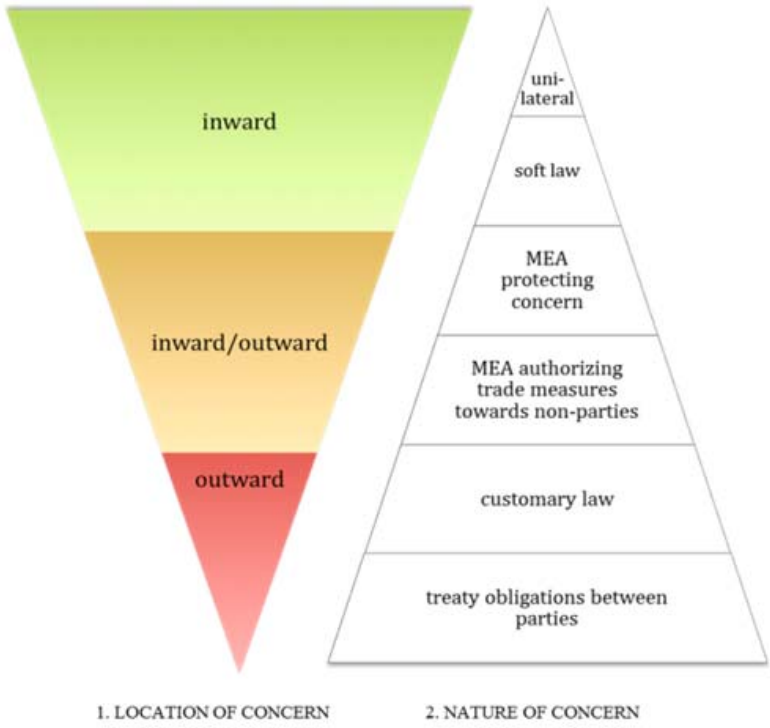

Figure 12. Step 1

The main challenge with climate change issues is exactly that all are affected, regardless of where the greenhouse gases are emitted. As Dannenmaier described it,

> 'concerns about climate change focus on the risk to human and non-human species as well as to habitat and natural landscapes; they also focus on the impact that measures to mitigate anthropogenic climate forcings might have on human economies and social prosperity.'[564]

Air and the climate are the perfect examples of common resources, whereby every state automatically has an interest because all states are affected. Some will suffer the more direct consequences on their territory through droughts or floods, others might only feel the more indirect consequences such as rising sea levels, but there is sufficient evidence[565] pointing to the global conse-

564 Dannenmaier(2012), 521.

565 See the Fifth IPPC Assessment Report (released in four volumes between September 2013 and November 2014) and previous IPCC Reports.

quences of climate chance, on the seas, on the climate, on biodiversity, even on migration, as they are all closely related and dependent on one another. Any state could thus in principle claim environmental effects on its territory. However, in order to pass the first step of the decision tree, the effects must be direct, substantial and foreseeable.

On the one hand, based on the present state of scientific knowledge,[566] the mere fact that all states are affected can suffice to establish direct, substantial and forseesable effects. On the other hand, the effects from such emissions cannot be considered 'direct'. As Voigt argues,

> 'due to the accumulation of GHG emissions from multiple sources and a plurality of emitters as well as due to the inertia of the climate system it is extremely difficult, if not impossible, to establish a direct link between the emitting activity and the local impact.'[567]

I would argue nevertheless that as indeed all states are affected by climate change, npr-PPMs addressing emissions would qualify as measures with an inward- and an outward-looking effect. Nevertheless, because of the partly outward-looking effect, international support for the concern at issue is required to further justify the extraterritorial effects.

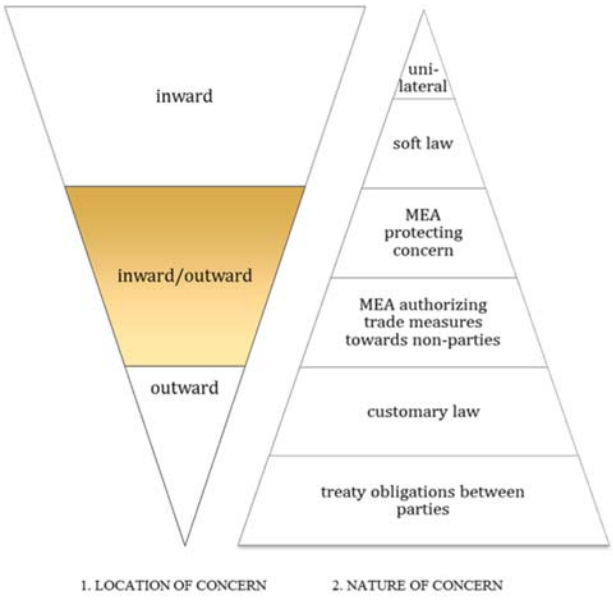

Figure 13. Step 1 Aviation in EU ETS

566 See IPCC Reports; Rehbinder(2012), 158.
567 Voigt (2011-2012), 501.

8.4.3.3 Necessity and recognition of the concern

As argued in chapter 7, the necessity test of the paragraphs of Article XX can be interpreted to give added value to international support.[568] Several elements can be taken into account. The AB stated in *Korea-Beef* that the more vital or important the concerns are that a measure is intended to protect, the easier it would be accept that measure as necessary[569] so international support for an international concern can be a supporting factor in that regard.[570] Any assessment of international support and recognition would need to take into account among others the complexity of the issue, the negotiation history of agreements, the efforts for multilateral alternatives made by the country taking the unilateral measures, and the nature of the failure to reach full agreement (division about the concern itself or the appropriate action).

Necessity refers to an assessment whether less-trade restrictive measures can reach the same objective. Where less international support exists for an objective or method to reach that objective, the threshold for proving there are no less trade restrictive alternatives will become higher. Equally, if a PPM is enforcing a treaty obligation, then that measure will most likely be considered appropriate and not more trade-restrictive than necessary. The material contribution to the achievement of the policy objective can also be considered.[571] The AB has stated in *Brazil-Tyres*, a dispute *not* concerning climate change, that even where the contribution of a law to protecting an environmental concern such as climate change is not immediately obvious because it is part of a broader program of which the impact can only be evaluated over time, that should not prevent a finding that this measure is necessary.[572] Howse interpreted this unexpected reference to climate change as a message by the AB that

> 'it would not be inclined to second guess lightly the choices of WTO members on how to regulate in the area of climate change, given the complexity of policy design, the evolving nature of the problem and our understanding of it, and the multiple interactions of any particular policy with other policies.'[573]

For instance, the objective of the EU ETS and the Aviation Directive is the reduction of emissions by a certain % by a certain date. Apart from the evaluation over time, it is also difficult to give a prognosis as the ETS has also been struggling with low carbon prices and a growing surplus of allowances due

568 See chapter 7.2.3.
569 AB Report *Korea-Various Measures on Beef* 2000, para.162.
570 See chapter 7.2.3.
571 AB Report *Brazil – Retreaded Tyres* 2007, para.210.
572 Ibid para.151.
573 Robert Howse, 'Commentary: The Political and Legal Underpinnings of Including Aviation in the EU ETS' 2012, ICTSD Programme on Trade and Environment, 30.

the financial crisis, growing pains as the first and largest emissions trading system being set up, carbon leakage, etc.[574]

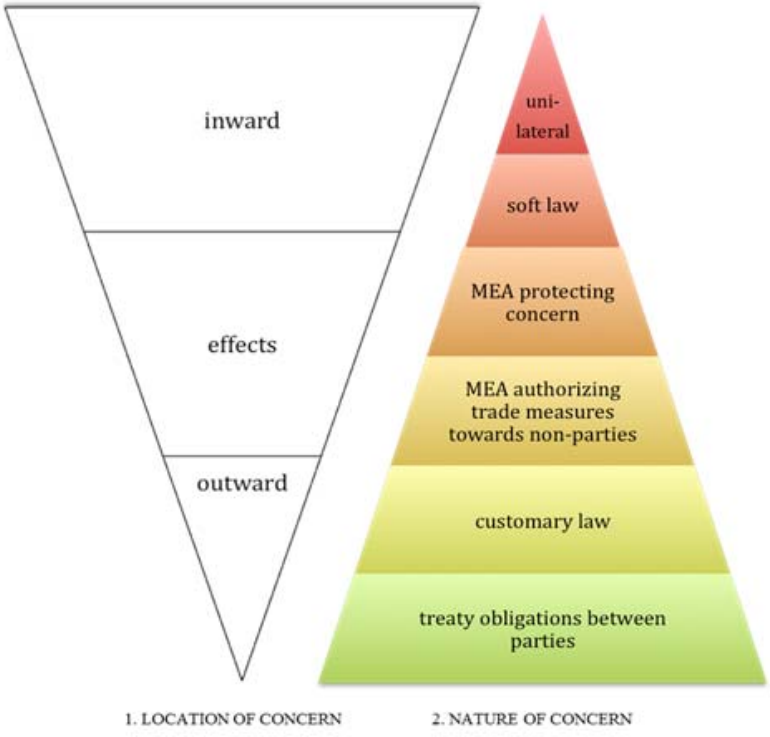

Figure 14. Step 2

The general concern for climate change is recognized in the UNFCCC, ratified by 195 countries including all EU member states, with its objective to stabilize greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system[575] and whereby states should protect the climate system and take precautionary measures to anticipate, prevent or minimize the causes of climate change and mitigate its adverse effects.[576] The Kyoto Protocol to the UNFCCC sets out binding emission reduction targets. The reports by the Intergovernmental Panel on Climate

574 Laing and others (2013). See in that regard also the Commission's efforts for a structural reform of the European carbon market, an update of which can be found at http://ec.europa.eu/clima/policies/ets/reform/index_en.htm.
575 UNFCCC, 1992, Article 2.
576 Ibid Article 3.

Change (IPCC)[577] present a scientific view on the current state of knowledge in climate change and its potential environmental and socio-economic impacts.[578] The Paris Agreement emphasizes again the urgency of the threat of climate change and the need to hold the increase in the global average temperature well below 2ºC above pre-industrial levels.[579] Climate change considerations are also reflected in EU bilateral and inter-regional cooperation, and the EU has included cooperation clauses on climate change in its association, partnership and trade agreements with developing countries.[580] It can thus be concluded that the general concern for climate change finds wide support through existing binding international agreements. However, much disagreement exists on the required efforts, the responsibility of historic emitters as opposed to new emitters, contradictory interests, financing etc, which has led to the failure of the 2009 climate summit in Copenhagen.[581] The 2015 Paris climate summit was of major importance for the discussion of further stringent cooperation, and setting ambitious but necessary global reduction targets.[582]

With regard to emissions from international aviation, it is set out under Article 2(2) of the Kyoto Protocol[583] that the ICAO is to tackle the problem, but the ICAO has so far been unable to do so. The EU's aviation scheme came as a unilateral response to failed efforts to reach international agreement on the issue within the ICAO.[584] In its 2004 Resolution A35-5, the ICAO explicitly endorsed the development of an emission trading system to reduce international aviation emissions. However, the Group on International Aviation and Climate Change, tasked with developing proposals for such system, was

577 The IPCC has been formed in 1988 by the World Meteorological Organization and the United Nations Environmental Programme.

578 The fifth IPPC Assessment Report was released in four volumes between September 2013 and November 2014.

579 Paris Agreement, 2015, Article 2.

580 Kulovesi(2012), 138. See e.g. Cotonou Agreement, art 32bis.

581 See http://unfccc.int/meetings/copenhagen_dec_2009/meeting/6295.php.

582 Elizabeth Kolbert, *The Weight of the World* (August 24, 2015). at http://www.newyorker.com/magazine/2015/08/24/the-weight-of-the-world.

583 'Parties included in Annex I shall pursue *limitation* or *reduction* of emissions of greenhouse gases...from aviation and marine bunker fuels, working through the International Civil Aviation Organization and the International Maritime Organization, respectively'. Unlike other sectors, responsibility for cutting international aviation emissions was not given to individual countries (parties). Instead reductions should be achieved by Annex 1 Parties working through international bodies that regulate these modes of transport – ICAO for aviation and IMO for maritime transport.

