ADDRESSING ENVIRONMENTAL CONCERNS THROUGH TRADE: A CASE FOR EXTRATERRITORIALITY?

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Abstract In the absence of stringent and coordinated international action, States might seek alternatives to promote environmental protection unilaterally. Trade measures may be tools to promote environmental protection in other countries through the means of trade restrictions based on the process and production methods of a good (PPMs), but can they be used to protect global environmental concerns? PPMs are considered to be controversial because of their extraterritorial character. Inspired by other fields of law where an extraterritorial application of laws is accepted, such as competition law and international human rights law, this paper proposes a systematic approach to assess the acceptability of extraterritorial trade measures with an environmental objective within the scope of the general exceptions of the GATT. This contribution purports to answer whether the WTO forms a stumbling block for States to address global environmental concerns through trade.

Keywords: effects doctrine, environment, extraterritoriality, WTO.

I. INTRODUCTION

In the absence of stringent and coordinated international action regulating the preservation of the environment, countries seek alternatives to promote environmental protection. Trade measures may be such an alternative, but can they be used to protect global environmental concerns or concerns located outside the territory of the regulating State?

US–Shrimp was the first case in which the WTO Appellate Body addressed this issue.[1] In order to protect endangered sea turtles, the US banned the import of shrimp fished outside US waters and in a manner not complying with US standards for turtle protection. The US did not dispute that there had been a violation of WTO law, and

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[1] WTO, Appellate Body (AB) Report, *United States–Import Prohibition of Certain Shrimp and Shrimp Products* (1998) WT/DS58/AB/R. Even though *US–Shrimp* was the first case before the WTO AB, the unadopted GATT Panel reports GATT, GATT Panel, *United States–Restrictions on Imports of Tuna (Mexico)* (1991) DS21/R; GATT, GATT panel, *United States Restrictions on Imports of Tuna (EEC)* (1994) DS29/R, dealt with a similar measure.

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the case focused on the possible justification of the US measure under the general exceptions of Article XX GATT. The important question of whether the US could adopt trade restrictions to protect foreign sea turtle species was largely evaded by the Appellate Body. It avoided answering whether there is an 'implied jurisdictional limitation' in Article XX GATT—ie whether WTO Members can only act to protect a concern within their jurisdiction—by focusing solely on the facts of the case. As some of the sea turtles were known to swim through US waters some of the time, the Appellate Body found there to be a 'sufficient nexus' between the sea turtles and the US.[2] The Appellate Body failed to define the required nexus; and missed the opportunity to shed more light on the scope of Article XX. In the recent *EC–Seals* case the Appellate Body emphasized the systemic importance of determining the jurisdictional limitations of Article XX GATT, but did not explore the issue further due to a lack of arguments made by the parties.[3] The question thus remains whether trade measures that aim to protect an environmental concern located outside the territory of the regulating State can be accepted. Does WTO law, and more particularly Article XX GATT, form a stumbling block for States seeking to address global environmental concerns through trade?

The traditional focus of trade law is on end products and their market impact. However, environmental trade measures do not always regulate the end product: environmental concerns might be related more to the production process than the actual end product (shrimp remain the same irrespective of whether sea turtles were harmed in the catch). Trade measures targeting production methods that leave no physical trace in the end product ('non-product-related process and production methods' or npr-PPMs, such as the use of dolphin-friendly fishing nets) have been subject of much (unresolved) debate, as they aim at influencing production processes abroad.[4] As has been noted, one particular controversial aspect relates to objectives of npr-PPMs that are not limited to concerns within the jurisdiction of the regulating country.[5] Due to the sensitive nature of jurisdictional claims as well as the impact

[2] WTO, AB Report, *US–Shrimp* (1998) para 133.

[3] WTO, AB Report, *European Communities–Measures Prohibiting the Importation and Marketing of Seal Products* (2014) WT/DS401/AB/R, para 5.173.

[4] For an overview of the debate on PPMs, see *inter alia* OECD, 'Processes and Production Methods (PPMs): Conceptual Framework and Considerations On Use of PPM-based Trade Measures, Organisation for Economic Cooperation and Development' (1997); B Jansen and M Lugard, 'Some Considerations on Trade Barriers Erected for Non-Economic Reasons and WTO Obligations' (1999) 2(3) JIEL 530; R Howse and D Regan, 'The Product/Process Distinction – An Illusory Basis for Disciplining "Unilateralism" in Trade Policy' (2000) 11(2) EJIL 249; S Charnovitz, 'The Law of Environmental "PPMs" in the WTO: Debunking the Myth of Illegality' (2002) 27(1) YaleJIntlL 59 ; P Van den Bossche, N Schrijver and G Faber, *Unilateral Measures Addressing Non-Trade Concerns*: A Study on WTO Consistency, Relevance of other International Agreements, Economic Effectiveness and Impact on Developing Countries of Measures concerning Non-Product-Related Processes and Production Methods (Ministry of Foreign Affairs of The Netherlands 2007); H Horn and PC Mavroidis, 'The Permissible Reach of National Environmental Policies' (2008) 42(6) JWT 1107; CR Conrad, *Processes and Production Methods (PPMs) in WTO Law: Interfacing Trade and Social Goals* International Trade and Economic Law (Cambridge University Press 2011).

[5] The extraterritorial prescriptive effect of PPMs as they focus on the production process occurring outside the territory of the regulating State is not unlawful from a general international law perspective: rather than *regulating* conduct abroad, 'extraterritorial' trade measures *affect* or *incentivize* conduct abroad. Furthermore a measure needs to be 'activated' through market

npr-PPMs may have on foreign producers and/or policymakers, these measures raise questions on their legality and acceptability under WTO law. This contribution will focus on the jurisdictional limitation of the justification grounds of Article XX GATT: could justification be hindered because a measure is protecting a concern outside the territory of the regulating State? Discussing justification grounds presumes a violation of substantive obligations; however, for the purpose of the current analysis potential inconsistencies with substantive WTO law will not be discussed.[6] Note, though, that a (non-discriminatory) npr-PPM is not necessarily inconsistent with WTO obligations, in which case justification is no longer necessary.

This contribution proposes an extraterritoriality decision tree within the framework of Article XX GATT that offers a systematic approach to the assessment of the 'extraterritorial' objectives of npr-PPMs. The model finds its legal basis in the paragraphs of Article XX GATT and functions as a set of questions regarding the acceptability of an extraterritorial element, before the measure can be examined under the *chapeau* of Article XX GATT in light of good faith. Due to the lack of guidance on the issue in the WTO agreements and in case law, this model has been inspired by the application and rationale of extraterritoriality in other fields of law such as public international law, international human rights law and competition law.[7] Positive law from such other fields lends support to the proposed model within a trade context.

II. EXTRATERRITORIALITY UNDER ARTICLE XX GATT

A. Article XX GATT(b)–(g): Environmental Concerns and Necessity

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, a degree of necessity—depending on the wording of the particular paragraph—must be shown between the measure at issue and the societal value pursued.

access. Scott refers to 'measures giving rise to territorial extension', 'triggered by a territorial connection but in applying the measure the regulator is required, as a matter of law, to take into account conduct or circumstances abroad'. See J Scott, 'Extraterritoriality and Territorial Extension in EU Law' (2014) 62 AmJCompL 90. Regarding enforcement jurisdiction, the enforcement of trade measures occurs within the territory of the imposing member, likely at the border. See also E Vranes, *Trade and the Environment: Fundamental Issues in International Law, WTO Law and Legal Theory* (Oxford University Press 2009) 174. Despite this finding of lawfulness, npr-PPMs still trigger controversy. Can the objective of the measure create additional support for jurisdiction? Within the context of GATT law this question leads to art XX.

