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

Cooreman, B.E.E.M.

9 Concluding chapter: Outlook and final remarks

9.1 A WIDE SCOPE TO ADDRESS GLOBAL ENVIRONMENTAL CONCERNS THROUGH TRADE MEASURES

This thesis has sought to answer whether states, in the absence of international environmental action, can unilaterally impose trade measures targeting foreign production processes (PPMs) in order to protect transboundary environmental resources. Does WTO law allow for 'extraterritorial' trade measures addressing these concerns? Or does it act as a stumbling block for alternative solutions to global environmental challenges? There has been a long-standing perception that PPMs that do not leave a final trace in the imported product (npr-PPMs) cannot be accepted under the existing trade rules because of their extraterritorial character. However, that perception does not correspond to reality. Whereas current WTO law does not include an explicit jurisdictional limitation, it is submitted that the rules can be interpreted rigorously to allow a wide scope for environmental npr-PPMs, while still safeguarding against overreach. In that light, environmentalists should not fear that trade rules will impede environmental protection, and trade advocates should not fear that allowing environmental protection through npr-PPMs will undermine the global trading system. Trade measures can contribute to progress on global environmental priorities, rather than complicate or impede it. Unilateral trade measures can be a much-needed alternative when multilateral or concerted environmental solutions are missing.

This thesis has demonstrated that WTO law, as it stands, leaves considerable scope for states to impose npr-PPMs addressing transboundary environmental concerns. By looking at WTO law from the perspective of other fields of law where an extraterritorial application of laws is accepted practice, an extraterritoriality decision tree has been proposed to assess extraterritoriality claims under WTO law, and more particularly under Article XX GATT. In trade law, extraterritoriality is not as much a question of *jurisdiction*, but of *justification*. Trade measures only apply to products that access the market of the regulating country: due to this territorial trigger, npr-PPMs can better be defined as measures with an *extraterritorial effect*, rather than as 'full' extraterritorial

measures.[1] Can that effect be justified when a measure is targeting an environmental concern (partly) located outside the territory of the regulating state? It is submitted that states can impose environmental npr-PPMs when, firstly, the regulating state is affected by the concern at issue,[2] and, secondly, where that concern is recognized as such in international environmental law.[3] In the landmark case *US-Shrimp* the AB found a 'sufficient nexus' between the US and the threatened sea turtles to justify the extraterritorial reach of the US measure. The AB did not require an explicit or strong territorial link as per general international law principles, but applied a less stringent test. While intuitively correct, the AB's nexus test was unsatisfactory in its wording and implementation. The extraterritoriality decision tree as proposed in this thesis systematizes and substantiates the assessment of trade measures addressing transboundary environmental concerns under Article XX GATT. Considering environmental effects on the territory of the regulating state in combination with support for the concern in international environmental law enables a robust review of trade measures with an extraterritorial effect. This two-tier test warrants a wider scope for states to address extra-territorial concerns under Article XX GATT than would be permitted under public international law or competition law.[4]

As the text of Article XX GATT (as well as its context) is silent on its scope, any interpretation such as the one proposed in this thesis could be disputed. In order to settle all discussion on persistent uncertainties, such as the acceptability of npr-PPMs and the scope of the WTO agreements, WTO Members must opt to clarify or change the law. Amendments to Article XX GATT, adopting an interpretative understanding to clarify the meaning of existing obligations, adopting a plurilateral agreement on the interpretation of WTO rules or even a moratorium on dispute settlement in the area of clean energy were some of the policy options proposed by experts in the recent ICTSD and World Economic Forum E15 Initiative on Trade and Sustainable Development.[5] However, this thesis contends that, before going down the long and challenging road of treaty amendments, much can be done *de lege lata*. It has been demonstrated that the WTO legal framework that states can and must work

1 See chapter 4 for a distinction between extraterritorial measures and measures with an extraterritorial effect under public international law.

2 See chapter 5 for a study on the effects doctrine in the field of competition law.

3 See chapter 6 for a study on the extraterritorial application of regional and international human rights treaties.

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

5 Ricardo Melendez-Ortiz, *Enabling the Energy Transition and Scale-Up of Clean Energy Technologies: Options for the Global Trade System – E15 Expert Group on Clean Energy Technologies and the Trade System* (2016) 17; Bacchus (2016), 17; Ricardo Melendez-Ortiz and Richard Samans, *Strenghtening the Global Trade and Investment System in the 21st Century: Synthesis Report* (The E15 Initiative: Strengthening the Global Trade and Investment System for Sustainable Development, 2016) 91.

with today is not as limited or controversial as often assumed. Rather, WTO law leaves quite some scope to the Members to make use of trade measures to further global environmental protection.