584 For an overview of the failed proposals and negotiations, see Transport & Environment, 'Grounded: How ICAO failed to tackle aviation and climate change and what should happen now', 2010, at http://www.transportenvironment.org/sites/te/files/media/2010_09_icao_grounded.pdf, 4; Steven Truxal, 'The ICAO Assembly Resolutions on International Aviation and Climate Change: an Historic Agreement, a Breakthrough Deal and the Cancun Effect' 2011 36 Air and Space Law 217, 217.

only set up in 2007. In the 2010 Resolution A37-19, the ICAO Assembly recognized that 'some states may take more ambitious actions prior to 2020, which may offset an increase in emissions from the growth of air transport in developing states'. It also implicitly endorsed unilateral measures, 'urging states to respect the guiding principles listed in the Annex, when designing new and implementing existing market-based measures for international aviation', even when it also urged them to 'engage in constructive bilateral and/or multilateral consultations and negotiations with other states to reach an agreement'.[585] Whereas the EU lodged a reservation setting out that the Chicago Convention did not require contracting parties to obtain the consent of other parties before applying market-based measures to operators of other states,[586] a number of other states lodged reservations expressly denying that unilateral measures were permitted.[587] Thus, one could say that there is definitely recognition at an international level that action with regard to aviation emissions is required, but the support for unilateral action is doubtful. However, the EU did engage in consultations and negotiations, which did not lead to any results at the time of adoption of the Aviation Directive. It remains to be seen at this point whether the 'stop the clock' action induced a sense of urgency to come to international agreement before the EU would again 'start the clock', and whether other states are as committed to reaching agreement as they were fierce in their protesting against EU action. In any case, Article 4(1) (b) and (f) of the UNFCCC establishes a common responsibility for all states to reduce greenhouse gas emissions. Continued opposition by ICAO members to come to international agreement is not consistent with the obligations and responsibilities of states under the UNFCCC.

With regard to the inclusion of both departing and arriving flights in the system, there is no agreement under the UNFCCC or the IPCC guidelines as to how responsibility for GHG emissions from international aviation (nor international shipping) should be apportioned between them. While article 3(5) of the UNFCCC acknowledges the right of parties to adopt unilateral acts to combat climate change, without specifying how these international emissions should be allocated, the question of when, if ever, it may be lawful for states to enact unilateral measures that include extraterritorial GHG emissions is left open.[588] According to the IPPC guidelines, countries are responsible for the emissions that arise in the territories under their jurisdiction (a territorial or

585 Consolidated statement of continuing ICAO policies and practices related to environmental protection, IAO Assembly Res A37-19, 8 oct 2010, para 6(c), para 10.

586 Bartels(2015), 436.

587 As was noted above, in 2011 the ICAO Council endorsed a working paper presented by 26 ICAO Members, containing a New Delhi declaration, which 'urged the EU and its MS to refrain from including flights by non-EU carriers to/from an airport in the territory of an EU Member State in its emissions trading system'. See ICAO working paper, 'Inclusion of international civil aviation in the EU ETS', C-WP/13790, 17 Oct 2011.

588 Scott (2015), 8.

production-based consumption system);[589] however, emissions that arise in international airspace are not allocated to individual countries. Thus, the guidelines do not specify which consumed fuel or which ship/flight movements are to be attributed to which state.[590] The EU has opted for a framework that allocates responsibility for aviation emissions to the departure state: if arriving flights are subject to adequate climate change regulation in the state of departure, they can be exempted from the EU ETS.[591] Where a departure state fails to take responsibility for aviation emissions by adopting the necessary measures, the EU as the arrival state asserts a right to 'step in'.[592] This unilateral determination by the EU is one of the controversial aspects of the measure, as it has now opted for a criterion of market access, currently unsupported by international agreement – but note that there is no agreement in support of any other solution either.

The Aviation Directive does not make a distinction between developed and developing countries, and might in that regard not be in line with international recognition for the principle of common but differentiated responsibilities and respective capabilities (CBDRRC).[593] The principle implies differentiation based on the level of economic development and capabilities of a country, as well as on the contribution to global environmental harm.[594] CBDRRC is

589 A production-based system boundary allocates responsibility for GHG emissions in the state where these emissions are generated or produced. A consumption-based system on the other hand allocates GHG emissions according to the country of the consumer, usually based on final consumption. The total GHG emissions of a state then equal the emissions of consumption added with the emissions of production of imports reduced by the emissions of production of exports. According to a territorial or production-based system boundary, the GHG emissions of developed countries (so called Annex I countries) appear to have leveled off in recent years, while from the perspective of a consumption-based system boundary they have continued to rise at an annual rate of approximately 10%. See Scott, ibid 7., referring to Alice Bows and John Barrett, 'Cumulative emission scenarios using a consumption-based approach: a glimmer of hope?' 2010, 1 Carbon Management 161, 168.

590 Scott (2015), 17. See IPPC Guidelines Vol 1 and chapter 3.5 (water borne transportation) & 3.6 (civil aviation) of Vol 2.

591 Aviation Directive, 2008, Article 25a.

592 Joanne Scott and Lavanya Rajamani, 'Contingent Unilateralism: International Aviation in the European Emissions Trading Scheme' in Bart Van Vooren, Steven Blockmans and Jan Wouters (eds), *The EU's Role in Global Governance: the Legal Dimension* (Oxford University Press 2013) 213.

593 The CBDRRC principle is articulated in Article 3 of the UNFCCC and lies at the heart of the international compact on climate change. The Impact Assessment to the Commission's proposal for the Aviation Directive argued that the directive would be in conformity with the principle, but the Commission argued later that the principle does not apply as the Aviation Directive applies to businesses and the CBDRRC principle applies to states. (see Runge-Metzger, 40, at http://ec.europa.eu/clima/policies/transport/aviation/docs/presentation_icao_en.pdf).

594 See principle 7 of the Rio Declaration, defining CBDRRC and stating that 'The developed countries acknowledge the responsibility that they bear in the international pursuit to sustainable development in view of the pressures their societies place on the global environment and of the technologies and financial resources they command.'

one of the biggest challenges of environmental law, because it is debated how to best interpret and apply this principle of differentiation. The problem is that a distinction is often made between Annex I and non-Annex I countries to the Kyoto Protocol, a distinction that can no longer be said to be a reflection of the actual situation today, as some of the richest countries in the world are excluded from Annex I.[595] Also it is questionable whether the Annex I/non-Annex I distinction is the right approach for climate change,[596] in light of for instance the massive and increasing emission contributions by countries such as China or India. It is disputed whether the CBDRRC principle is a legal obligation or merely a consideration that should be taken into account, yet as a fundamental part of the climate change regime,[597] it can be argued that there is at least a duty of good faith to take the principle into account when drafting policy, including unilateral instruments.[598]

The CBDRRC principle can manifest itself through differential treatment with regard to implementation, with regard to assistance, and more disputed, with regard to key obligations.[599] That duty of good faith could also be read in the chapeau of Article XX GATT, which would leave an opening for the EU to implement CBDRRC in a climate change related trade measure.[600] Differentiation between developed and developing countries based on objective criteria should not pose a problem at WTO level, as it could be interpreted as special and differential treatment in light of the 1979 Enabling Clause.[601] In *EC-Tariff*

595 Such as Kuwait, United Arab Emirates, Brunei, Singapore, and Qatar, which are amongst the top 20 richest countries in the world. Also OECD members such as Chile and South Korea are excluded.

596 Pauw and others (2014), 2.

597 The principle of CBDRRC can also be read into the preamble to the WTO Agreement, stating 'seeking both to protect and preserve the environment and to enhance the means for doing so in a manner consistent with their respective needs and concerns at different levels of economic development'. For other possible manifestations of the principle in WTO law, see Fabio Morosini, 'Trade and Climate Change: Unveiling the Principle of Common but Differentiated Responsibilities from the WTO Agreements' 2010, 42 George Washington International Law Review 714, 723.

598 Pananya Larbprasertporn, 'The Interaction between WTO Law and the Principle of Common but Differentiated Responsibilities in the Case of Climate-Related Border Tax Adjustments' 2014, 6 Goettingen Journal of International Law 145, 149; Scott and Rajamani (2012), 478; Pauw and others (2014).

599 Scott and Rajamani (2012), 478.

600 Michael Hertel, 'Climate-Change-Related Trade Measures and Article XX: Defining Discrimination in Light of the Principle of Common but Differentiated Responsibilities' 2011, 45 Journal of World Trade 653, 676.

601 GATT Contracting Parties, Decision of 28 November 1979 (L/4903) on Differential and more favourable treatment reciprocity and fuller participation of developing countries. The Enabling Clause has been applied with regard to tariff preferences, but also allows for special and differential treatment with regard to non-tariff measures (paragraph 2(b)). See also Keck and Low (2004). Special and differential treatment allows for differentiated treatment for developing countries by justifying a deviation from the MFN obligation. What could in theory lead to some discussion is when a non-Annex I country under the Kyoto

Preferences, the AB emphasized the importance of elaborating objective criteria for differentiating between developing countries and ensuring that such criteria would be applied transparently and consistently, and allow for the necessary flexibility.[602]

In conclusion, there is wide international agreement about climate change in the form of the UNFCCC, as well as the recognition within the ICAO that aviation emissions need to be reduced. The Kyoto Protocol is a binding agreement prescribing specific commitments – though with notable exceptions, such as the US and China, and withdrawals, such as Canada. The 2015 Paris Climate Agreement is a binding agreement setting out an ambitious limit to the increase of the average global temperature – but excludes the aviation sector. Thus, if the Aviation Directive constitutes a violation of WTO law, and the measure would need to be justified under Article XX GATT, the extraterritoriality threshold is passed with regard to product-based measures that target emissions from airline operators, as firstly, environmental effects on the territory can be demonstrated, and secondly, there is wide international support for the general concern of reducing emissions in the fight against climate change.

However, there is no agreement yet on the methods for reduction of aviation emissions: a global emission trading system is still under development and it remains unclear which system boundary will be applied. In order to determine support for the methods prescribed, scientific research and/or state practice should be considered. If there is no state practice, and no consensus on the appropriate methods (e.g. the Aviation Directive opts for a primary responsibility for the country of departure), a deferential approach should be

protocol would not have listed itself as a developing country under the WTO. In that regard differential treatment that is made according to Annex I – non-Annex I countries could conflict with the countries qualifying for special and differential treatment. A further distinction could then be made between countries based on their economic capabilities, which would justify differentiation under the Enabling Clause; and between countries based on their historic and current share in emissions (responsibility), which would not lead to discrimination between countries where the same conditions prevail, as these conditions would be linked to the objective of the measure, emission reductions. The E15 Expert Group on Trade and Climate Regimes proposes common action by the UNFCCC and the WTO to clarify the differences, if any, between the concept of common but differentiated treatment in the climate regime and the concept of special and differential treatment in the WTO. See Bacchus (2016), 14.

602 AB Report *EC-Tariff Preferences* 2004, para.182. Scott and Rajamani propose two options for the EU to implement CBDRRC into the Aviation Directive. First, the EU could differentiate between countries in terms of the conditions required for an exemption of the system. Developing countries should be required to adopt measures to reduce the climate impact of their flights commensurate with their respective (historic) responsibilities and capabilities. Surely, as any choice to be made, this will be a subjective exercise, but such criteria ensure a fair differentiation. Second, the revenues raised as a result of developing country flights in the ETS could be committed to a global climate fund, used for the financing of climate mitigation and adaptation activities in developing countries. See Scott and Rajamani (2012), 487.

adopted with respect to the scientific validity of the prescribed rules. If alternative, less-trade restrictive methods would exist, it is up to the imposing Member to demonstrate why it opted for this specific measure and justify why the objective cannot be reached through reasonably available less-trade restrictive measures.[603] For lack of alternatives that are reasonably available at this moment, the EU ETS could be accepted as it long as the choices made are substantiated by evidence demonstrating to the extent possible the effectiveness of the system.