[6] Npr-PPMs are not excluded from the scope of the WTO Agreements, with the exception of the SPS Agreement (Annex A), referring solely to health concerns *within* the territory of the regulating Member. When within the scope of the agreements, consistency of the npr-PPM with the substantive obligations of WTO law needs to be assessed. Most discussion has focused on whether npr-PPMs would be considered as a border measure under art XI GATT (as was the case in the non-adopted GATT *US–Tuna* cases, as well as not disputed by the US in *US–Shrimp*), or as an internal measure under art III GATT. Whether a measure is considered under art III or art XI can be of particular interest to npr-PPMs: under art XI a violation is automatically established, which is not the case under art III, where a measure is only inconsistent when discriminatory. Differentiation based on production methods may not be deemed discriminatory if the resulting products are unlike or if the differentiation is not deemed to be protective of domestic products. See also (n 4).

[7] In this paper, extraterritoriality in these fields of law will only be discussed briefly. For the full discussion, see the author's (unpublished) doctoral thesis.

With regard to the first condition, paragraphs (b) and (g) of Article XX GATT allow WTO members to rely on environmental objectives as grounds of justification. Article XX(b) refers to the protection of human, animal or plant life and health, whereas Article XX(g) refers to the conservation of exhaustible natural resources. Competitiveness concerns and economic motivations related to environmental concerns, such as measures to 'level the playing field' by insisting that foreign producers use the same production practices as domestic producers in order to offset regulatory costs differences, do not fall within the scope of Article XX. The WTO regulates commercial relations between WTO Members, and Members should be assumed to have accepted commercial externalities resulting from domestic environmental policies, to the extent that they do not violate the non-discrimination provisions.[8]

Where a measure has a clear environmental objective, however, the question at issue is whether there is an implied jurisdictional limitation to Article XX: are paragraphs (b) and (g) limited to concerns within the territory or jurisdiction of the imposing member, or can members also rely on the exceptions to address environmental concerns outside their territory? Under Article 31(1) VCLT, a treaty is to be interpreted in good faith and must begin with an examination of the ordinary meaning of the words, read in their context, and in the light of the object and purpose of the treaty involved. Should Article 31 VCLT not resolve a problem of interpretation, Article 32 VCLT permits the use of supplementary tools of interpretation, including the *travaux préparatoires*.[9] Neither paragraph (b) nor (g) of Article XX GATT contain a reference to territory or jurisdiction.[10] Looking beyond the wording, Article XX serves to balance WTO Members' rights to regulatory space and invokes exceptions, with other Members' rights to free trade.[11] WTO Members' trade relations should allow for 'the optimal use of the world's resources in accordance with the objective of sustainable development, seeking both to protect and preserve the environment'.[12] There are no subsequent agreements between the parties on the jurisdictional scope of Article XX, nor do the *travaux* reveal the intent of the parties with respect to the appropriate limitation of Article XX.[13] Given this lack of direction, a broad interpretation of the listed environmental objectives, including concerns located outside the territory of the regulating State, seems appropriate, in particular in the light of current global environmental challenges.[14] Nonetheless, acceptance of environmental objectives without any jurisdictional limitation would also

[8] PC Mavroidis, 'Reaching Out For Green Policies: National Environmental Policies in the WTO Legal Order' (2014) EUI Working Paper RSCAS 2014/21, 9.

[9] While not all WTO Members are parties to the VCLT, the AB has recognized the VCLT's rules on treaty interpretation (arts 31 and 32) as customary international law and its relevance for the interpretation of the WTO Agreements, thereby making them binding on all States. See WTO, AB Report, *Japan—Taxes on Alcoholic Beverages II* (1996) WT/DS8/AB/R [10].

[10] Contrary to, for example, Annex A of the SPS Agreement that clearly refers to concerns *within* the territory of the regulating Member.

[11] WTO, AB Report, *US–Shrimp* (1998) para 128.

[12] Preamble Marrakesh Agreement.

[13] The GATT was drafted by governments at the UN Conference on Trade and Development between 1946 and 1948. The Conference negotiated a Charter for the International Trade Organization, and the GATT was viewed as an interim agreement pending the implementation of the ITO Charter. The preparatory work of the ITO Charter is thus considered the preparatory work of the GATT. No references are made to a territorial limitation. See also S Charnovitz, 'The Moral Exception in Trade Policy' (1998) 38 VAJIntlL 700.

[14] The interpretation of environmental objectives is by definition evolutionary. See WTO, AB Report, *US–Shrimp* (1998) para 130.

distort the appropriate balance between regulatory space and free trade. In *US–Shrimp* the Appellate Body relied on there being a 'sufficient nexus' between the concern (sea turtles) and the regulating State (the US), implying that the requirement of a territorial link was satisfied by referring to the turtles swimming through US waters.[15] The Appellate Body failed to give further guidance on the requirements for such a nexus. As a first step towards a more systematic approach to assess trade measures addressing environmental concerns, the proposed extraterritoriality decision model distinguishes between inward-, outward-, and inward/outward-looking measures, based on the location of the concern.[16] Is the measure addressing environmental harm within the territory of the regulating State; are there environmental effects upon its territory, or are these only discernible outside its borders? This distinction will be elaborated on below.

The second condition under the subparagraphs of Article XX, 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.[17] Article XX(b) demands that measures are *necessary* to protect the environment. In *Korea–Beef* the Appellate Body stated that the more vital or important the concerns or values that a measure is intended to protect, the easier it would be to accept the necessity of a measure.[18] Necessity furthermore requires taking into account the level of contribution of the measure to the realization of the end pursued.[19] In *Brazil–Tyres* the Appellate Body stated that the fact that the contribution of a law to the protection of an environmental concern was not immediately obvious, because it was part of a broader programme the impact of which could only be evaluated over time, should not prevent there being a finding of necessity.[20] Lastly, it should be considered whether less trade-restrictive measures can secure the same objective and level of protection.[21] Article XX(g) does not refer to 'necessary' but requires that measures are *related to* the conservation of exhaustible natural resources. In *US–Gasoline*, the Appellate Body examined whether 'the means are, in principle, reasonably related to the ends'.[22] In *US–Shrimp* the Appellate Body emphasized the wide support for the concern at issue when discussing whether the measure at stake was related to that policy concern.[23]

In view of a possible jurisdictional limitation upon Article XX and balancing between WTO Members' rights, the necessity test is helpful to determine which concerns could be reasonably accepted. Determining the degree of necessity thus forms the basis for the second step in the extraterritoriality decision model, to be further elaborated below, and which assesses the international support for and recognition of a concern. The

[15] ibid para 133.

[16] Charnovitz introduced this distinction in Charnovitz (n 13) 695. Robert Hudec refers to the term 'externally-directed' in RE Hudec, 'GATT Legal Restraints on the Use of Trade Measures against Foreign Environmental Practices' in JN Bhagwati and RE Hudec (eds), *Fair Trade and Harmonization: Prerequisites for Free Trade?* vol 2 (The MIT Press 1996) 95–174.