This concluding chapter first gives an overview of the research leading to the extraterritoriality decision tree under WTO law, followed by a short discussion of its challenges. Next, some observations are made with respect to concept of territoriality, questioning whether it is still a useful concept in a globalized world. Lastly, the thesis is concluded with some final remarks on this study and its implications.

9.2 AN INCLUSIVE PERSPECTIVE RATHER THAN 'IN CLINICAL ISOLATION': BUILDING A DECISION TREE

This thesis focuses on the extraterritorial reach of npr-PPMs, which may refer to two notions of extraterritoriality. Firstly, can states regulate foreign production processes through trade measures? And secondly, can states through such measures aim at the protection of non-trade concerns located outside their territory? In other words, is extraterritoriality a matter of jurisdiction (can states prescribe behaviour abroad), or a matter of justification (can states justify a measure based on a concern outside their territory)? As the first part of the research has shown, WTO law is silent on its jurisdictional scope, and jurisprudence on extraterritorial trade measures has been scarce (chapter 3). With regard to the first question, the AB found in *US-Shrimp* that in principle, states can regulate foreign production processes through trade measures, when they comply with the conditions of the general exceptions clause, Article XX GATT. Extraterritoriality under WTO law is thus a question of justification rather than of establishing jurisdiction. With regard to the second question, the AB referred to a 'sufficient nexus' between the regulating state and the environmental concern addressed through the disputed measure. Without further clarification of the required nexus in *US-Shrimp* or later case law, the scope of Article XX GATT has remained uncertain. In order to develop a more systematic and robust approach to assessing extraterritoriality claims under WTO law, the second part of the thesis has made an excursion to other areas of law where the extraterritorial application of laws is an accepted practice. This 'zooming out of WTO law' is in keeping with the AB's findings that the WTO agreements are not to be read 'in clinical isolation' from public international law;[6] and that the exceptions of Article XX GATT should be interpreted in light of contemporary concerns, as evidenced by international instruments of environmental law.[7]

6 AB Report *US-Gasoline* 1996, p.17.
7 AB Report *US-Shrimp* 1998, paras.129.

Even though npr-PPMs explicitly target foreign production, a measure will only be 'activated' when access is sought to the market of the regulating country. Producers abroad are still free to produce in whatever preferred or locally regulated way, and will only need to comply with the PPM-imposed rules once they have opted to export to the market of the regulating state. Enforcement of these rules only occurs within the territory of the importing state (including border controls). Npr-PPMs can hence not be considered 'full' extraterritorial measures: because of the territorial connection through market access, they are better designated as measures with an extraterritorial effect (chapter 4). The question whether that effect can be permitted relates to the second notion of extraterritoriality in this context: can npr-PPMs aim to protect environmental resources (partly) located abroad, i.e. do these 'extraterritorial' concerns fall within the scope of the general exceptions of Article XX GATT?

Through the analysis of the jurisdictional principles of public international law permitting extraterritorial prescriptive jurisdiction, the objective territoriality principle – i.e. the effects doctrine as commonly applied in competition law – has been identified as most relevant to the analysis and justification of npr-PPMs (chapter 5). States may act when their environment is affected by foreign production activities. Measures that are either inward-looking (environmental harm fully within the territory of the regulating state), or partly outward-looking (concerns of a transboundary or global nature that can lead to environmental effects both within and outside the regulating state) may be permissible under Article XX GATT. States cannot act extraterritorially when they cannot demonstrate environmental effects on their territory, i.e. when a measure is only outward-looking. By analogy with the application of the effects doctrine in competition law, environmental effects should be direct, substantial and foreseeable. However, whereas national competition rules are applied extraterritorially in the absence of relevant international rules, the situation differs in an environmental context. There is a body of international environmental law that could be taken into account – in addition to considering environmental effects on the territory -, and which could possibly justify a more lenient approach to the required effects: even effects that are less direct or less substantial could then nonetheless justify state action when support for the concern is found in international environmental law. For example, when the threat to sea turtles is recognized as an important concern in an MEA, states could be permitted to act to protect sea turtles even when the environmental effects of a decreased sea turtle population upon their territory would be weaker, i.e. less present. The binding nature and the membership of the MEA are elements to be taken into account to assess the international support for the action taken.