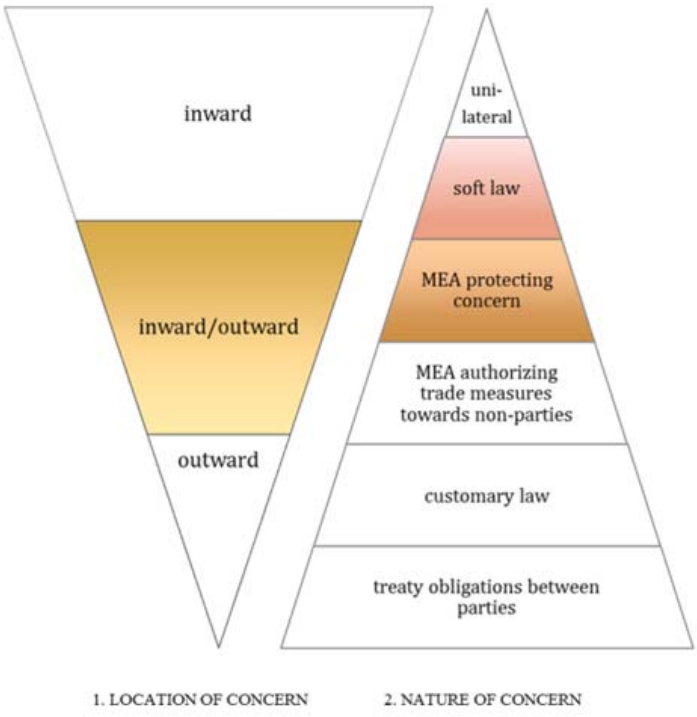

Figure 15. Full model Aviation in EU ETS

8.4.3.4 Chapeau

The chapeau prohibits arbitrary and unjustifiable discrimination between countries where the same conditions apply. In terms of aviation emissions and the effect of those emissions, the same conditions apply for all countries. The fact that some countries produce greater emissions than other does not

603 AB Report *EC-Seal Products* 2014, para.5.215.

matter for this finding.[604] The Directive applies to all airline operators irrespective of their country of origin. While this might result in higher emissions costs for longer distances, it cannot be said that this amounts to discrimination that is arbitrary or unjustifiable. In principle all airlines can opt to make transit stops, and all operators can be exempt from the directive for inbound flights if their home country has appropriate climate regulation in place.[605] In view of this latter condition, countries with equivalent climate regulation could be found to differ from countries without such regulation. As different conditions apply in these countries, differentiation does not amount to unjustifiable or arbitrary discrimination. By exempting operators when third country schemes in place, as well through as multiple references to the ICAO and international emission trading schemes,[606] the EU Directive is open for and contingent on international developments.

In determining which countries are considered for an exemption, it is important to have clear, objective and transparent criteria in place to determine the adequacy of third country programs.[607] In its original proposal, the Commission suggested that an exemption for a non-EU country should be made conditional upon the adoption of measures that are at least equivalent to the requirements of the Aviation Directive.[608] That reference for equivalence was later on dropped in the decision-making process, but is still included in the preamble of the adopted directive.[609] Equivalence can be interpreted in several ways, for instance effort-based or outcome-based. It is in any case important that sufficient flexibility is allowed for the third country to determine how to reach the objectives. In 2013 the Commission had proposed as an amendment to the Aviation Directive an exemption for flights to and from developing countries accounting for less than 1% of total revenue ton kilometers, as specified in the ICAO resolution, but only if they are also beneficiaries of the EU's GSP.[610] Such a criterion would most likely not have complied with

604 In *US-Shrimp* for instance, the AB also did not quantify the number of turtles: it was sufficient that they existed in the affected countries.

605 Aviation Directive, 2008, Article 25a(1).

606 Ibid recital (9).

607 See in that regard also AB Report *EC-Tariff Preferences* 2004, para.183.

608 See Commission proposal for a EU ETS Directive, COM(2006)818, 20 Dec 2006, 21.

609 Aviation Directive, 2008, recital (17).

610 Proposal for a Directive of the European Parliament and of the Council amending Directive 2003/87/EC establishing a scheme for greenhouse gas emission allowance trading within the Community, in view of the implementation by 2020 of an international agreement applying a single global market-based measure to international aviation emissions, COM/2013/0722 final, recital 10. This proposal was not adopted in the amending regulation, which only refers to an exemption for non-commercial aircraft operators emitting less than 1 000 tonnes CO_2 per annum, without any reference to developing or developed countries. (Regulation (EU) 421/2014 of the European Parliament and of the Council of 16 April 2014 amending Directive 2003/87/EC establishing a scheme for greenhouse gas emission allowance trading within the Community, in view of the implementation by 2020 of an

the chapeau, as from an environmental perspective this exemption is entirely arbitrary. There is no environmental rationale behind GSP beneficiaries.[611] Furthermore, the reason why flights departing from countries with adequate climate regulation could be exempted from the system is to avoid a double burden for flight operators. The Aviation Directive provides an exemption for arriving flights, based on the regulation of departure. As this is not yet an internationally accepted system boundary (even though referring to the country of departure is most closely linked to the established production-based emission allocation system), if a third country system would adopt a different standard, the EU may have to consider different exemptions as well.[612]

8.4.4 Challenges

Apart from the particular challenges related to aviation emissions and climate change regulation (for instance, the operationalization of CBDRRC or the system boundary determination: production-based or consumption-based),[613] the example of the Aviation Directive allows to identify challenges that are of broader relevance for the extraterritoriality discussion as well.

Firstly, as has already been indicated above,[614] climate change affects all states and any measure that a state would adopt to fight climate change would thus be considered as both inward- and outward-looking. If substantial and direct environmental effects can be demonstrated, a first important hurdle to establish jurisdiction for measures with an extraterritorial effect is passed. The second step of the decision tree is then of crucial importance: the international support for the environmental concern in question is very relevant to determine which the acceptable scope of extraterritorial measures. If international law prescribes binding obligations, as in the IUU Fishing example, then a state could adopt country-based measures, with the aim to 'force' other states to change their legislation and act in accordance with their obligations under international law.[615] However, if international law does not lay down

international agreement applying a single global market-based measure to international aviation emissions, Recital 9.)

611 Bartels(2015), 480.

612 See also AB Report *US-Shrimp* 1998, 161.

613 The Directive foresees in not including EU-arriving flights when an equal or similarly adequate system is in place in the country of departure. (Aviation Directive, 2008, Article 25a(1).) Article 3(5) of the UNFCCC acknowledges the right of parties to adopt unilateral acts to combat climate change, but it does not specify the system boundary to be relied upon by states in operationalizing measures of this kind (eg consumption based or production based). 'It therefore does not settle the question of when, if ever, it may be lawful for states to enact unilateral measures that include extraterritorial GHG emissions within their scope.

614 See *supra* at 8.4.3.2 for the assessment of inward- outward-looking.

615 See *supra* at 8.3.4.

binding obligations, or is not specific enough, then one could argue that states are only allowed to adopt product-based measures. The regulatory space to impose product-based measures is larger, because such a measure targets the product or service that will actually enter the market, and does not *impose* anything on a sovereign third country (even though surely depending on the export flows there might be an incentivizing effect to adapt legislation in the country of origin as well). Country-based measures would only be allowed to be used as leverage, when binding obligations already exist and countries refuse to comply with these obligations. A country that consciously chooses not to take part in an international system, without taking adequate measures itself, cannot be forced to comply with such a system. Nevertheless, process-based measures targeting producers (or in this case operators) can be imposed and can indirectly create an incentive for governments to take action. For instance, if the US finds the Kyoto protocol and its mechanisms fundamentally flawed, then it should install alternatives with methods that it deems more appropriate, but the US cannot refuse to undertake action so as to do its fair share, when the global impact of its actions is undeniable. While the EU cannot force the US to commit to obligations under e.g. the Kyoto Protocol, it can condition market access for US operators, which may lead to increased pressure on the US government to act. The Aviation Directive is a process-based measure (compliance is at the level of individual flights, targeting the emissions from the specific flights arriving and departing from the EU). The option for an exemption if the country of departure has climate regulation in place should be seen as a 'contingency-clause', through which the EU wants to avoid double counting. While such clause also holds an incentive for third countries to adopt legislation and participate in creating a global system, the formal objective of the exemption is not to target other governments and force them to adopt legislation. The EU exemption can be seen as a reward for third country's efforts.[616]

Secondly, the existence of binding obligations points to, as in the IUU Fishing example, a case of norm enforcement. However, the example of aviation emissions could rather be classified as norm furtherance: there is wide support for the concern, there are some commitments, but international negotiations are stalled. Through its measure the EU has created an incentive to boost negotiations at the ICAO level, and hopefully to set up other national or regional emissions trading systems. In a case of norm furtherance, there can be agreement on the importance of the concern, but not on the appropriate way to act. Thus, such measures are not necessarily based on existing international standards, but they nevertheless address global concerns in relation to which there is international agreement on their importance.[617] Norm enforcement and norm furtherance can be complemented with a third category,

616 Scott (2014), 110.
617 Scott (2014), 124.

norm creation. Norm creation would occur in case of unknown or little-known concerns, upon which states would like to act and create incentives for others to act. However, in line with norm enforcement and norm creation, unless a measure is only inward-looking and does not affect other states, states should first focus on raising international awareness and seeking international cooperation. If that would not work, then depending on the origin of the failure (no recognition of the specific concern, or as in the case of climate change, no agreement on the appropriate method to tackle the concern), that failure could possibly support further action, and be considered as an action of norm furtherance.

Thirdly, unilateral actions in the absence of international action raise the question of responsibility. Do states have an additional responsibility, or even a duty, to act beyond their own 'fair share' when other states, or even the international community as a whole, neglect to act and honor their responsibilities?[618] Caney distinguishes between two ways of climate justice: firstly, burden-sharing justice, focusing on how the problem should be shared fairly among the duty-bearers;[619] secondly, harm-avoiding justice, taking as a starting point the imperative to prevent climate change. Under the latter, the burden of someone who is failing or neglecting its own burden will (need to) be taken over someone else. Caney therefore identifies two types of responsibilities: first-order responsibilities, the obligation for an agent to do its fair share; and second-order responsibilities; responsibilities that seek to induce agents that fail to comply with their first-order responsibilities to step into line.[620] Second-order responsibilities would operate on the principle that 'with power comes responsibility', whereby power can be defined as 'A has power over B to the extent that he can get B to do something that B would not otherwise do'.[621] A strong market can thus become a powerful tool to incentivize conduct through market access, because of a moral responsibility to exploit that power. Applied to the example of GHG emissions, states would have a first-order responsibility over emissions generated within their territory (based on the territorial-based system constructed by the IPCC guidelines), and extraterritorial emissions (generated outside their territory) would then be considered second-order responsibilities. However, as aviation and shipping emissions are excluded from the IPCC guidelines, these responsibilities could be applied differently. Scott has argued that states enjoy the autonomy to 'plug this system

618 Anne Schwenkenbecher, 'Bridging the Emissions Gap: A Plea for Taking Up the Slack' 2013, 3 Philosophy and Public Issues 271.

619 He identifies several principles of burden-sharing justice, such as the principle that those who have caused the problem should bear the burden; the principle that those who have the ability to pay should bear the burden; and the principle that those who have benefited from the activities that cause climate change should bear the burden. Caney (2014), 126.

620 Ibid 134. See also Scott (2015).

621 Caney (2014), 141.

gap' as long as the sovereign equality of other states is respected.[622] The difficulty with the first- and second-order responsibilities is to determine when a state has not done its share. Who will determine how to share the burden, if the international community cannot reach agreement on this? Arguably, the refusal or delays in reaching such agreement can already be a failure to comply with first-order responsibilities. In that regard the 'most common position' could be used as a benchmark to determine what can be expected from states – even if this would not be a legal obligations without agreement on that issue. For instance, the standard set by the 37 states that committed to new reductions under the Kyoto-amendment could be seen as a benchmark. When that benchmark is not reached, second-order responsibilities could come into play.[623] Scott has proposed certain safeguards against their abuse: the overall efforts of countries should be taken into account, and not just in a specific sector; objective criteria must be given when exercising second-order responsibilities in a specific sector to guarantee that the measures are not adopted to rebut competitive disadvantages; and, the CBDRRC principle should be taken into account when assessing the 'fair share'.[624] Overall, it is submitted that states cannot 'unilaterally' set the benchmarks for second-order responsibilities: state action must rely on soft law instruments at least, supported by as many states as possible. However, precisely in light of the continued lack of international agreement, 'sovereign equality of states' should not be used as an excuse to oppose international action and escape one's moral responsibilities.