[17] See WTO, AB Report, *Korea–Measures Affecting Imports of Fresh, Chilled and Frozen Beef* (2000) WT/DS161/AB/R; WTO, AB Report, *European Communities–Measures Affecting Asbestos and Asbestos-Containing Products* (2001) WT/DS135/AB/R; WTO, AB Report, *Brazil–Measures Affecting Import of Retreaded Tyres* (2007) WT/DS332/AB/R.

[18] WTO, AB Report, *Korea–Various Measures on Beef* (2000) para 162. Whereas in *Korea–Beef* the AB dealt with art XX(d), this balancing test was brought into art XX(b) in *EC–Asbestos*.

[19] WTO, AB Report, *Korea–Various Measures on Beef* (2000) para 163.

[20] WTO, AB Report, *Brazil–Retreaded Tyres* (2007) para 151.

[21] ibid para 178.

[22] WTO, AB Report, *United States–Standards for Reformulated and Conventional Gasoline* (1996) WT/DS2/AB/R [20–22].

[23] WTO, AB Report, *US–Shrimp* (1998) para 135.

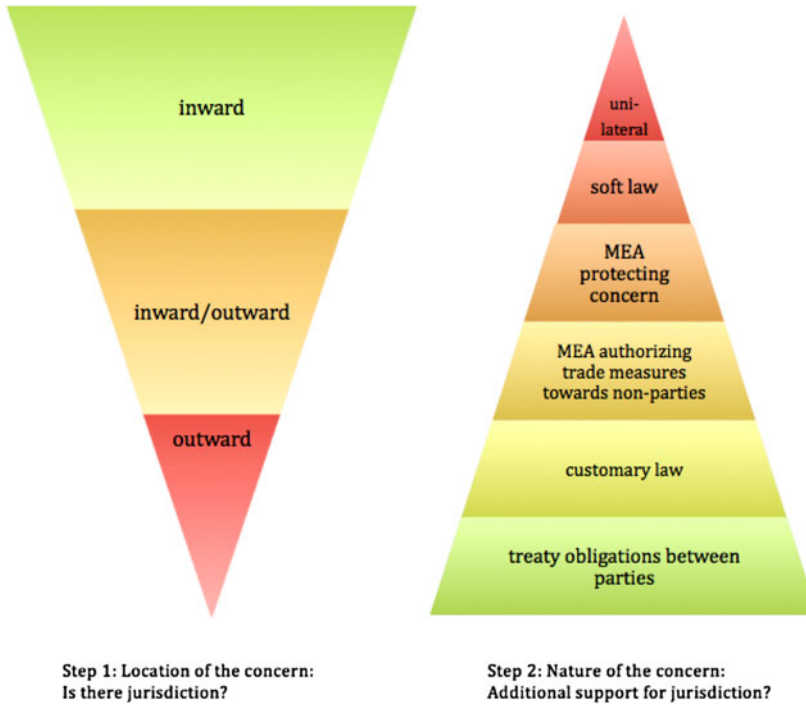

Figure 1: Extraterritoriality decision tree under Article XX GATT

more common and important the interest, the more a measure will be considered necessary.[24] The more international support there is for an environmental concern, the easier it will be for a measure to 'relate' to that policy objective. Where there is less international support for an objective, or for a particular method being used to reach an objective, the threshold for proving there are no less trade-restrictive alternatives will become higher.

B. Step 1 of the Decision Tree: Location of the Concern

The first step of the proposed extraterritoriality analysis refers to the location of the concern. Environmental PPMs can be imposed to protect an internal or *inward-looking* concern (eg the chemical composition of gasoline can influence pollution levels within the regulating country, often in the form of a product-related PPM), to protect an external or *outward-looking* concern (eg dolphin-friendly fishing techniques can lead to less dolphins being caught in fishing nets outside the regulating country, typical npr-PPMs), or both inward and outward (eg protection of the global commons, the global effects of a preserved

[24] The importance of the concern could refer to the importance of a concern to the regulating Member, but should equally include the importance to the broader membership as a measuring tool, especially where the environmental concern is located outside the jurisdiction of the regulating State.

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rainforest, or sea turtles swimming within and outside territorial waters). Is there a (physical) link with the territory or not at all? Neither the Appellate Body nor any panel have made this distinction explicit, but distinguishing between measures with an inward- or outward-looking purpose allows for a better assessment of the acceptability of PPMs that address activities occurring outside the territory of the regulating country. Purely inward-looking measures, even when non-product-related, will have a much stronger (territorial) connection or nexus than purely outward-looking measures. However, an outward-looking concern could still be an acceptable justification ground if the regulating State is substantially affected by the environmental impact.[25] Without environmental effects on the territory, outward-looking concerns will require strong international support for the norm they are purporting to protect in order to still pass the extraterritoriality test.[26]

With the recent *EC–Seals* case in mind, the proposed distinction only refers to 'physical' environmental concerns, rather than moral concerns. A measure can address an outward-looking physical environmental concern, combined with an inward-looking moral concern—for instance, concerns by consumers in country A about a polluted lake in country B that local villagers depend on for drinking water. I submit that moral concerns should not be addressed under the environmental exceptions of Article XX but need to be assessed under Article XX(a) on public morals, as was done by the EU in *Seals*.[27] Whether Article XX(a) can be relied upon to address concerns over harm fully occurring abroad was not explicitly addressed by the Panel or Appellate Body in the *Seals* dispute, as the EU regulation dealt both with seals within and outside the EU.[28] A strictly territorial interpretation of Article XX(a) seems to be unwarranted and illogical. On the other hand, one could argue that without a territorial limitation to Article XX(a), the door would be opened to all sorts of moral concerns, leading to the infamous slippery slope. However, I submit that the risk of an 'uncontainable' Article XX(a) lies not in its extraterritorial scope, but in an overly broad definition and acceptance of public morals. In order to not render the other exceptions of Article XX inutile (an overly broad Article XX(a) could be used as a loophole to other paragraphs that might have a more limited territorial/material scope), and still respect Members' rights to determine their own public morals, panels will need to strictly scrutinize the existence of a moral concern.[29]

[25] See section II.B.2 and II.B.3 for elaboration.

[26] See section II.C when discussing the nature of the concern.

[27] WTO, Panel Report, *European Communities–Measures Prohibiting the Importation and Marketing of Seal Products* (2013) WT/DS401/R; WTO, AB Report (2014) *EC–Seals*.

[28] The AB did mention the systemic importance of the jurisdictional scope of Article XX, however, could not examine the issue further as no arguments were made by the parties in this regard. See WTO, AB Report, *EC–Seals* (2014) para 5.173.

[29] The public morals exception raises a number of questions regarding its territorial scope, the validity of public morals, the actual existence of a moral concern, whose concern it should be, necessity etc. Discussing these questions in detail would go beyond the scope of this contribution, but see eg Charnovitz (n 13); J Marwell, 'Trade and Morality: The WTO Public Morals Exception after *Gambling*' (2006) 81 NYULRev 802; N Diebold, 'The Morals and Order Exceptions in WTO Law: Balancing the Toothless Tiger and the Undermining Mole' (2008) 11(1) JIEL 43; M Wu, 'Free Trade and the Protection of Public Morals: An Analysis of the Newly Emerging Public Morals Clause Doctrine' (2008) 33 YaleJIntlL 215. Note also that very strong consumer preferences could already influence the finding of likeness of products under art III GATT (if npr-PPMs would be taken into account under said article). If products would be deemed unlike based on consumer preferences, there would be no inconsistency with art III and no need for any further justification.