The analysis of the extraterritorial application of international and regional human rights treaties (chapter 6) has demonstrated that states may indeed be more willing to accept an extension of jurisdictional boundaries when common norms are at issue. By focusing on a factual assessment of a state's

control over territory and/or persons, the human rights bodies have shown that, when shared values and global concerns so demand, the notions of jurisdiction and sovereignty can be elastic. Such extraterritorial application enshrines the 'normative basis for the protection of fundamental rights as rights of human beings rather than as rights of citizens'.[8] Even though the concept of extraterritoriality in a human rights context – referring to an extension of a state's own obligations – differs from the extraterritorial effect of npr-PPMs – imposing obligations on foreign producers –, the human rights perspective still offers valuable insights into the flexibility of jurisdictional boundaries (even though the analysis of Article XX GATT is concerned with justification rather than jurisdiction). In addition to effects on the territory, international environmental law – as evidence of common concerns and global environmental priorities – can strengthen the justification of npr-PPMs with an extraterritorial reach.

In the third and final part the extraterritoriality decision tree has been proposed and applied to several case studies. The proposal of the tree builds upon the lessons learned from the analysis of these other fields of law as well as the AB's jurisprudence (chapter 7). As discussed in chapter 1, the core of the substantive legal analysis of npr-PPMs takes place under Article XX GATT. The extraterritoriality decision tree is embedded within the paragraphs (paragraphs (b) and (g)) of Article XX – does the environmental concern fall within the scope of the paragraphs, and is the measure necessary/related to the concern – and functions as an extraterritoriality threshold question before the measure can be examined further under Article XX's paragraphs and *chapeau* in light of good faith. The first step of the decision tree looks at the environmental effects on the territory, and the second step looks at the international support for the concern at issue. The scope of Article XX is thus limited by two requirements: a link between the regulating state and the environmental concern must be established through environmental effects on the territory; and a measure will qualify more easily as necessary when the substantive norm that it promotes finds international support in hard and/or soft environmental law. These requirements of effects and international support can be seen as communicating vessels: stronger effects require less international support in order to be justified, while weaker effects need more international support, and vice versa. Through the combined consideration of both effects and international support, trade measures with an extraterritorial effect could be justified even in those instances where that would not be evident from a general international law perspective. Nevertheless, there has to be some environmental effect on the territory: when states are not, or only very indirectly, affected by the environmental concern at issue, they cannot impose npr-PPMs addressing that concern, irrespective of the degree of international support.

8 Gardbaum(2009), 233.

Neither can they do so when there is no international support yet for an environmental concern that also affects other states. In those cases, justification may be sought under the public morals exception of Article XX(a), of which it has been argued that there is no jurisdictional limitation, but where a thorough assessment of the actual existence (evidence) of the public moral is required.