8.5 TIMBER AND FOREST LAW ENFORCEMENT, GOVERNANCE AND TRADE

8.5.1 Measure and context

In 2003 the European Commission developed the Forest Law Enforcement, Governance and Trade (FLEGT) Action Plan. Illegal logging, or logging in

622 Thus, any gap-filling system that is endorsed by a state must be susceptible to replication by all other states without this resulting in the double counting of the GHG emissions. The exemption given to flights departing in third countries with climate regulation in place should be seen in that light: if only the country of departure regulates emissions, double-counting will be avoided. The inclusion of emissions of flights departing from countries without climate regulation, could then be seen as an exercise of second-order responsibility by the EU. See Scott (2015), 18.

623 Note, however, that it is highly debatable whether the commitments under Kyoto can even be seen as a 'fair share' to tackle climate change. Numerous studies show that also the EU emission reduction targets are far beyond what would be required. Ibid 24.

624 Ibid 26. CBDRRC should not necessarily follow the Kyoto division between Annex I and non-Annex I countries, but can be calculated by other parameters. See for instance the Climate Equity Reference Calculator, developed by EcoEquity and the Stockholm Environment Institute, at http://www.gdrights.org/calculator/.

violation of national laws (as well as the non-existence or weakness of local laws), is a global problem that can lead to substantial negative economic, environmental and social consequences.[625] From an environmental perspective, illegal logging can cause serious damage through deforestation and has a negative impact on climate change and biodiversity, for instance through the logging of national parks.[626] Deforestation is a serious threat: at the current rate of loss, tropical rainforests could disappear within 100 years.[627] Although the supply-side of the problem lies in timber-producing countries, the EU as a major source of demand can play an important role by not exploiting illegal logging operations and only allowing legally harvested timber on the market.

The FLEGT Action Plan has led to the adoption of two key pieces of legislation: the 2005 FLEGT Regulation, allowing for the control of the entry of timber to the EU from countries entering into bilateral FLEGT Voluntary Partnership Agreements (VPA) with the EU,[628] and the 2010 Timber Regulation as an overarching measure to prohibit placing illegal timber and timber products on the EU market, laying down obligations on operators who place timber on the market.[629] Next to these regulations, the Action Plan has further encouraged private and public initiatives to support the fight against illegal logging, such as commitments by timber trade federations and companies through Codes of Conduct to eliminate illegally harvested timber from their supply chains. The EU furthermore commits to increased dialogue through existing institutional structures with importing and exporting countries (notably including the US and Japan), integration of FLEGT in development cooperation programming at the stage of country strategy papers, and use of external funding.[630]

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625 Economically, illegal logging leads to lost revenues in timber-producing countries and undermines the competitiveness of legitimate forest industry operators; socially, it can lead to among others conflicts over land and resources, corruption, organized crime and armed conflicts. In that light see also the so-called conflict timber, timber traded by armed groups, the proceeds of which are used to fund armed conflicts.

626 European Commission, Forest Law Enforcement, Governance and Trade (FLEGT) – Proposal for an EU Action Plan, 2003, 4. One should be aware that legal logging does not necessarily mean sustainable logging: this is why attention needs to be paid to the development (and enforcement) of laws supporting sustainable management of the environmental resources as well.

627 Non-legally Binding Instruments on All Types of Forests (UNGA Resolution A/RES/62/98, 17 December 2007).

628 Council Regulation (EC) No 2173/2005 of 20 December 2005 on the establishment of a FLEGT licensing scheme for imports of timber into the European Community, 2005. See also the implementing regulation 1024/2008, laying down detailed provisions relating to the conditions for acceptance of the FLEGT license, and for the application of the system of imports of timber products.

629 Regulation (EU) No 995/2010 of the European Parliament and of the Council of 20 October 2010 Laying Down the Obligations of Operators Who Place Timber and Timber Products on the Market, 2010.. The Regulation entered into force in 2013.

630 Marin Duran and Morgera(2012), 273.

The 2005 FLEGT Regulation establishes a licensing scheme system for imports of timber.[631] The EU is to conclude voluntary partnership agreements (VPAs) with third countries, under which 'legally produced or acquired' timber can be imported into the EU with a corresponding license, verifying the legality of importer timber. Without such license timber cannot be imported from those countries.[632] Legality of timber harvests is to be checked against compliance with the national law of the harvesting/exporting country as set out in the VPA.[633] One of the elements that can be given attention in defining 'legality' is compliance with environmental legislation of the country of harvest. In this regard, the EU is working with willing third countries on the legality of timber as a neutral concept, rather than the politically charged sustainable forest management that has resisted international definition thus far.[634] The main incentive for third countries to participate in the FLEGT VPA process – apart from access to the EU market – is receiving priority assistance for the upgrading of their legal and administrative framework related to forest management.[635] This is supported by the FAO, which is managing a global project funded by the EU to help ACP countries in the review of their legislation and upgrading of their forest governance and law enforcement capacities. By participating in the FLEGT VPA system, exporting countries undertaking efforts to tackle illegal logging ensure that only legally harvested timber will be accepted into the EU market, while importers purchasing timber will have a guarantee on the origin and legality of the timber, increasing market confidence for timber from the participating countries.[636] In principle, every timber-producing country can participate, but the EU identified priority countries to be approached for participation, including Cameroon, Gabon, Congo, Ghana, Russia, Brazil, Papua New Guinea, Indonesia and Malaysia.[637] Timber

631 FLEGT Regulation, 2005.. For an assessment of FLEGT, see the report by the Court of Auditors, 'EU support to timber-producing countries under the FLEGT action plan', Luxembourg: Publications Office of the European Union, 2015 at http://www.eca.europa.eu/Lists/ECADocuments/SR15_13/SR_FLEGT_EN.pdf.

632 The first VPA to be signed was with Ghana, followed by the Republic of Congo, Cameroon, Indonesia, Central African Republic and Liberia. Negotiations are ongoing with Cote d'Ivoire, Democratic Republic of the Congo, Gabon, Guyana, Honduras, Laos, Malaysia, Thailand and Vietnam. (*last update July 2015*).

633 The different VPAs determine legality on the basis of the legislation in the exporting country, with input of national stakeholders in that country. Six countries have signed a VPA and are currently developing the systems needed to control, verify and license legal timber (Cameroon, Central African Republic, Ghana, Indonesia, Liberia, Republic of the Congo); while nine others are currently negotiating (Cote d'Ivoire, Democratic Republic of the Congo, Gabon, Guyana, Honduras, Laos, Malaysia, Thailand, Vietnam).

634 Marin Duran and Morgera(2012), 273. Relying on the legislation of the third country arguably aims to ensure the third country's ownership of the initiative, as well as demonstrate respect for its national sovereignty over its forest resources.

635 E.g. Article 15 VPA EU-Ghana.

636 FLEGT Action Plan, 2003, 12.

637 Minutes from an ad hoc meeting on the FLEGT donor coordination of 26.2.2004.

originating from countries that have not concluded a VPA with the EU, is subject to the Timber Regulation.[638]

The 2010 Timber Regulation prohibits the placing on the EU market of illegally harvested timber and timber products, and requires EU operators who place timber products on the market to exercise 'due diligence'.[639] In the absence of an internationally agreed definition, legal timber is defined as timber that is in compliance with the laws of the countries where it is harvested.[640] Due diligence entails that the operator must minimize the risk of illegal timber in the supply chain, by providing information on the trader and the supply, by assessing the risks to illegal timber in the supply chain.[641] Monitoring organizations shall regularly evaluate due diligence systems and the competent authorities shall carry out checks on operators.[642] Traders are furthermore under the obligation throughout the supply chain to ensure they can identify the operators or traders who have supplied the timber and where applicable, the traders to whom they supplied the timber.[643] Penalties include fines proportionate to the environmental damage and economic detriment, seizure of the timber and timber products concerned; and suspension of the authorization to trade.[644]

8.5.2 Extraterritorial effect

The 2005 FLEGT Regulation might be considered as having an extraterritorial effect because imports will depend on the harvesting process in the country of origin. However, the conditions of import have been agreed upon in bilateral agreements (VPAs), and any 'extraterritorial effect' thus has the consent of the third country. The norm to be protected is determined by national law, supported by international law; and the sanction for a violation of that norm is clearly agreed upon in the VPAs.[645] The 2010 Timber Regulation is more relevant to our discussion of unilaterally imposed measures with an extraterritorial effect and the following sections will thus focus on that regulation only.

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638 The Timber Regulation also applies to FLEGT partner countries, but imports of timber from those countries should be considered to have been legally harvested provided those timber products have FLEGT licenses. Operators thus only have to verify the validity of documentation for FLEGT-licensed timber and idem for timber with a CITES permit. In that way, an additional incentive is created for third countries to engage in VPA negotiations. See Timber Regulation, 2010, recital (9).

639 Ibid Article 4.

640 Ibid recital (14); Article 2(f) and (g).

641 Ibid Article 6. Monitoring organizations shall regularly evaluate due diligence systems and the competent authorities shall carry out checks on operators.

642 Ibid Article 8; 10.

643 Ibid Article 5.

644 Ibid 19.

645 E.g. VPA between the EU and the Republic of Cameroon on FLEGT, Article 4.

The extraterritorial effect of the Timber Regulation lies in the fact that EU market access is made dependent on the logging process occurring in third countries (non-VPA-countries). If timber has been logged illegally, thus in violation of the national laws of the harvesting country, then that timber is not allowed to be placed on the EU market.[646] Even though the EU does not prescribe what legality entails, but rather enforces the norms of the third country, access to the EU market is linked to an activity occurring outside the EU's borders as regulating 'country'. The following assessment of the decision tree will be applied to determine whether jurisdiction can be established for this type of enforcement, and whether it matters that the enforced norms are the norms of the harvesting country, rather than externally imposed norms.

8.5.3 The decision tree applied

8.5.3.1 Inconsistency with substantive obligations under GATT

The Timber Regulation could be considered as a quantitative import restriction imposed at the border under Article XI GATT, or as an internal measure under Article III GATT. Even though the Timber Regulation does not explicitly prohibit the importation of illegally harvested timber, it prohibits the 'placing on the market' of illegally logged timber, foreseeing penalties upon infringements of the Regulation.[647] This creates a *de facto* restriction on the importation of timber,[648] leading to an inconsistency with Article XI.[649] However, even if enforced at the border, the Timber Regulation could also be considered an internal measure under Article III GATT, applicable both to imported and domestic products.[650] The national treatment obligation requires WTO Members not to treat foreign products less favourably than like domestic products. The Timber Regulation does not make a distinction between domestic and imported products but refers to 'placing on the market' of products, which can be through import, but equally through the placing on the market of domestically grown timber.[651] The Regulation is thus rather an internal measure, that can be enforced at the border.

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646 Both illegally logged timber from outside the EU as from within the EU is not allowed on the market.

647 Timber Regulation, 2010, Article 19.

648 WTO, *Argentina-Measures Affecting the Export of Bovine Hides and the Import of Finished Leather* Panel Report 2000, WT/DS155/R, para.11.20.

649 Geraets and Natens (2014), 440. In *Brazil-Tyres* the Panel held that a system of fines could have a restrictive effect on importation, see Panel Report *Brazil-Retreaded Tyres* 2007, paras.7.372.

650 Ad Note to Article III GATT.

651 See for an example of felling licenses for UK grown timber, www.forestry.gov.uk/pdf/ON033EUTimberRegulationsv2.pdf/$FILE/ON033EUTimberRegulationsv2.pdf.

In considering likeness under Article III:4 GATT, the groups of products to be compared must be determined. Both groups of domestic and imported products can contain legal timber and illegal timber. If legal and illegal timber are identical, except for the fact that the former was logged in compliance with local laws and the latter not, then the group of imported timber products as a whole must be considered and compared to the group of domestic timber products as a whole. If legal and illegal timber are not considered to be like, because of a strong preference by consumers for legal timber products for instance, then the group of imported legal timber must be compared to the group of domestic legal timber. Imported timber is then like domestic timber, where the characteristics, end use of and consumer preferences for the wood type(s) put the products in a competitive relationship. Even though the legality of imported timber is determined by the national laws of the country of origin, and the legality of domestic timber is subject to domestic laws – and what is legal under one national system is not necessarily legal under another system –, all types of legal timber would still be in a competitive relationship on the importing market, and be considered 'like' for the purpose of this analysis. With regard to illegal timber, it can be questioned whether WTO rules apply to 'illicit' goods.[652] Can trade in illegal goods (as determined by the laws of the country of origin) be regulated by public measures (not allowing those goods equals a product ban), and if so, can those measures be subject to rules of non-discrimination et al? This seems unlikely.