1. Inward

Where imported goods have direct environmental effects on the territory of the importing State, either through their physical characteristics (pr-PPMs)[30] or through their production activity (npr-PPMs),[31] there should be little debate that States can make use of PPMs. This position finds support under the jurisdictional principles of international law, as harm within the territory creates a strong territorial link, which allows the State in question to exercise jurisdiction.[32]

2. Inward and Outward

Most environmental measures have both an inwardly- and outwardly-directed purpose. Activities targeted by PPMs can have environmental impacts within and outside the regulating country (pollution, climate change, biodiversity). Measures that address moral concerns over foreign environmental harm should be addressed under Article XX(a).[33]

With regard to physical environmental inward-and-outward-looking concerns, it has already been pointed out that in *US–Shrimp* the Appellate Body required a sufficient nexus between the regulating country and the concern, but without clarifying what that nexus could consist of.[34] A territorial connection is implied, but the question then becomes how such a connection can be established in the light of the nature of environmental concerns where there is not necessarily any such tangible territorial nexus. In particular, global concerns such as air pollution, climate change or biodiversity disruption challenge the traditional understanding of a territorial connection: a clear causal link cannot easily be established, harm is likely to be caused by multiple actors, the harm is not immediately observable and can have cross-border impacts. It is clear, though, that these environmental concerns have widespread effects. In this context, the effects doctrine, as relied on to justify the extraterritorial application of competition law, can be of help. National competition law is being applied extraterritorially by a growing number of States, addressing foreign anti-competitive behaviour that affects or harms domestic interests.[35] Reasoning based on

[30] See for instance WTO, AB Report, *US–Gasoline*, 1996. The US Clean Air Act was adopted to improve air quality in the most polluted areas of the country by controlling toxic and other pollution caused by the combustion of gasoline manufactured in or imported into the US.

[31] Purely inward-looking npr-PPMs are rare: examples could relate to soil or water pollution through production in neighboring territory. It is more likely though that the environmental effects are either related to the product (pr-PPM) or that a measure will address environmental concerns that have an impact both within and outside the territory of the regulating State.

[32] The objective territoriality principle is one of the permissive principles to exercise jurisdiction under public international law, according to which jurisdiction is founded when any essential constituent element of a crime or act is consummated on the forum State's territory. See International Bar Association – Legal Practice Division: *Report of the Task Force on Extraterritorial Jurisdiction* (2008) 11; J Crawford, *Brownlie's Principles of Public International Law* (8th edn, Oxford University Press 2012) 458.

[33] See (n 29).

[34] WTO, AB Report, *US–Shrimp* (1998) para 133.

[35] The EU and the US are best known for their extraterritorial application of competition law. See eg EU: Court of Justice of the European Union, *Innolux v Commission*, C-231/14P ECLI:EU:C:2015:451, 2015; General Court, *Gencor v Commission*, T-102/96 ECLI:EU:T:1999:65, 1999; Court of Justice of the European Union, *Ahlström Osakeyhtiö and Others v Commission (Wood Pulp I)*, Joined cases 89, 104, 114, 116, 117, 125–129/85 ECLI:EU:C:1988:447, 1998; Court of

effects can be transposed to environmental challenges and npr-PPMs.[36] Whereas competition law focuses on the effects that anti-competitive behaviour can have on the domestic market, environmental PPMs focus on the effects that production processes can have on the domestic environment: a connection can be established through the effects of foreign action on the regulating country. However, when can those effects (or nexus) be considered sufficient?

The competition law effects doctrine requires effects to be direct, substantial and foreseeable.[37] In an environmental context, the criteria of direct and substantial effect are likely to be considered together, as it is not always clear how to distinguish between direct and indirect effects, especially with regard to pollution concerns. A substantial effect is clearer and easier to measure, once a threshold is determined.[38] Nevertheless, by whom and how will such threshold be determined? Is a substantial effect an *appreciable* effect? Can *potential* effects be sufficient?[39] With regard to foreseeability, environmental risks can be very difficult to predict and can also be uncertain.[40] Would it be possible in these cases to rely on the precautionary principle, as a generally recognized principle of environmental law?[41] In cases of inward-looking concerns, States may indeed rely upon the precautionary principle as only a

Justice of the European Union, *Imperial Chemical Industries Ltd. v Commission (Dyestuffs)*, case 48/69 ECLI:EU:C:1972:70, 1972; US: Sherman Act (1890) 15 U.S.C. sections 1–7; *US v Aluminium Co of America*, 148 F 2d 416 (2d Cir 1945) ('Alcoa'); *Hartford Fire Insurance v California*, 509 US 764, 796 (1993). Apart from these examples, other countries such as Japan, Brazil, Israel, Singapore, China and India have adopted the effects doctrine in the context of competition law. The effects doctrine was also approved by the International Law Association as a principle of international law at its 55th Conference in 1972 and by L'Institut de Droit International stated during its session in 1977.

[36] Horn and Mavroidis (n 4) 1133. See also G Van Calster, *International & EU Trade Law: The Environmental Challenge* (Cameron May Publishing 2000) 214.

[37] See Restatement of the Law (Third) on Foreign Relations Law of the United States (1986). See section 402 on general principles for extraterritorial jurisdiction and section 415 on antitrust law.

[38] Whereas antitrust law often relies on clear *de minimis* thresholds before domestic law will be applied to foreign anticompetitive conduct, it is more difficult to establish similar environmental thresholds, as it is almost impossible to estimate the effect of eg one ton of CO_2 emissions by a certain activity in a certain location on EU air quality.

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

[40] They 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. See R Cooney and ATF Lang, 'Taking Uncertainty Seriously: Adaptive Governance and International Trade' (2007) 18(3) EJIL 523 .

[41] Principle 15 of the Rio Declaration on Environment and Development (1992) provides that 'in order to protect the environment, the precautionary principle shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.' See also among others T O'Riordan, J Cameron and A Jordan (eds), *Reinterpreting The Precautionary Principle* (Cameron May 2001); I Cheyne, 'The Use of the Precautionary Principle in WTO Law and EC Law' (2005) European Union Studies Association Biennial Conference 2005; M Stevens, 'The Precautionary Principle in the International Arena' Sustainable Development Law & Policy 2(2) (2002) 13.

State can consider the level of protection it considers appropriate.[42] However, when a concern is outward-looking, I submit that a stricter balance must be struck between the domestic interests and the sovereignty of other States so as to minimize the risk for international conflict. As the territorial link (effects) becomes weaker, the interests of the exporting States will carry more weight.[43] Where the protection of the global commons is at issue, the strength of the territorial link cannot apply as such: by its very nature, every State has an equal interest in protecting the global commons. The fact that some States experience less physical harm today than others (or vice-versa) should not be the sole ground to determine which State has an 'overriding interest'.[44] Additional weighing factors could then include international consensus on how to protect the concern at issue (ie following step of the decision tree) as well as good faith requirements (in general and as read in the chapeau), such as flexibility in the application of the measure, dialogue and international responsiveness.[45]

3. *Outward*

A third category of measures relates to environmental concerns which are located entirely within the territory of a foreign State, such as a polluted lake in a foreign country, a foreign plant species or a foreign animal threatened with extinction.[46] The distinction between foreign harm and transboundary harm depends on the determination of the directness of harm: environmental concerns such as polluted or dried out lakes could indirectly lead to other transboundary harm. Concerns that are fully located abroad could still lead to environmental effects within the regulating country, even though it will become harder to establish that the effects are indeed 'direct' and 'substantial'. If the effects are indeed direct and substantial, a territorial nexus will be established, as discussed above.