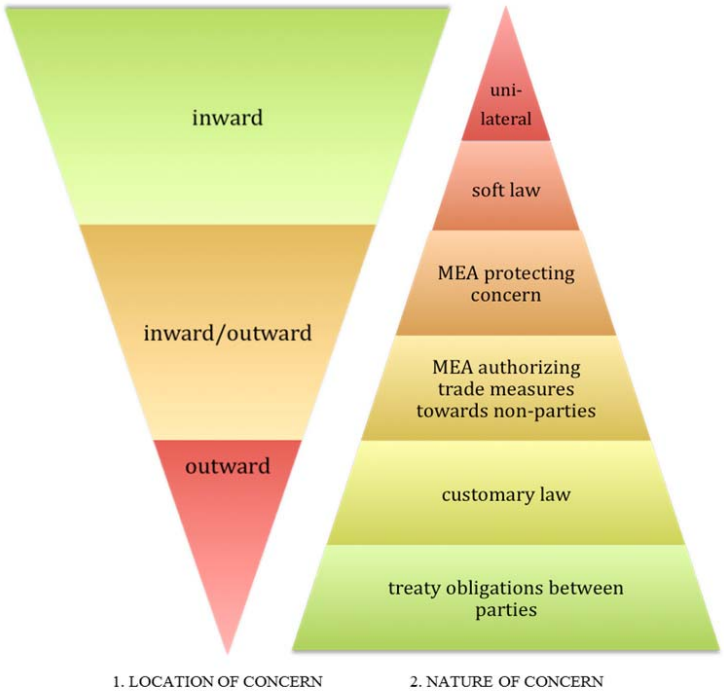

Figure 25. Extraterritoriality decision tree

Lastly, the proposed extraterritoriality decision tree has been applied to the landmark case of *US-Shrimp* and to different examples within EU environmental law: the Illegal, Unreported and Unregulated Fishing (IUU Fishing) Regulation, the aviation measures in light of the European Emission Trading System (EU ETS), and the Timber Regulation as part of the EU's Forest Law Enforcement, Governance and Trade (FLEGT) Action Plan (chapter 8). The analyzed measures are all taken in the absence of a well-functioning international regime governing the concern in question– substantive norms are either lacking, not binding, incomplete, or unenforceable. The case studies have demonstrated that first, a violation of a substantive WTO obligation needs to be established before the extraterritoriality question even arises; and second, Article XX GATT as it stands can accommodate npr-PPMs with an extraterritorial effect through the systematic assessment as proposed by the decision tree, albeit with different degrees

of stringency. The analyzed examples all serve a purpose as a regime generator: they create an incentive for increased collective or multilateral decision-making. Different types of regime generators can be identified based on the objective of the measure: npr-PPMs can have as their objective the enforcement of international obligations, the enforcement of third country legislation or the furtherance of existing norms. While there is ample room under WTO law for these types of generators, the extraterritorial effect of npr-PPMs cannot be permitted where the measure aims at *norm creation* by imposing a norm that does not yet find any international legal support (in either soft or hard law). Neither can trade measures be used as regime generators where no effect on the regulating state's territory underlies the measure.

9.3 Challenges and dilemmas

The decision tree proposes a systematic approach to assess the extraterritorial effect of environmental measures under Article XX GATT. While the appeal of the model lies in its simplicity, relevant challenges and dilemmas have been identified, both of a conceptual and practical nature, to which there is no conclusive answer yet within WTO law. These points are worth noting, because of their importance for the drafting and effective functioning of environmental legislation and environmental trade measures. They show in particular the interplay between law, politics and science: the international community of state and non-state actors will need to engage to build a comprehensive framework for environmental protection, where the needs and capabilities of all involved are respected.

9.3.1 The principle of common but differentiated responsibilities and respective capabilities

Even though not explicitly mentioned in the decision tree, it is important to implement the principle of common but differentiated responsibilities and respective capabilities (CBDRRC) into environmental policy.[9] At the international level, when drafting international agreements, the principle should be taken into account in the division of states' environmental action burden. At a national level and through unilateral trade measures, it is more difficult to operationalize the principle when there is no international agreement on how that burden should be divided. A unilaterally determined division of burden can hardly be reconciled with international decision-making. Rather, the principle of CBDR-RC can manifest itself in unilateral npr-PPMs through for

9 See also chapter 7.1 and chapter 8.4.

instance the implementation of structural assistance for countries with limited capacities, lower standards or longer transition periods. In other words, developed countries have to take the needs of developing countries into account to the extent possible when designing their policy. Such an application of the principle of CBDR-RC could also be read in a duty of good faith as expressed in the *chapeau* of Article XX GATT. Even though not a hard, enforceable legal obligation, when developing countries are for instance affected to such an extent that their market access is severely limited by the imposed measures, it is argued CBDR-RC can be an element in the assessment of unjustifiable discrimination.

9.3.2 The inherent uncertainty of environmental science

Scientific evidence is needed not only to determine the existence and degree of environmental effects, but also to determine the appropriateness and effectiveness of the environmental method and the substance of environmental policy. A number of challenges have been identified in relation to the reliance on science: firstly, one can only work with the information and data available. The incredibly complex interaction of different factors and actors, through time and space, complicate any scientific analysis. Environmental scientists have to contend with relatively limited knowledge, with environmental harm or effects or causal links that can take decades or centuries to manifest themselves, with inherent uncertainty about the what, how and when.