If the products are like, it needs to be determined whether the imported products are treated less favourably so as to afford protection to domestic products; in other words, whether the conditions of competition are modified to the detriment of the group of imported products. As the regulation applies both to imported and domestically produced timber, there is no *de jure* violation. Could there be a *de facto* violation because the national laws of country of origin and country of import may differ? If timber is considered illegal in the country of origin, but would have been considered legal under the rules of the importing country due to lower standards, would this amount to treatment less favourable? Unless the regulatory requirements for legality in the importing country would be such as to clearly protect domestic production, these different regulatory requirements by themselves cannot amount to less favourable treatment. From a EU perspective, it seems unlikely that in light of the EU's efforts with respect to forestry management, EU local requirements would be less stringent than the requirements in third countries. Furthermore, national timber regulation is likely to be based on international private and public standards and norms.

The remaining question is then whether imported products bear a heavier burden than domestic products. The Timber Regulation is applied even-

652 Geraets and Natens (2014), 440; Mitchell and Ayres (2012), 468; Brack, Chandra and Kinasih (2012), 9.

handedly: even though the proportion of affected imports might be higher than the proportion of domestic production, mainly because of the higher proportion of imported timber on the market,[653] the Regulation does not modify the conditions of competition in that market to the detriment of the imported products.[654] It could possibly be argued that the due diligence requirements for operators that place timber on the market are harder to fulfil with regard to imported products than for domestic products, because of uncertainty about the foreign origin, and the distance making it more difficult to evaluate and examine the correctness of information. The imported products might then be at a competitive disadvantage. Nevertheless, this is not as to protect domestic products, and the mere different impact does not lead to treatment less favourable.[655] It is thus unlikely that the Timber Regulation is inconsistent with Article III:4 GATT.

The Timber Regulation could arguably be inconsistent with Article I:1 GATT, because of the discrimination between identical products based on the country of origin. Rather than referring to general environmental-friendly criteria, the Timber Regulation refers to the national laws of the harvesting country. Legality, and thus the right to be placed on the market, is determined based on the national laws of the harvesting country. Timber products that are physically identical, and logged in a similar way, could be legal according to the laws of country A but illegal according to the laws of country B. In this way, the Regulation could confer indirect 'advantages' on products from some countries (those with less stringent national laws), without according them to all like products originating in other WTO Members.

It is unlikely that the Timber Regulation would fall within the scope of the TBT Agreement, because firstly, the Timber Regulation is a non-product-related PPM, whereas the TBT Agreement may only apply to 'related' PPMs.[656] Whether 'related' can also include non-physical characteristics of a product has not yet been clarified in the case law. Secondly, even if the TBT could apply to npr-PPMs, it is not clear whether the Timber Regulation prescribes a technical regulation, as it does not lay down any rules itself, but refers to the national laws of the harvesting country. It is possible though that implementing measures could qualify as technical regulations under the TBT Agreement, for instance when EU Member States require the marking of imported products to indicate origin or verification.[657] However, the Timber Regulation itself does not prescribe such rules.

653 Forest Trends, *European Trade Flows and Risks* (2013)., at http://forest-trends.org/documents/files/doc_4085.pdf.

654 AB Report *Korea-Various Measures on Beef* 2000, paras.135.

655 AB Report *EC-Seal Products* 2014, para.5.108.

656 See chapter 2.4.3. and chapter 7.5.1.

657 Akiva Fishman and Krystof Obidzinski, 'European Union Timber Regulation: Is It Legal?' 2014, 23 Review of European Community & International Environmental Law 258, 273.

8.5.3.2 Environmental objective and location of the concern

Assuming it can nevertheless be established that the Timber Regulation violates WTO law, a justification needs to be found in Article XX GATT, where the question of extraterritoriality arises. Sustainable forest management can be an environmental objective both under Article XX(b) (protection of flora and fauna), and Article XX(g). Forests are definitely exhaustible, and avoiding trade in illegal timber can contribute to preventing deforestation. Also the objectives of climate change and biodiversity have widely been recognized as important environmental objectives. The question is then again whether there is a jurisdictional limitation to these environmental objectives: are paragraphs (b) and (g) limited to environmental concerns within the territory of the regulating state, or can members also rely on these exceptions to address concerns outside their jurisdiction?

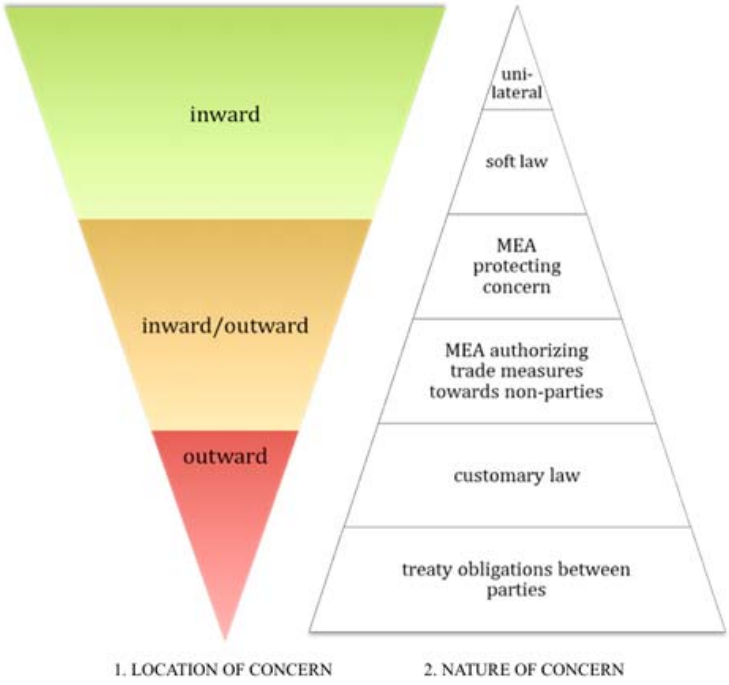

Figure 16. Step 1

With regard to forests within the EU, there is no doubt that the EU can take the necessary measures. With regard to forests outside the EU, however, it is again a question of whether the deforestation of those forests, and illegal harvesting of timber can have sufficient environmental effects on EU territory in order for the measure to be considered both inward- and outward-looking.

In order to justify an exercise of jurisdiction, the environmental effects must be direct, substantial and foreseeable. Several elements can be taken into account to determine these effects. Firstly, forests are the green lung of our planet and can be considered a common resource. Secondly, decreased forests have an impact on global biodiversity and climate change.[658] As those are global concerns that affect the planet as a whole, every state is affected and could this in principle substantiate a claim of environmental effects on its territory.[659] Measures taken to protect forests, would thus qualify as measures having an inward- and outward-looking effect, as there are environmental effects both within and outside the territory of the regulating country. Because of the partly outward-looking effect, further support for the concern at issue is still required to strengthen the exercise jurisdiction.

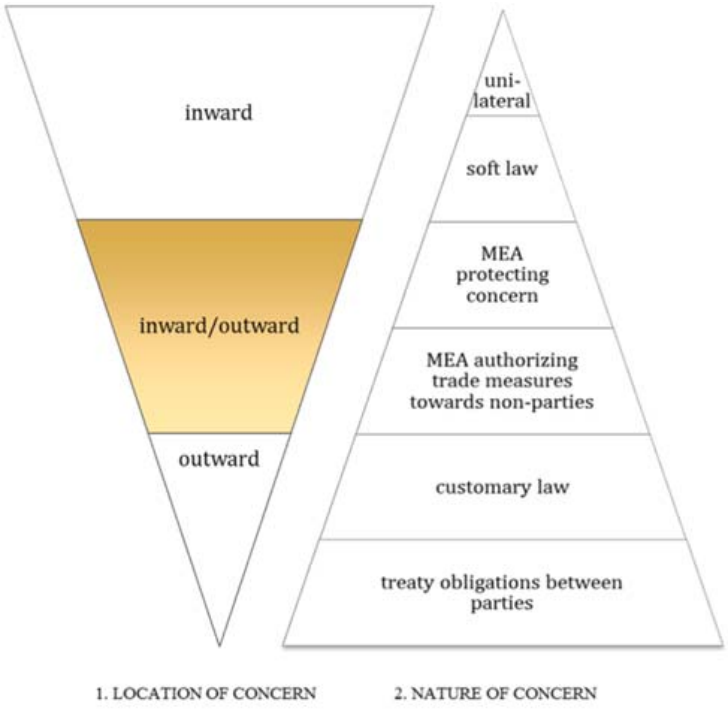

Figure 17. Step 1 Timber

658 See IPCC, Climate Change and Biodiversity (Habiba Gitay et al. eds, 2002), Climate Change and Biodiversity, (Thomas E. Lovejoy & Lee Hannah eds., 2005), see also Harro Van Asselt, 'Managing the Fragmentation of International Environmental Law: Forests at the Intersection of the climate and Biodiversity Regime' 2012, 44 NYU Journal of International Law, 1213.

659 See *supra* at 8.3.3.2. when discussing effects of climate change.

8.5.3.3 Necessity and recognition of the concern

The necessity test of the paragraphs of Article XX can be interpreted to give added value to international support.[660] Determining the degree of necessity involves a process of weighing and balancing a series of factors, which results in an ad hoc, contextual assessment of each measure.[661] The more common a concern - as recognized by international support for that particular concern -, the more easily a measure addressing it will be considered necessary.[662] Necessity also assesses whether less-trade restrictive measures can reach the same objective. If a measure finds support in or is even prescribed by international agreements, it is less likely that a measure will have a protectionist objective and that the measure would be considered too trade-restrictive.[663]

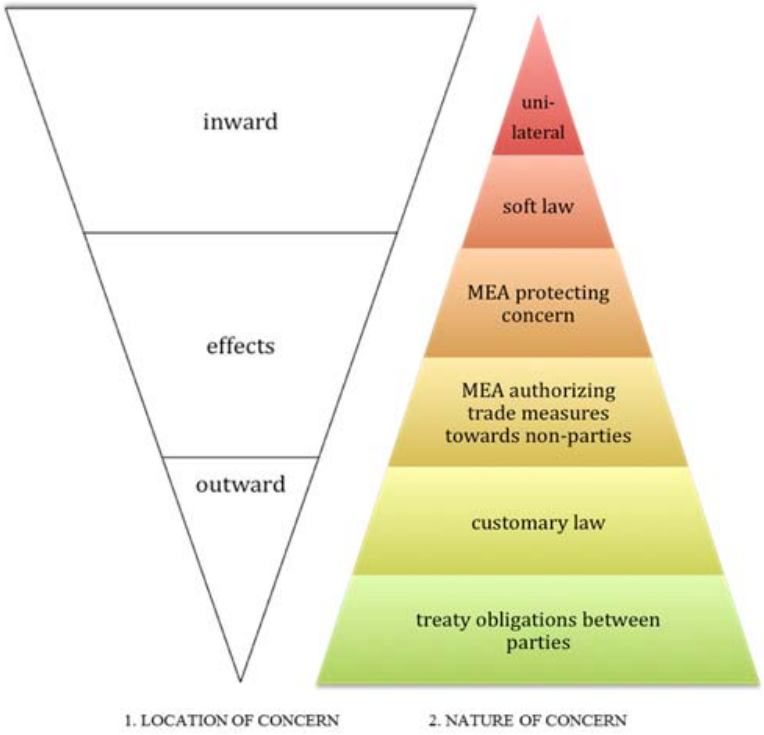

Figure 18. Step 2

660 See chapter 7.2.3.
661 AB Report *Korea-Various Measures on Beef* 2000; AB Report *EC-Asbestos* 2001; AB Report *Brazil – Retreaded Tyres* 2007.
662 AB Report *Korea-Various Measures on Beef* 2000, para.162.
663 See chapter 7.