Moral objections about the foreign activity and resulting environmental harm (for instance, the threat of extinction of pandas) need to be addressed under Article XX(a) GATT, rather than under the environmental exceptions.[47] In the absence of moral concerns or effects, it is very unlikely that a PPM addressing a fully demarcated foreign environmental harm with no or only an indirect environmental impact would be accepted under Article XX.

C. *Step 2 of the Decision Tree: Nature of the Concern and Norm Recognition*

The analysis above has shown that PPMs can be more easily accepted where they are inward-looking, or have a connection or nexus through effects. The weaker this territorial connection, the more additional support a State will need in order to justify

[42] WTO, AB Report, *European Communities–Measures Concerning Meat and Meat Products (Hormones)* (1998) WT/DS26/AB/R, para 186. Within GATT, there is no reference to the precautionary principle. In *EC–Hormones* the AB recognized that that the principle found reflection in different provisions of the SPS, including art 5.7, but did not say whether the principle had crystallized as a general principle of law.

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

[44] See in this regard also the possible existence of environmental obligations *erga omnes* as discussed below, (n 60).

[45] See section III.

[46] Horn and Mavroidis (n 4) 1166.

[47] See (n 29).

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imposing npr-PPMs. In such cases, the level of international recognition of and support for a particular norm or concern to be protected is important when determining whether the 'end can justify the means'. As argued above, the necessity test in Article XX can be interpreted to give added value to this requirement of international support. Furthermore, an analysis of extraterritoriality in the context of international human rights law has shown that jurisdictional boundaries can be more elastic when fundamental values or norms are concerned.[48] If this observation is applied to a trade and environment context, it seems that the more an environmental norm is recognized and supported internationally, the more acceptable a npr-PPM protecting that norm outside its borders will be; and the likelihood of the PPM having a protectionist objective would decrease. Scott refers in this regard to the 'international characterization' of norms.[49] A compelling and widely supported international norm could give additional support for the protection of inward/outward-looking concerns, even where the environmental effects would be weaker. The biggest challenge here is how to determine the international characterization of norms: the formal codification of environmental norms and objectives by the international community has been a slow and difficult process for many reasons, such as uncertainty or disagreement about the extent of environmental harm, about the appropriate scope and methods of action, about burden-sharing, about historical responsibilities, etc. Furthermore, should the assessment of international support be measured only by State action, or could one also take into account positions advocated by NGOs? The suggested categorization of international support primarily considers the legal framework in place,[50] to determine why for instance a country takes a certain position or why agreement cannot be reached.[51]

1. Treaty obligations between parties

The first category in the second pyramid of the decision model relates to measures that are mandated or authorized by a treaty to which both the importing and exporting member(s) are a party, and include both mandated PPMs as well as trade sanctions in response to

[48] A distinction between the human rights context (the extraterritorial application of regional and international human rights treaties) and the trade-environment context is that international human rights obligations will apply when States exercise 'effective control' over territory outside their borders. The actual territorial State is at that point unable to ensure sufficient human rights protection in its territory due to lack of control. In an environmental context, a PPM would apply to all imported goods, without distinguishing between States that are unable to ensure a sufficiently high level of environmental protection, and States that are unwilling to ensure that level of protection. For a more comprehensive and in-depth analysis of extraterritoriality and human rights, see among others M Milanovic, *Extraterritorial Application of Human Rights Treaties: Law, Principles and Policy* (Oxford University Press 2011); F Coomans and R Künneman (eds), *Cases and Concepts on Extraterritorial Obligations in the Area of Economic, Social and Cultural Rights* (Intersentia 2012).

[49] Scott (n 5) 89.

[50] Respecting legal certainty and legal expectations where possible.

[51] The political structures of WTO Members vary radically, from full democracies to authoritarian, non-democratic systems. Despite the political structure, it can still be expected that functioning governments represent the interests of their country. If there would be a public outcry, supported by civil society, without the government acting upon this, I submit that that could be an element to take into account in the contextual analysis, eg for failure to conclude an agreement. If international agreements cannot be concluded, but there is wide support by civil society, that support (claim, magnitude, etc.) should be considered.

non-observance of the treaty in question.[52] When States are complying with their obligations under a treaty, that treaty will be the appropriate forum to deal with possible complaints, as dispute settlement panels cannot make findings on violations of other agreements.[53] Within the scope of WTO disputes, regulating WTO Members could refer to these treaties to substantiate the requirement of necessity of the trade measure, and measures will easily pass the extraterritoriality test.[54]

Examples include sustainability clauses in FTA's[55] or international resource conservation agreements that authorize trade measures to enforce the agreements among the parties.[56]

2. *Customary law*

A second category is customary law. In order to determine whether a rule has the status of customary law, there must be consistent State practice, and States must believe that such practice is required by law. Once a rule is recognized as custom, it is binding on all States, except persistent objector-States who have expressly shown that their practice has always differed.[57] In the area of environmental law, very few rules have gained the status of customary law[58], which might have to do with the scientific uncertainty and often slow developments or materialization of environmental harm. The international community might agree that States should not pollute water or air; or should not cause environmental damage elsewhere, but there is no consistent State practice yet in this regard. Related to this are obligations *erga omnes*: in view of the importance of rights involved, all States can be held to have a legal interest in their protection.[59] A violation of such an obligation would lead to State responsibility. Without expanding on the topic

[52] Charnovitz (n 4) 105; L Bartels, 'Article XX of GATT and the Problem of Extraterritorial Jurisdiction: The Case of Trade Measures for the Protection of Human Rights' (2002) 36(2) JWT 391.

[53] WTO, AB Report, *Mexico–Tax Measures on Soft Drinks and Other Beverages*, WT/DS308/AB/R (2006) para 56. If there is a conflict between the GATT/WTO and the other treaty in question, as a general rule the later treaty will prevail according to art 30 of the Vienna Convention on the Law of Treaties.

[54] According to the AB, art 3.2 DSU supports that WTO law must be understood within the context of the broader body of international law, including multilateral environmental agreements. WTO, AB Report, *US–Gasoline* (1996) [30].

[55] See for instance EU–Korea FTA art 13(6); L Cuyvers, 'The Sustainable Development Clauses in Free Trade Agreements: An EU Perspective for ASEAN?' (2013) UNU-CRIS Working Papers W-2013/10.

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

[57] See eg J Charney, 'The Persistent Objector Rule and the Development of Customary International Law' (1985) 56(1) BYBIL 1; JP Trachtman, 'Persistent Objectors, Cooperation, and the Utility of Customary International Law' (2010) 21 DukeJComp&IntlL 221.