Secondly, due to this complexity, diverging opinions will likely each find supporting evidence. Who is then to determine the 'truth'? Who is to determine the most appropriate approach? One of the most significant accomplishments of the climate regime is the development of the Intergovernmental Panel on Climate Change, a cooperation engaging thousands of experts.[10] Where possible, that approach should be extrapolated elsewhere, albeit on a smaller scale. Any assessment of environmental effects should be as objective as possible, outlining different views, and indicating what is known, what is not known, and what is assumed and suspected.

Thirdly, decision-makers must act upon the available scientific evidence, an assessment involving both facts and value.[11] For instance, the Framework Convention on Climate Change has as its objective the stabilization of atmospheric concentrations of greenhouse gases at levels that would prevent 'dangerous' anthropogenic interference with the climate system. However, when do these levels become dangerous? Assessing risk is a scientific task,

10 See for more information and reports, www.ipcc.ch.

11 Daniel Bodansky, 'The Legitimacy of International Governance: A Coming Challenge for International Environmental Law?' 1999, 93 American Journal of International Law 596, 621.

but determining the acceptable level is as much a value judgment and such decisions require inferences, choices, and assumptions that themselves reflect policy preferences.[12] Whether states rely on precautionary measures or undertake a cost-benefit approach to risk is equally a matter of political judgment. Environmental decision-making often raises questions that involve science but cannot be answered in purely scientific terms.[13] With regard to these political judgments, WTO panels and the AB should, where possible, adopt a deferential approach: where WTO members are consistent in their approach (e.g. either adoption of precautionary principle or not; non-discriminatory baseline data for domestic and imported producers; etc.) these policy choices of members should be accepted as such.

9.3.3 The catch 22 of unknown concerns

A state that wants to act upon an 'unknown' (or rather a little-known or newly emerging) concern that finds no support yet internationally can only do so within its own territory. These concerns are defined as unilateral concerns under the decision tree, and cannot be object of an extraterritorial PPM due to the lack of international support and recognition. Efforts must first be made to raise international awareness and instigate international negotiations. This can be criticized, as arguably these newly emerging concerns are most in need of PPMs. However, while those concerns that are not yet supported internationally but may nonetheless have a global impact may indeed in dire need of alternative action, it is nevertheless important to respect the sovereignty of states and the nature of the international community as it stands today. States should commit to multilateralism, and at least attempt to involve other states before imposing trade measures that will affect other countries and their producers. If international negotiations do not result in a multilateral agreement, the reason(s) for failure (e.g. no recognition of the specific concern, or no agreement on the appropriate method to tackle the concern) would need to be assessed to see whether there might be more informal support on the specific concern for instance, including reports and civil society initiatives. If states and/or their consumers are genuinely concerned about a newly emerging concern, an argument for justification of a npr-PPM could possibly be brought under the exception for moral concerns, Article XX(a) GATT.[14]

12 Ibid.
13 Ibid 622.
14 See chapter 7.3.

9.3.4 Towards a duty of market power

Powerful markets are in a stronger position to make use of extraterritorial PPMs and it has been demonstrated that they have no legal excuse not to do so. The power of exclusion will be stronger when exporters have no real choice of targeting another market, and subscribing to the imposed rules is the price of trading with that market. However, does the *legal possibility* to make use of PPMs to protect environmental concerns also entail a legal or moral responsibility or *duty* of indeed making use of PPMs? In other words, do states have a duty not to allow the market to be used for environmental harm? No legal duty can be read in WTO rules or any environmental instrument today. However, states have a moral duty to act in order to protect the environment and ensure sustainable development, as recognized in a number of instruments,[15] including the preamble of the Marrakesh Agreement. The protection of the commons may require leadership and creating an incentive to comply with higher environmental norms can be a tool for such leadership. When an international, multilaterally agreed solution is lacking, when the international system is deadlocked, when progress in environmental protection of the commons fails to materialize, alternatives are required. Those states that are in the position to make effective use of those alternatives should create the much-needed incentives to put a spurt on international progress. A similar duty is suggested with regard to human rights protection through the Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights, as has been discussed in chapter 6.