At the Earth Summit in Rio 1992, the international community failed to reach agreement on a global forest convention. Two soft law instruments were adopted: the Forest Principles[664] and Chapter 11 on deforestation of Agenda 21.[665] Since 1992, in the absence of a hard-law international instrument on forests, sustainable forest matters are addressed in a fragmented and uncoordinated manner by a large number of private and public, international and regional soft-law instruments.[666] At the UN level, the Intergovernmental Panel on Forests was established in 1995 in order to share knowledge between states, and was replaced by the United Nations Forum on Forests in 2001.[667] In 2008 the UN General Assembly adopted a resolution on 'Non-legally Binding Instrument on All Types of Forests' (NLBI), strengthening commitment to sustainable forest management, through among other national forest programs.[668] The NLBI also promotes bilateral, regional and international cooperation aimed at curbing trade in illegal timber, without any binding obligations or commitments, however. In 1994, the United Nations Conference on Tropical Timber adopted International Tropical Timber Agreement (ITTA), succeeding an earlier 1983 ITTA, seeking to promote trade in timber from sustainable sources.[669] Its successor agreement, the ITTA of 2006, further emphasizes the need to improve the distribution and trade of legally harvested timber.[670] There have been a series of regional initiatives addressing forest law enforcement and governance, starting with the Asia Forest Law Enforcement and Governance process, raising awareness, and bringing together governments of timber-

664 Statement of Principles for a Global Consensus on the Management, Conservation and Sustainable Development of All Types of Forest, 1992.

665 Agenda 21, 1992, Chapter 11.

666 For a comprehensive overview, see Jeremy Rayner, Alexander Buck and Pia Katila, *Embracing Complexity in International Forest Governance: A Way Forward* (2010); *Embracing Complexity: Meeting the Challenges of International Forest Governance. A Global Assessment Report by the Global Forest Expert panel on the International Forest Regime* (2010); Lars Gulbrandsen, 'Overlapping Public and Private Governance: Can Forest Certification Fill the Gaps in the Global Forest Regime?' 2004, 4 Global Environmental Policy; FLEGT Action Plan, 2003, 24. A well-known example of a private initiative is the Forest Stewardship Council Certification Scheme. This organization has promoted responsible management of the world's forests since 1993. Its main tools are standard setting, certification and labeling. Use of the FSC logo is intended to signify that the product comes from responsible sources – environmentally appropriate, socially beneficial and economically viable. The FSC label is used on a wide range of timber and non-timber products from paper and furniture to medicine and jewelry. See http://us.fsc.org.

667 See http://www.un.org/esa/forests/forum/.

668 GA Res 62/98, UN Doc, A/RES/62/98 (Jan 31, 2008).

669 International Tropical Timber Agreement, Geneva, 26 January 1994. 45 parties ratified the Agreement.

670 International Tropical Timber Agreement, Geneva, 27 January 2006. 72 parties have ratified the agreement.

producing and consuming countries, civil society and the private sector.[671] A similar process is ongoing in Africa.[672] Both focus mainly on the legality of logging.

Using trade measures as a tool to promote sustainable forest management and legal logging has furthermore been recognized in CITES, with regard to the timber species listed, and its implementation in the EU Wildlife Regulation.[673] The International Tropical Timber Organization (ITTO) and CITES collaborate on a program to ensure that international trade in CITES-listed timber species is consistent with sustainable management.[674] Furthermore, initiatives such as the 1998 G8 Action Program on Forests have made the elimination of trade in illegally logged timber a priority.[675] The UN Security Council has been active against 'conflict timber' through imposing trade bans on all timber traded by armed groups, coming from war zones that might be illegally exploited and used to fuel armed conflicts.[676] The EU is not alone in using trade measures in the fight against illegal logging: Australia and the US have adopted similar legislation.[677]

Forest management is furthermore linked to biodiversity and the fight against climate change. Under the UNFCCC countries have committed to undertake action with regard to forests as 'sinks and reservoirs of greenhouse gases'. The linkages between climate change and biodiversity loss are manifold and complex.[678] Since 2007, REDD (reducing emissions from deforestation and forest degradation) has become an important part of the negotiations for long-

671 For an overview of the Forest Law Enforcement and Governance East Asia, see *Forest Law Enforcement and Governance: Progress in Asia and the Pacific* (2010).

672 African Law Enforcement and Governance, Ministerial Declaration 2003, at http://siteresources.worldbank.org/INTFORESTS/Resources/AFLEGMinisterialDeclaration_English.pdf.

673 A listing under the Appendices of CITES means that timber products from these species can only be imported into the EU when accompanied by an export permit from the country of origin and an EU import permit. Export permits are valid only if the timber was harvested legally within the country of origin, and an import permit can only be granted when it is established that the granting of such a permit would not have a detrimental effect on the survival of the species or the extent of the territory occupied by it.

674 https://www.cites.org/eng/prog/itto.php.

675 G8 Action Programme on Forests, initiated in 1998. See e.g. http://www.g8.utoronto.ca/foreign/forests.html;http://www.mofa.go.jp/policy/economy/summit/2002/g8forest2.html.

676 E.g. Security Council Resolution 1521 (2003) and Resolution 1579 (2004) against Liberia. The EU FLEGT Action Plan points to the need to advance work on conflict timber, with a view to set up an international process similar to the Kimberly Process to diamonds. (FLEGT Action Plan, 2003, 21.).

677 US Lacey Act (16USC §§3371-3378) as amended in 2008; Australia Illegal Logging Prohibition Act 2012, No 166, 2012.

678 See IPCC, Climate Change and Biodiversity (Habiba Gitay et al. eds, 2002), Climate Change and Biodiversity, (Thomas E. Lovejoy & Lee Hannah eds., 2005), see also Van Asselt (2012), 1213.

term cooperative actions under the UNFCCC[679] and deforestation issues are increasingly addressed in the context as a REDD-plus item. Through a REDD mechanism, countries with tropical forests could be compensated for their efforts to reduce the rate of deforestation and enhance sustainable forest management.[680]

The CBD then is the first MEA (with almost universal membership, albeit excluding the US)[681] approaching the protection of biological diversity, including forests, in a comprehensive manner.[682] Under its eco-system approach, particular attention is paid to the management and protection of biological resources, and forests form an important part of these resources, even though no explicit reference is made to forests. As forests are important for among others flora and fauna and natural heritage, the parties have acknowledged that forest issues are covered by the CBD mandate.[683] In 2002, the parties adopted an expanded work program on forests, which provided an extensive set of goals, objectives and activities for the conservation of forest biodiversity and the fair and equitable sharing of benefits arising from the utilization of forest genetic resources.[684] The program does not include quantified, time-bound targets, but lists a wide range of possible activities that can be undertaken at the national level.

Thus, the EU has been an active proponent of a global forest convention, but in light of the failure of reaching binding agreement at an international level, the EU has focused on a unilateral and bilateral approach to ensure the legality of timber brought within its borders.[685] The EU has a clear bottom-up strategy for building international consensus on sustainable forest management.[686] The concern of sustainable forest management has definitely been recognized at an international level, but the international community has so far been unable to agree on a binding regime. Both in its FLEGT and Timber Regulations, the EU is not creating new norms, but relying on definitions of legality based on the national law of the exporting country, which are often

679 It will most likely take some time before fully fledged rules for REDD are set up. In the mean time, several multilateral actions have been undertaken to support the development of and readiness for REDD, such as the Forest Carbon Partnership Facility (supported by the World Bank), and the UN-REDD Programme (established by FAO).

680 Van Asselt (2012), 1222.

681 The Convention has 196 parties. The US is the only nation that is not a party: while it has signed, it has not ratified the CBD. See https://www.cbd.int/information/parties.shtml.

682 Statement of Principles for a Global Consensus on the Management, Conservation and Sustainable Development of All Types of Forest, 1992.

683 Philippe Le Prestre, 'The CBD at ten: the long road to effectiveness' 2002, 5 Journal of International Wildlife Law and Policy 269, 276. The CBD

684 CBD Decision VI/22 'Forest Biological Diversity', UN Doc UNEP/CBD/COP/6/20 Annex I (2002).

685 Annalisa Savaresi, 'EU External Action on forests: FLEGT and the development of international law' in Elisa Morgera (ed), *External Environmental Policy of the European Union* (Cambridge University Press 2012) 149.

686 Marin Duran and Morgera(2012), 273.

also based on international standards.[687] Making use of trade measures as a tool for sustainable forest management has been recognized in instruments such as CITES or the G8 Action Program on Forests. In that regard, one could say that there is clear international support from different fora for the concern at issue (tackling illegal harvesting of timber), as well as for making use of trade measures. In light of the foregoing, it can be concluded that the extra-territoriality threshold would be passed.

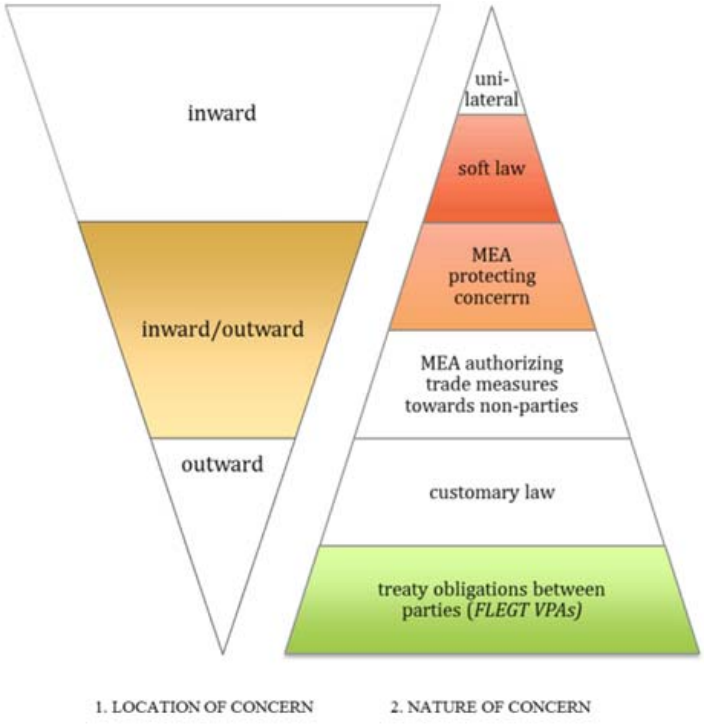

Figure 19. Full model Timber

8.5.3.4 Chapeau

Any measure that has complied with the extraterritoriality decision tree and has thus passed the extraterritoriality threshold, still needs to comply with the conditions of the *chapeau* of Article XX in order to be justified under the general exceptions. The *chapeau* is an expression of the principle of good faith, and several elements have been presented that play a role in the analysis of

687 E.g. explicit reference to international standards in the VPA EU-Cameroon.

the *chapeau*, such as a duty to cooperate, respect for multilateralism, a responsiveness to international developments and a need for flexibility in how to attain the environmental objectives. It has been questioned whether one could read a duty to assistance in the *chapeau*, meaning that when a country imposes a measure, it should also provide for the necessary management elements for success, such as transfer of technology or knowledge.[688]

The Timber Regulation is a product-based measure, whereby the finding of legality of timber products depends on the legislation in the harvesting country. The VPAs concluded pursuant to the FLEGT Regulation are bilateral agreements, under which the partner countries agree with the EU on the conditions of import. The EU is clearly aiming for a consensual and cooperative approach to address deforestation by exporter and importer countries. Reliance on the legislation of the third country arguably aims to ensure the third country's ownership of the initiative, as well as demonstrate respect for its national sovereignty over its forest resources.[689] Relying on the national law of the harvesting country to determine legality could lead to different standards applying depending on where the timber was harvested. However, as the Timber Regulation itself is neutral, this possible differential treatment cannot be seen as arbitrary or unjustifiable discrimination. The rationale of such differential treatment clearly bears a relationship to the objective of the measure, which is preventing the illegal harvesting of timber and its trade. The purpose of cooperation is also to serve as an incentive to come to international agreement, including a common definition and legal framework for the legal harvesting of timber.