[58] The best, if not the only, example is the 1982 United Nations Convention on the Law of the Sea (UNCLOS) which in part already codified existing customary law, and of which many norms now have the status of customary law as well, as non-parties to the treaty also follow many of the UNCLOS norms.

[59] *Barcelona Traction, Light and Power Company Ltd* (*Belgium v Spain*) (Judgment of 5 Feb) [1970] ICJ Rep 3.

of State responsibility and countermeasures by injured States, the recognition of obligations *erga omnes* could support npr-PPMs that have as their objective the protection of concerns that are partly or even fully outward-looking.[60] However, under the current status quo of environmental law, no such obligations have been clearly identified.[61]

3. *Multilateral treaty authorizing trade measures towards non-parties*

A third category refers to environmental trade measures authorized and supported by a multilateral environmental treaty (MEA) towards States that are not a party to that treaty.[62] The regulating member (party to the MEA) cannot legally rely on its treaty obligations towards the member that is not a party to the MEA. However, I submit that such MEA can still offer support for npr-PPMs. If the treaty has a substantial membership (including a large number of WTO Members for instance), establishing wide international support for the norm to be protected, but the exporting country is not a party to the agreement, a balancing of the interests at stake might tip in favour of the State imposing the measure.[63] From an environmental perspective, this approach makes most sense, as this does not allow States to escape their responsibilities and to free-ride on the environmental efforts of other States, while ensuring wide support for the concern.[64] With a more limited membership, the question becomes more complicated and sensitive, as one needs to balance individual interests of States, which might both find support in international practice. This balancing of interests will need to be determined on a case-by-case basis, as there is no conclusive general answer. An element that I propose to be taken into account is whether the non-signatory party has clearly opted for not-signing, or whether there is another reason why it has not become a party to the MEA yet (other priorities for instance, delay in negotiations or fundamental disagreement).

Without a clear legal 'backup', agreed upon by both parties, the extraterritoriality threshold will be higher and the legitimate nature of an objective will become subject to stricter scrutiny, as will also be discussed in the categories below.

4. *Multilateral environmental treaty not referring to trade measures*

The following category refers to trade measures aimed at protecting an environmental concern recognized as such by a multilateral environmental treaty, but whereby the

[60] See for instance the preamble of the Institut de Droit International, 2005 Krakow Resolution on Obligations and Rights *Erga Omnes* in International law, stating that 'a wide consensus exists to the effect that (…) obligations relating to the environment of common spaces are examples of obligations reflecting those fundamental values'.

[61] State practice to date only supports the development of *erga omnes* obligations in the context of human rights and humanitarian norms. C Tams, *Enforcing Obligations Erga Omnes in International Law* (Cambridge University Press 2005).

[62] Examples include the Basel Convention on the Control of Transboundary Movements of Hazardous |Wastes and Their Disposal (22 March 1989, 28 ILM 649), requiring parties to prohibit imports of hazardous waste from non-parties (art 4.5); the Wellington Convention on Driftnets (24 November 1989, 29 ILM 1454, art 3(2)), stating that a Party may take measures *consistent with international law* to prohibit the importation of fish caught using a driftnet or the Anadromous Stocks Convention (11 February 1992, US Senate Treaty Doc 102–30, art III:3), directing parties to take appropriate measures to prevent trafficking in anadromous fish taken in violation of what is provided for in the convention.

[63] Hudec (n 16) 124.

[64] ibid 131.

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treaty does not refer to the use of PPMs or any other trade measures to protect the concern at issue, eg UN Declarations on environmental protection.[65] If the agreement at issue is an MEA to which both the importing and the exporting State are a party, and both States thus support the same environmental norm, in case of a conflict arising, there should be little discussion on the environmental objective. Any discussion will then most likely focus on the design and the application of the measure (including the preferred method to reach an environmental objective). If only the importing member is a party to the MEA, I submit that the size of the MEA's membership should be considered in order to assess the degree of international recognition for the environmental objective.[66] Whether the npr-PPM is aiming at protecting a regional concern or a global concern (protection of the global commons) should then be considered in the assessment of the MEA's membership. In case of a regional concern, a sizeable membership from the affected region could then suffice.

5. *Soft law*

This category relates to trade measures protecting an environmental concern that is only supported in soft law. The EU Timber Regulation[67] for instance, prevents the placing on the market of illegally harvested timber, thereby aiming to combat illegal logging, a cause supported in several soft-law norms, such as the Rio Forest Principles or the 2001 Bali Declaration.[68] As with the above-mentioned categories, if support for the soft-law norms is widespread, this could support an outward-looking action. However, the lack of binding agreements could also be a sign of lack of international consensus or sense of urgency at the international level. In that case, the extraterritorial element of the measures might well become objectionable.

6. *Unilateral concerns*

Norms or concerns that find no support under international law, not even under soft law, could be classified in this model as unilateral concerns.[69] The absence of international (soft or hard) law does not necessarily mean that there is no State practice by States

[65] eg Rio Declaration on Environment and Development (1992).

[66] An interesting question in this regard is when a norm can be deemed to be shared internationally, and how specific should an international agreement be? Is it sufficient to share the concern (for instance global warming) or should also the prescribed standards (for instance emission limits, specific technologies, measurements techniques, etc) be agreed on internationally?

[67] Regulation EU/995/2010.

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

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

other than the imposing State, but does increase the burden of scrutiny. An element that should be considered here is whether States have attempted to negotiate bi- or multilaterally. The Appellate Body in *US-Shrimp* addressed this point under the chapeau as an aspect of the good faith test implied in the chapeau prohibition of arbitrary and unjustifiable discrimination. I submit that it is more appropriate for this to be considered at this stage of the decision tree when determining the international support and recognition for a norm. In case of failed negotiations, it is important to take a closer look at the reason for failure: is there a lack of consensus on the concern to be protected, or on the ways on how to protect these? Norms that are deemed in need of protection by a large group of States, but on which States cannot come to agreement, differ from norms that find very little approval internationally.

In the absence of multilateral solutions or international recognition of a need due to uncertainties concerning harm, its seriousness, or causes, could States rely upon the precautionary principle to protect an environmental concern?[70] Npr-PPMs relating to a unilateral concern run the risk of being seen as protectionist and will be subject to very strict scrutiny. Within an international organization such as the WTO, it is important to balance the different interests of the member States and respect for multilateralism, while at the same time realizing the need to protect (yet uncertain) important values in the absence of international action.

Unilateral interests of States are likely to conflict with interests of other States. As has been discussed above in the context of inward- and outward-looking concerns, a comity or reasonableness test can be applied with the purpose of avoiding true conflict between the regulations of States.[71] Regarding the location of the concern, the country with the strongest territorial link (or strongest environmental effects on its territory) would carry more weight. However, when looking at the nature of the concern, a similar test can be applied that requires to look at the content of the interests. What happens when legitimate environmental concerns of the importing State clash with legitimate concerns of the exporting State? For instance, environmental requirements for imported biofuels could clash with foreign interests such as food security or land grabbing.[72] This requires a difficult balancing act, in which the context and impact of the measure need to be carefully assessed.

Unless the PPM is clearly inward-looking, I submit that the space for States to impose measures with an extraterritorial effect is very limited here. States should in such a situation raise international awareness and focus on international negotiations, or where States and/or their consumers are genuinely concerned, bring an argument under Article XX(a) GATT.