Furthermore, while protection of common environmental concerns must be founded on a practice of burden-sharing justice, where others are not respecting or complying with their burden, it must be complemented with a practice of harm-avoiding justice.[16] Such practice implies that those who can will take an additional burden from those who are not doing their part. This type of responsibility has been described by Caney as second-order responsibilities.[17] Environmental measures with an extraterritorial effect could be described as second-order responsibilities: the imposing state attempts to involve other actors and create incentives for other countries to act. With power comes responsibility, and it could be argued that where a state is capable of using its market power to create incentives to stimulate and encourage environmental protection, it should do so. A duty of good faith as expressed in the chapeau of Article XX GATT could guide such responsibility in order to avoid abuse: PPMs could be complemented with the necessary management and assistance tools to guarantee that other countries, and in particular developing countries, are in a position to comply with the imposed laws.

15 See for instance Paris Agreement, 2015; Agenda 2030.
16 See chapter 8.4.4.
17 Caney (2014).

9.4 RETHINKING TERRITORIALITY IN A GLOBALIZED WORLD

It has been demonstrated throughout this thesis that environmental challenges can have a global impact, and thus require global solutions. The traditional approach to international lawmaking whereby sovereign states agree on common solutions is challenged in the field of environmental law. In a number of areas where environmental action is required, cooperation is stalling for a multiplicity of reasons. Existing environmental cooperation often takes a cautious approach, with few binding commitments, and even less enforcement options. The ongoing debate on environmental npr-PPMs demonstrates that states are seeking alternatives. This thesis has shown that while the extraterritorial reach of npr-PPMs might raise controversy, a convincing argument can be made to permit such a reach under Article XX GATT when a state is affected by an environmental concern and finds support for that concern in international environmental law.[18] Apart from environmental challenges, a number of other areas demand a more flexible approach to territoriality in today's globalized world, such as all cyberspace-related matters, but also fields of law related to an ever-increasing financial and corporate interdependency, including securities, anti-fraud and financial regulation. There is an undeniable connection between the territorial scope of economic and social activities and the territorial scope of legal rules governing such activity. As the former became increasingly global, the latter must follow suit.[19] States are not on the verge of disappearing, but transnational interests and needs increasingly transcend narrow sovereign interests.[20]

In times of globalization, sovereignty as a Westphalian concept is challenged by multilateral and international cooperation and institutionalization processes. This is clearly visible within the EU, but also in a wider context through international organizations such as the UN or the WTO.[21] Global challenges demand cooperative solutions. International cooperation does not necessarily weaken the sovereignty of states, but can arguably even serve to reassert and enhance it, albeit on a different level.[22] International institutions can be seen as vehicles or tools through which sovereignty in an interdependent, globalized world is preserved and realized.[23] 'Power' of states is not lost, but has been allocated upward and it will depend on the institutional set-up of the international organization to what extent traditional state

18 See *supra* at 9.2 for more detail; as well as chapter 7 for an elaborate proposal of the extraterritoriality decision tree and chapter 8 for its application to several case studies.

19 Kal Raustiala, *Does the Constitution Follow the Flag* (Oxford University Press 2009) 118.

20 Betlehem (2014), 15.

21 Jackson (2003), 787; Wenhua Shan, Penelope Simons and Dalvinder Singh (eds), *Redefining Sovereignty in International Economic Law* (Hart Publishing 2008).

22 Kal Raustiala, 'Rethinking the Sovereignty Debate in International Economic law' 2003, 6 Journal of International Economic Law 841.

23 Ibid 857.

power remains with the states through e.g. veto power and opt-out or exit availability. As has been discussed in chapter 3, sovereignty and jurisdiction are closely linked concepts. Where the international processes of global governance are lagging, global challenges – such as wars, migration streams and terrorism, linked to economic growth, sustainable development, human rights protection, and environmental protection – demand alternative action. These challenges affect all states, irrespective of whether they are taking action or not. Since the effects are not limited by territorial boundaries, state action should not be limited by those boundaries either. Ideally, solutions are found through global governance and cooperation. However, in reality there are states that are acting; states that could act but are not willing to do so (free-riders); and states that are not able to do so. If only one group of states can act within their territorial boundaries with respect to for instance environmental concerns, any protection will be sub-optimal. By permitting alternatives, such as for instance npr-PPMs as proposed in this thesis, allowing states to act unilaterally where that action is contingent upon multilateral developments, incentives are created to involve or coerce the free-riders, increasing the potential reach and effectiveness of environmental protection. All states that are capable should offer technical and financial assistance to those states that are not able yet to take the necessary action, which can be coupled with market incentives. The global character of the concerns cannot be ignored: people have the right to environmental protection, even if their government cannot make this a priority.