With regard to assistance, a measure should be assessed in a broader regulatory context. For instance, the FLEGT Regulation is closely linked to the Timber Regulation, and all countries producing timber can enter into negotiations with the EU to become a FLEGT partner, so they would then be able to issue FLEGT licenses with a presumption of legality for timber products. As a FLEGT partner, the EU will grant assistance to the partner country for the upgrading of its legal and administrative framework related to forest management. VPAs can provide for financing and technical contributions from the EU,[690] as well as market incentives, such as encouragement of public and private procurement policies and market promotion.[691]

688 See chapter 7.4.
689 Marin Duran and Morgera(2012), 274.
690 E.g. Article 15(4) VPA between the EU and Ghana.
691 E.g. Article 18 VPA between the EU and Ghana.

8.5.4 Challenges

FLEGT is a cooperative effort for the enforcement of forest law, and more particularly the enforcement of national laws of the harvesting country. If country A is incapable of sufficiently enforcing its norms, to what extent can country B 'assist' with that enforcement? If country A believes that milder enforcement is appropriate than what country B adheres to, could country B then opt for stricter enforcement for imports coming from A? With the FLEGT Regulation and the VPAs, the EU has clearly opted for a consensual approach, whereby both parties agree on the concern to be protected and the norm (the legality definition under national law); as well as the applicable sanction, being no market access. In the absence of VPAs, the EU stills seeks to prohibit market access through the Timber Regulation. Under the Timber Regulation, the definition of 'legal timber' is still based on the national law of the harvesting country, but the measure is unilateral in the sense that there is no cooperation or assistance between country of export and country of import. Operators importing timber into the EU have an obligation of due diligence, to minimize the risk of bringing illegal timber to the market, which can be penalized among others with the seizure of the products.[692] The EU is not imposing a definition of legal timber, and it could thus very well be that legality definitions differ from country to country. However, as the definition of illegality implies that illegal products cannot legally be placed on the market, the EU's measure to prohibit the market entry of illegally logged timber is in line with the national laws of the country of origin. The sanctions that can be imposed upon violation of the law should be considered separately from the legal norm of legality: those sanctions are to be prescribed under national law (e.g. pecuniary penalty in country A, while seizure of the illegal goods if they are placed on the market in country B).[693]

What if country A exempts exports from more stringent domestic regulation? Can the country of import then still 'enforce' the more stringent domestic regulation on imports? It seems only reasonable that the importing country can solely refer to the national laws as they apply to the product at issue: if not considered illegal in the country of origin, then it cannot be considered illegal by the country of import based on that national legislation. Thus, enforcement of third country norms allows the importing state to impose measures with an extraterritorial effect, as long as that meausure fully relies on the applicable law of the country of origin. Where the country of import imposes additional obligations to a particular product, the measure is no longer only 'enforcing' third country norms. Those additional obligations would then

692 Timber Regulation, 2010, Article 6.

693 Ibid Article 19. The sanctions for the EUTR are furthermore set by the EU Member States, leading to a variation of sanctions across the Member States as well. See Commission Report to the Parliament and the Council, 18 February 2016 (COM(2016) 74 final), p.4.

need to be examined under the decision tree to assess whether they are acceptable as well. This example of third-country norm enforcement shows that an additional type of measure needs to be added to the second pyramid of the decision tree determining international support: enforcement of norms of the country of origin, i.e. enforcement of third country norms.

In the FLEGT and timber example, the EU is not imposing a standard for legality, and not imposing new norms. Nor is the EU explicitly enforcing or furthering existing international norms. Rather, the EU is enforcing third-country norms, shared by a common concern for sustainable forest management. The EU is supporting the further development of international law through a clear bottom-up approach, and is thereby acting as a regime generator. That regime cannot work without the cooperation of both exporting and importing states, and the EU is acting upon its responsibility to involve the necessary actors in the most sustainable way. The cooperation with FLEGT partners as well as the market access incentives will hopefully lead to the development of a multilateral/international regime.[694]

One could wonder whether the Timber Regulation with its reference to national law could not have a counterproductive effect and lead to a race to the bottom, whereby countries will consciously impose weak legislation with regard to the harvesting of timber, in order to ensure 'legal' supply. However, political pressure by other countries in similar conditions, as well as regional and international organizations can hopefully convince the harvesting countries of the importance of sustainable forest management.[695] Precisely because these environmental concerns have a global impact, it is important that all states are involved and have ownership. Furthermore, even though countries can formally adopt legislation, the legal culture of the country in question will affect compliance and enforcement, which is difficult to control. Even though under the Timber Regulation operators need to exercise due diligence when placing timber products on the EU market, their actions are limited by the available information from the country of origin. Distinguishing between countries based on their legal culture is likely to be a too sensitive and arbitrary exercise in order to pass a non-discrimination test under for instance the *chapeau* of Article XX GATT. If it were found that certain laws are structurally

694 For a review of the functioning and effectiveness of the Timber Regulation, see the Commission Report to the Parliament and the Council, 18 February 2016 (COM(2016) 74 final) and the Staff Working Document on the evaluation of the Regulation of the Timber Regulation, 18 February 2016 (SWD(2016) 34 final), at http://ec.europa.eu/environment/forests/eutr_report.htm.

695 So far, no race to the bottom has been identified, and the multitude of forestry initiatives seem to rather lead to upward harmonization. See Christine Overdevest and Jonathan Zeitlin, 'Assembling an Experimentalist Regime: Transnational Governance Interactions in the Forest Sector Revisited' in Laszlo Bruszt and Gerald A. McDermott (eds), *Leveling the Playing Field: Transnational Regulatory Integration and Development* (Oxford University Press 2014) 245.

not complied with, importing states would need to engage in talks and assistance to work towards respecting the rule of law. Extraterritorial trade measures relying on third country legislation, such as the EU Timber Regulation, thus need to be coupled with other assisting measures where necessary to optimize an effective outcome.

8.6 Regime generators: An *ex-ante* approach to the decision tree

The case studies have demostrated that npr-PPMs have different degrees of international 'back-up', which lead to different degrees of 'regime-generating potential'.[696] That back-up refers both to support for the environmental concern (e.g. climate change) and support for the method of action and protection (e.g. a cap-and-trade-system). While there might, for instance, be international support (through hard or soft law) for a particular environmental *concern*, there might not yet be agreement on a common *method* to address that concern. As a matter relevant to determine the necessity of a measure, the assessment of international support must consider both. With regard to appropriate methods of environmental protection, scientific reports and/or state practice in the absence of international agreement can be considered.

Four categories of regime generators can be distinguished: international norm enforcement, third country norm enforcement, norm furtherance and norm creation. While the latter three can only be permitted in the form of process-based npr-PPMs (targeting the specific production process), international norm enforcement may also be permitted in the form of country-based measures, under which npr-PPMs do not only target the specific production process, but make market access conditional on the country of origin. Country-based measures are more restrictive because products that are produced in accordance with the PPM will not be accepted on the market as long as the country of origin does not comply with the prescribed measure (e.g. adopt measure to protect sea turtles comparable to the US TED requirement). Country-based measures are furthermore more intrusive on the sovereignty of the country of production, as they coerce that state into adopting a policy that it otherwise might not have. The following models demonstrate the acceptable scope of action for each type of regime generator. Whereas the decision tree as proposed in chapter 6 is conceptualized as an *ex-post* tool for adjudicators, this further subdivision is equally useful for legislators *ex-ante* by outlining the available scope of action.

696 See chapter 7.6.2.

8.6.1 International norm enforcement

8.6.1.1 International norm enforcement: country-based measure

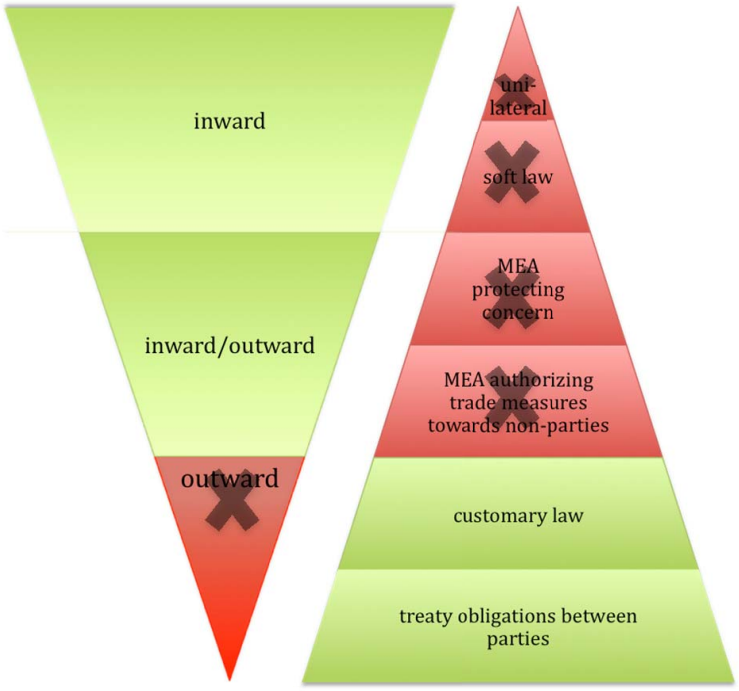

Figure 20. International norm enforcement: country-based measure

International norm enforcement through country-based measures, targeting the country of origin rather than only the specific production process, can only be permitted when binding international obligations exist (either through treaties that bind the affected parties or customary law) for the country of production. In case of direct and substantial environmental effects within the regulating state, the highest level of support through international obligations leads to acceptance of the extraterritorial effect. The coercive effect on other countries can be accepted because those countries are already bound by their international obligations and the targeted state is thus not coerced into adopting rules it does not deem appropriate. Rather, what is required is compliance with its international obligations. If the treaty in question does not foresee in hard enforcement options, a trade measure by a treaty party can create an incentive for compliance – as long as the npr-PPM does not contravene the treaty in question. When the extraterritoriality threshold is passed, a trade

measure will still need to comply with the conditions of the chapeau of Article XX GATT, which can be interpreted as a good faith obligation. For instance, country-based measures combined with technical assistance in order to help the country reaching the prescribed requirements can increase acceptance by the targeted states.

8.6.1.2 International norm enforcement: process-based measure

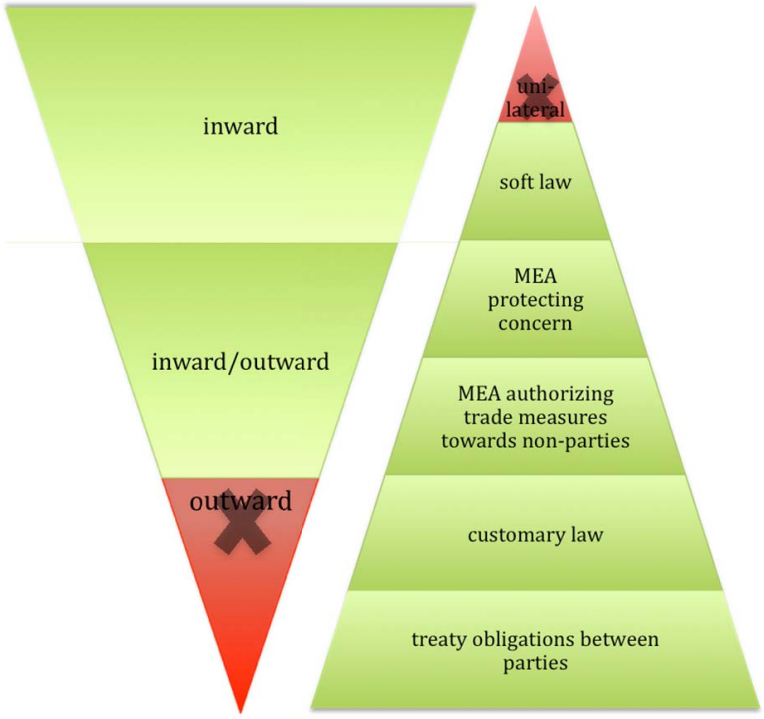

Figure 21. International norm enforcement: process-based measure

Measures of international norm enforcement targeting the specific production process rather than the country are less intrusive than country-based measures and could be accepted even in case of widespread support of the norm through soft law (rather than only through hard law). International norm enforcement implies that a more binding obligation exists that can be enforced, but if it could be demonstrated through an assessment of the international framework on the concern at issue that the soft law framework is widely supported and is recognized by a large number of states as an 'unwritten rule', such a soft law norm could in principle also be 'enforced'. An assessment of the soft law

norm should consider the membership, reasons for failure to conclude a binding agreement and ongoing negotiations. International norm enforcement of soft law is only acceptable when states can demonstrate direct and substantial effects within their territory (inward or inward/outward-looking measures). If there are no or only weak or indirect effects (outward-looking measure), and there are no binding international obligations, then less-trade restrictive measures need to be applied, such as for instance labeling (market incentives rather than market bans).