[70] L Boisson de Chazournes, 'Unilateralism and Environmental Protection: Issues of Perception and Reality of Issues' (2000) 11(2) EJIL 325.

[71] In the context of competition law, 'true conflict' has been used when conduct complying with one State's regulation is in violation with another State's regulation. When one can comply with both without necessarily violating one set of regulations, there would be no true conflict. [*Hartford Fire Ins. Co. v California*, 509 US 764 (1993) (Scalia J, dissenting)] According to Regan and Howse, such true conflict is not very likely, as 'not many countries require that shrimpers use turtle-unfriendly nets, or that cosmetics be tested on animals'. See Howse and Regan (n 4) 286.

[72] Paolo Farah, ASIL/IEcLIG Conference paper Denver, November 2014. In that regard it will be interesting to read the forthcoming Panel Report WTO, Panel Report, *European Union—Anti-Dumping Measures on Biodiesel from Argentina*, WT/DS473, <Panel composed on 23 June 2014>.

III. THE CHAPEAU

Once a measure has complied with the conditions of one of the paragraphs of Article XX, and has thus passed the 'extraterritoriality threshold', the analysis turns to the chapeau of Article XX. In assessing the application of the measure, the chapeau's purpose is to prevent abuse or misuse of the specific exemptions provided for in Article XX.[73] The scope of this article does not permit a detailed discussion of the chapeau, but the following is worth noting.

In assessing the application of the measure, one must examine the manner in which the measure is implemented in practice and how other elements extraneous to the measure could affect the measure's ability to perform its function.[74] According to the Appellate Body, the chapeau is an expression of the principle of good faith as general principle of law.[75] Good faith in this context can be reflected in a duty to cooperate, and to show systematic respect for multilateralism and the international community's interests.[76] Basically, the integrity of the measure should be key.[77]

In its analysis of arbitrary and unjustifiable discrimination, the Appellate Body in *US–Shrimp* emphasized the need for flexibility in attaining environmental objectives, as it found the coercive effect and rigidity of the US measure in question to be 'the most conspicuous flaw'.[78] It later reiterated that there is 'a considerable difference between conditioning market access on the adoption of essentially the same programme, and conditioning market access on the adoption of a programme *comparable in effectiveness*'.[79] Foreign governments had to adopt essentially the same policy. A distinction can be made between process-based measures and country-based measures, whereby the former are to be preferred as they target the individual producer and the disapproved production process, rather than force a government to adopt a certain policy.[80] One way of attaining the required flexibility, and recognizing measures comparable in effectiveness, is through mutual recognition.[81] This can either be in a

[73] WTO, AB Report, *US–Shrimp* (1998) para 119.

[74] WTO, Panel Report, *Brazil–Measures Affecting Import of Retreaded Tyres* (2007) WT/DS332/R, para 7.107.

[75] WTO, AB Report, *US–Shrimp* (1998) para 158.

[76] E Morgera, 'The EU and Environmental Multilateralism: The Case of Access and Benefit-Sharing and the Need for a Good-Faith Test' (2013–14) 16 CYLES 109.

[77] SE Gaines, 'Processes and Production Methods: How to Produce Sound Policy for Environmental PPM-Based Trade Measures?' (2002) 27(2) ColumJEnvtlL 431.

[78] WTO, AB Report, *US–Shrimp* (1998) paras 161–164. Shrimp harvesting methods comparable in effectiveness to those required by the US were not accepted. This was proof to the AB that the measure in its application was more concerned with effectively influencing other WTO Members to adopt the same policy, rather than inquiring into the appropriateness of different comparable programs to protect the concern at issue.

[79] WTO, AB Report, *United States–Import Prohibition of Certain Shrimp and Shrimp Products, Recourse to Article 21.5 of the DSU by Malaysia* (2001) WT/DS58/AB/RW, para 144.

[80] See Howse and Regan (n 4) 269. Charnovitz uses a similar distinction between 'government-policy' and 'how-to' restrictions. Charnovitz (n 4) 107. Government-policy-standards or country-based measures may be more efficient in inducing the participation of other countries in multilateral environmental agreements though. For an interesting discussion on the efficiency of these measures, see H Chang, 'An Economic Analysis of Trade Measures to Protect the Global Environment' (1995) 83(6) Georgetown Law Journal 2131.

[81] G Marceau and JP Trachtman, 'The Technical Barriers to Trade Agreement, the Sanitary and Phytosanitary Measures Agreement, and the General Agreement on Tariffs and Trade: A Map of the World Trade Organization Law of Domestic Regulation of Goods' (2002) 36(5) JWT 844. Mutual

negotiated and reciprocal context based on common minimum standards,[82] but it can also be a unilateral decision, whereby foreign practices that reach the required standards will be accepted and recognized.[83] Related hereto is a requirement of continued 'responsiveness' to international developments,[84] or making measures 'contingent upon international action'.[85] This implies that a regulating State should be willing to 'disapply' its legislation when the foreign conduct in question has been satisfactorily regulated by another State or by an international body.[86]

IV. CASE STUDY: *US–SHRIMP* REVISITED

Applying the decision tree to the landmark *US–Shrimp* demonstrates how assessing the extraterritoriality question in a systematic manner makes the outcome more convincing—though not necessarily different—and more easily applicable to challenging cases.

As already noted, the US measure to ban the import of shrimp not harvested in a way complying with US standards on the protection of endangered sea turtles could not be justified under Article XX GATT as the conditions of the chapeau were not complied with. With regard to a possible jurisdictional limitation to Article XX(g),[87] the Appellate Body briefly referred to *some* sea turtle species traversing US waters *some* of the time and concluded that this led to a 'sufficient nexus' between the turtles and the US, without further defining such nexus.[88] This element of extraterritoriality was not mentioned at any other point in the analysis of Article XX.

Turning to the decision tree, the first step is based on the location of the concern. As the threatened sea turtles live outside, but can also migrate through, US waters, the measure is both inward- and outward-looking. Even though a (relatively weak) territorial link can be found for those turtles that indeed migrate through US waters, additional support is needed, in particular with regard to those turtle species that do not migrate through US waters. For that (partly) outward-looking element, the decision tree proposes an application of the effects doctrine, requiring environmental effects on the territory to be direct, substantial and foreseeable. This determination depends on how one defines these terms, and which benchmarks are set. Would the decrease in population or even extinction of sea turtles species have a direct and substantial impact on biodiversity within the US? This question requires scientific expertise. 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, and it is likely that an argument could

recognition provisions can be found in the SPS Agreement arts 3 and 4, as well as in art 6 and Annex 3(D) of the TBT Agreement.

[82] K Nicolaidis and G Shaffer, 'Transnational Mutual Recognition Regimes: Governance Without Global Government' (2005) 68 LCP 275.

[83] A mutual recognition clause might lead to a violation of the MFN obligation, however, could be justified when complying with the conditions of art XX GATT.

[84] Morgera (n 76) 121–3.

[85] J Scott and L Rajamani, 'EU Climate Change Unilateralism' (2012) 23(2) EJIL 469.

[86] J Scott, 'The New EU "Extraterritoriality"' 51 CMLRev (2014) 124.

[87] The AB found art XX(g) to be applicable to the situation at hand and did not examine further the application of art XX(b) (WTO, AB Report, *United States–Import Prohibition of Certain Shrimp and Shrimp Products* (1998) WT/DS58/AB/R, para 129.) With regard to art XX(g), the AB referred to Appx 1 of CITES, in which all the seven recognized species of sea turtles were listed at the time.