Sovereignty has always been a supple, multifaceted concept that has been bent to suit political purposes and fit realities.[24] Sovereignty and jurisdiction relate to power, control, and autonomy. While sovereignty and jurisdiction imply that no state can act entirely free of constraints in its relations with other sovereigns, sovereignty is not an absolute value: it can give way to other values, whether of an economic nature, an ethical nature, a moral nature, or an environmental nature.[25] Whether sovereignty will be interpreted in a way to allow an extension of jurisdictional boundaries is as much a matter of political as of legal debate.[26] Within the *political* understanding of sovereignty, the *legal* rights and duties can be determined. The extraterritoriality decision tree shows that an extraterritorial reach can be legally accommodated under existing WTO law. However, the precise determination, a wide or a narrow interpretation of effects, of support, and of necessity, cannot be fully dissociated from political decisions. Tolerating unilateral action as proposed here 'is not to accept an international order that is rooted in state power at the law's

24 Ibid 874; Sir Jennings(2002), 29.

25 Vaughan Lowe, 'Sovereignty and International Economic Law' in Wenhua Shan, Penelope Simons and Dalvinder Singh (eds), *Redefining Sovereignty in International Economic Law* (Hart Publishing 2008) 80.

26 Ibid 84; Paul Schiff Berman, *Global Legal Pluralism: A Jurisprudence of Law Beyond Borders* (Cambridge University Press 2012) 82.

expense. It is to accept that state power can be at times relied on in order to make the law relevant or effective'.[27] It is also not to accept a preference for unilateral action over multilateral action, but to recognise that one can trigger the other. States must seriously engage in setting out common rules and binding commitments on global challenges. However, where states have a good faith obligation to engage in multilateral cooperation in addition to acting unilaterally, they equally have a good faith obligation to not hide behind 'sovereignty' and 'territoriality' in order to escape their responsibilities.

9.5 FINAL REMARKS

This thesis has answered in the affirmative the question whether states *could* apply trade measures to address global environmental concerns. However, *should* they do so as well? The objective answer to that question requires a political effectiveness and economic efficiency analysis, which is beyond the scope of this study. Subjectively, the following can be noted. Global environmental threats are a reality, and international action is required in order to slow down further degradation. The international system is lagging and while important – albeit symbolic at times – steps are taken such as the 2015 Paris Agreement on Climate Change, the international community of states is failing to set out concrete and ambitious action. States seek alternatives that can exceed the suboptimal level of environmental protection that is limited to state's boundaries and trade measures offer opportunities. Indeed, there are pitfalls and indeed, there is a risk to abuse and disguised protectionism. As also pointed out by the E15 Expert Group on Trade and Climate Change, the interplay between trade and climate regime is ideally determined in concert by both WTO Members and UNFCCC parties. In the absence of such accord, WTO experts in WTO dispute settlement will draw the line of permissible climate measures.[28] While entrusting WTO experts with that task will not necessarily lead to wrong results, as technical trade experts they might not be sufficiently equipped to make decisions with potentially far-reaching environmental implications. Nonetheless, this research has shown that WTO law provides for protection mechanisms against abusive trade measures and sufficient safeguards against jurisdictional overreach and abuse of power as laid out in the decision tree. The multilateral nature of the trading system and the sovereignty of other states are respected to the extent possible in light of global concerns. Unilateral environmental action can incentivize further international cooperation; hence under the current circumstances the way forward is through such action and there is no good reason to accept the multilateral paralysis.

27 Hakimi (2014), 145.
28 Bacchus (2016), 14.

Sustainable development is one of the core objectives of the WTO. It has often been questioned whether the current WTO treaty obligations do not form an obstacle to achieving this objective. This study's main contention is that this concern is unwarranted. First, there is no reason to think that the WTO legal regime constitutes an impediment to global environmental action. Second, in the absence of global environmental agreements, unilateral trade measures remain a powerful tool to stimulate better environmental protection. It has been demonstrated that current WTO law leaves more room for environmental npr-PPMs with an extraterritorial reach than is often thought. At the same time, WTO law includes disciplines with which abusive measures can be weeded out. In conclusion, governments cannot hide behind the pretext that WTO law prevents them from using their markets, through trade-related measures, for environmental progress: WTO law is no excuse for environmental inaction.