8.6.2 Third-country norm enforcement

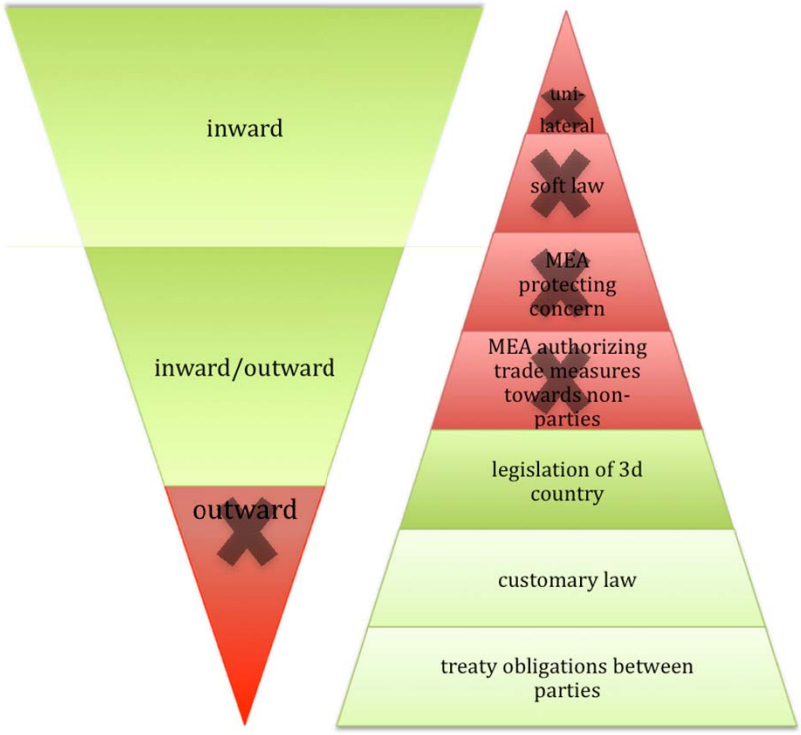

Figure 22. Third-country norm enforcement

Third-country norm enforcement through process-based measures can be accepted when the importing state conditions market access on compliance with the legislation of the country of export, and can thus be seen as 'enforcing' the legislation of the country of export. When the requirements of the importing country do not conflict with the requirements of the exporting country,

no further international support is needed to impose such measure (e.g. prohibition to be placed on the market in both countries). However, if the enforcement measure in the importing country goes beyond what is required in the country of export, additional international support is needed for that part of the measure. That part of the measure will then either be seen as norm furtherance, or possibly even norm creation.

8.6.3 Norm furtherance

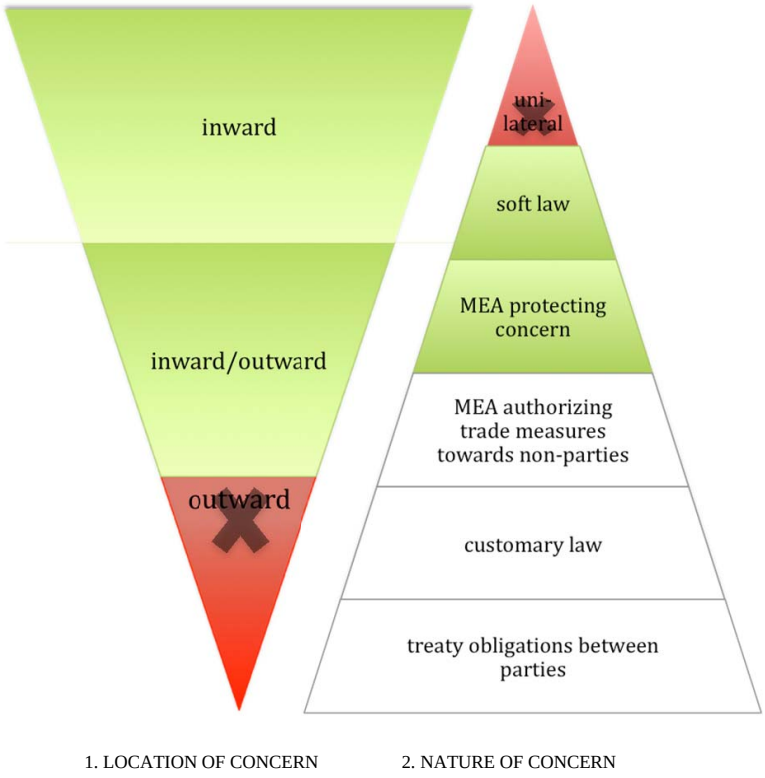

Figure 23. Norm furtherance

Process-based trade measures with the purpose of international norm furtherance can be accepted if the measure is either inward-looking or direct, substantial and foreseeable environmental effects on the territory can be discerned; and if there is sufficient international support for a concern. As international obligations do not yet exist, support needs to be assessed through soft law means. An assessment of that support, taking into account the membership, reasons for failure to conclude a binding agreement, and ongoing negotiations,

needs to be conducted. There can be (dis)agreement on the concern itself, or on the appropriate method to protect that concern. If states agree that an environmental concern needs to be protected, but there is no scientific consensus on how to reach that goal, it is proposed that as long as there is plausible/acceptable scientific support to act in a certain way, measures protecting that goal could be accepted. This can be read into the necessity test, whereby states need to show that the measures they are taking are indeed necessary and proportionate. The burden of proof is on the complaining party to suggest less-trade restrictive alternatives, and thus also alternatives that might rebut the credibility and appropriateness of the scientific method.

8.6.4 Norm creation

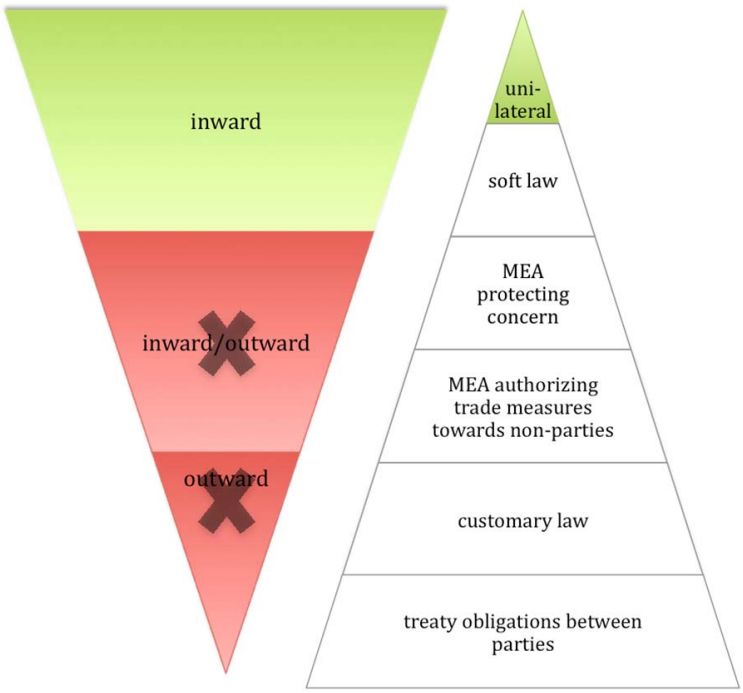

Figure 24. Norm creation

Norm creation would occur in case of unknown or little-known concerns, upon which states would like to act and create incentives for others to act. Unless a measure is strictly inward-looking, states cannot impose trade measures with an extraterritorial effect in the absence of international agreement. Even if there

are direct environmental effects within the territory, when the measure is also outward-looking and affecting other states, states should have recourse to multilateral action rather than unilateral action by raising international awareness and focusing on international negotiations. If such negotiations would not work, then depending on the reason for failure (no recognition of the specific concern, or no agreement on the appropriate method to tackle the concern), measures of norm creation could become of norm furtherance, for which the (newly-found) support at that stage needs to be assessed. Even though arguably this is the situation where PPMs might be needed the most, these unilateral measures both in form and in substance should be avoided within the multilateral trading system. States should commit to multilateralism, and at least attempt to involve other states before imposing trade measures that will affect countries and their producers. Furthermore, if states and/or their consumers are genuinely concerned about a (partly) outward-looking concern, an alternative path of action could be to seek justification under the exception for moral concern, Article XX(a).[697]

8.7 CONCLUSION

The examples discussed above have illustrated the application of the decision tree. All four measures are npr-PPMs with an environmental objective taken in the absence of a well-functioning international regime governing the concern in question – substantive norms are either lacking, not binding, incomplete, or unenforceable. While they are all regime generators, they can be distinguished based on the degree of available international support for and recognition of the norm imposed by the npr-PPM. The IUU Fishing Directive is an example of 'international norm enforcement', the Timber Regulation is an example of 'third country norm enforcement', and both the US TED measure and the Aviation Directive are examples of 'norm furtherance'. A fourth category of which no example has been discussed would be 'norm creation', whereby no international support for a certain concern yet exists, and for which further support is required before npr-PPMs with an extraterritorial effect can be accepted. Whereas the latter category requires the most stringent application of the decision-tree, the former category of 'international norm enforcement' allows for the most leeway for unilateral action.

The following observations on the extraterritoriality decision tree can be made. First of all, before the analysis - including the extraterritoriality question - turns to Article XX GATT, a trade measure needs to violate substantive WTO obligations. As long as a measure is designed in a manner consistent with WTO obligations, that measure is allowed under WTO law irrespective of its extraterritorial effects. Any controversy about possible extraterritorial effects would

697 See chapter 6.3 on moral concerns.

then need to be dealt with outside the ambits of WTO. The Timber Regulation and the Aviation Directive have for instance demonstrated that a violation is anything but obvious. The question under Article XX is then whether a measure can be justified when a state is addressing an environmental concern that is at least partly located outside its territory.

Secondly, states adopting npr-PPMs must be affected by the environmental concern, and must seek international support for the concern at issue through international environmental legal instruments. Due to this combination of environmental effects and international recognition of a particular concern, WTO Members are granted a wider scope for extraterritorial action than would normally be permitted under public international law or competition law: even where effects are weaer or more indirect, npr-PPMs with an extraterritorial effect could still be justified under Article XX GATT. The considerations of effects and international support can be seen as communicating vessels: stronger effects require less international support in order to be justified, weaker effects need more international support and vice versa. States cannot impose extra-territorial npr-PPMs when they are either not affected by the environmental concern, or when there is no international support yet recognizing the concern at issue. Where effects are uncertain in light of long-term effects and the available knowledge of environmental risks, reliance on the precautionary principle should not be opposed.

Thirdly, the decision tree systematizes and substantiates the AB's sufficient nexus test as developed in *US-Shrimp:* while intuitively correct, the AB did not expound why it implicitly accepted a weaker territorial link than normally required under public international law, neither did it elaborate on the impact of the migrating sea turtles on the US by the mere act of swimming through US waters. Through a rigorous assessment of a npr-PPM and its context, the decision tree confirms the AB's (implied) position that WTO law, as it stands, leaves a wide scope for environmental trade measures.

Lastly, the extraterritoriality framework is embedded in Article XX GATT, which includes checks to balance the right of members to regulate with the right of other members to free trade, through e.g. the necessity test with respect to the design of the measure[698] and the *chapeau*. There is no one-size-fits-all solution for environmental trade measures and contextual assessment is key, both in the assessment of the extraterritoriality decision tree, as the further justification of a measure.

698 See for instance the incentivizing measures taken regarding biofuels: all biofuels are accepted on the market, but if not produced according to EU sustainability standards, those fuels cannot count toward Member States' renewable energy targets.