[88] WTO, AB Report, *US–Shrimp* (1998) para 133.

be made for direct and substantial effects.[89] Nevertheless, according to sea turtle experts, the understanding of the ecological functions, and impacts, of sea turtles is a long way from providing clear answers. While many opinions, there is still little evidence to substantiate the environmental effects of a decline in sea turtle population.[90] The real impact of a decline in sea turtle population can only be considered in the long term. With regard to foreseeability of effects, similar scientific evidence is required. If such evidence is not available, and the risk assessment is uncertain, States might rely on the precautionary principle to support their actions.[91] In case of insufficient or weak effects, additional support for jurisdiction can be sought in the following step of the decision tree, based on the nature and level of international recognition for the concern.

With regard to the protection of sea turtles, the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) (then 144 parties including the appellees) recognizes sea turtles as endangered species, but does not foresee in conservation or protection measures.[92] The Convention on the Conservation of Migratory Species and Wild Animals recognizes the need to cooperate and take concerted action with all respective States.[93] The Inter-American Convention for the Protection and Conservation of Sea Turtles is a regional agreement, with six signatories at the time, foreseeing in the protection of sea turtles, however, none of the appellees to the dispute were signatory.[94] No negotiations for agreements were proposed nor undertaken with the appellees.[95] While all parties thus did recognize the need to protect sea turtles, there was no agreement on the appropriate method. Still, the combination of a likelihood of environmental effects on US territory and an internationally recognized environmental concern would reasonably lead to acceptance of the exercise of jurisdiction, or in other worlds, the extraterritoriality threshold would be passed in this case. Even when passing the extraterritoriality threshold, a Member will still need to comply with the other requirements of Article XX, including demonstrating why (the design of) the chosen measure is the least trade restrictive. Whether the measure is arbitrarily or unjustifiably discriminatory needs to be assessed under the regular analysis of the chapeau.[96]

V. A CRITICAL VIEW (BEYOND THE LEGAL FRAMEWORK)

A number of critical notes must be made with regard to the proposed model. Is this legal framework able to guarantee fair and equal opportunities to all WTO members to make use of npr-PPMs to attain environmental objectives? As PPMs condition market access,

[89] See eg EG Wilson *et al., Why Healthy Oceans Need Sea Turtles: The Importance of Sea Turtles to Marine Ecosystems* (2010) at <http://oceana.org/sites/default/files/reports/Why_Healthy_Oceans_Need_Sea_Turtles.pdf> 5.

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

[91] See (n 41).

[92] Convention on International Trade in Endangered Species of Wild Fauna and Flora (1973) Appendix I.

[93] Convention on the Conservation of Migratory Species of Wild Animals (1979).

[94] Inter-American Convention for the Protection and Conservation of Sea Turtles (1996). The parties to the Inter-American Convention were at the time apart from the US: Brazil, Costa Rica, Mexico, Nicaragua and Venezuela.

[95] WTO, Panel Report, *United States–Import Prohibitions of Certain Shrimp and Shrimp Products* (1998) WT/DS58/R, para 7.56. WTO, AB Report, *US–Shrimp* (1998) paras 166–172.

[96] See section III.

the size and attractiveness of the market will be determinant factors for a PPMs' success.[97] Foreign producers that are forced to comply with higher standards in order to gain market access can either choose voluntarily to converge to the required standard; try to compel the market power to change its rules through for instance diplomacy, WTO complaints or sanctions; seek a cooperative solution; or choose not to export to that market.[98] The effectiveness of PPMs in bringing about environmental changes[99] in other countries will thus depend on a number of factors, including market power, the trade dependence of the specific industry and the appropriateness and feasibility of the requirement imposed.[100] This reveals the inherent economic inequity of PPMs: only States with a substantial market will reasonably be able to take advantage of PPMs.[101]

However, this could also be seen as a responsibility, or even a duty,[102] of these larger States: protection of the commons, of a public good, might require leadership. The responsibility of the regulating States would need to be closely linked with an obligation to ensure that the imposed regime provides the necessary management elements for success for producers that are not able to comply with higher standards,[103] such as technology transfer.[104] Could requirements like technical and financial assistance in order to 'even-out' the possible negative consequences on foreign producers be read in the chapeau? This is not only relevant for the foreign producers, but also an element that can impact the effectiveness of PPMs in contributing to better environmental protection: effective environmental protection approaches need to take into account the availability of resources and ecological conditions, which will vary by country.[105]

[97] See in that regard David Singh Grewal's very interesting arguments on network power, arguing that sometimes in order to enjoy the benefits of globalization, one has no choice but to accept a specific set of dominant standards. There are not forced upon others, but if people want to access to network, their free choice over alternatives decreases (the 'unfreedom of globalization'). He makes the distinction between 'freedom to choose'—the freedom of choice without an acceptable alternative—from the 'freedom to choose freely'—the freedom of choice over viable alternatives. See DS Grewal, 'Network Power and Globalization' (2003) 17(2) Ethics & International Affairs 89; DS Grewal, *Network Power: The Social Dynamics of Globalization* (Yale University Press 2008). [98] A Bradford, 'The Brussels Effect' (2012) 107(1) NWULRev 50.

[99] This question differs from whether the PPM in question actually brings about environmental improvement—as this would very much depend on the substantive obligations. See in that regard the very interesting study by RW Parker, 'The Use and Abuse of Trade Leverage to Protect the Global Commons: What We Can Learn From the Tuna–Dolphin Conflict' (1999) 12(1) GeoIntlEnvtlLRev 1. In the light of protection of the global commons, trade leverage by powerful trading partners could offer a useful incentive to comply with environmental norms. He argues that the effectiveness of trade leverage is the degree to which it supports, and is supported by, effective environmental management approaches.

[100] OECD, 'Processes and Production Methods (PPMs): Conceptual Framework and Considerations On Use of PPM-based Trade Measures' (1997) 30. [101] Gaines (n 77) 427.

[102] F Francioni, 'Extraterritorial Application of Environmental Law' in KM Meessen, *Extraterritorial Jurisdiction in Theory and Practice* (Kluwer 1996) 122, 132. That duty could also be given form in light of the principle of common but differentiated responsibilities, see eg J Scott, 'The Geographical Scope of the EU's Climate Responsibilities' (2015) 17(1)CYELS 92.

[103] In contrast to those who are not *willing*. The challenge is how to measure and determine who belongs to which category. [104] Parker (n 99) 119.

[105] OECD, Processes and Production Methods (PPMs): Conceptual Framework and Considerations On Use of PPM-based Trade Measures (1997) 32.

Furthermore, the tree might not suffice to promote environmental protection of less-recognized or known environmental needs.[106] The requirement to look at international support and multilateral recognition of norms ignores that environmental trade leverage tools such as PPMs are often not needed to maintain the status quo, but rather to 'force' regime formation and awareness for an environmental concern.[107] Where international legal norms are still lacking, unilateral acts allow States to assert an important interest in matters that are not yet covered by international law, and could serve to promote the adoption of new international norms that are necessary to clarify the 'grey areas' of international practice.[108]

VI. CONCLUSION

This contribution has taken a closer look at the jurisdictional limitation of Article XX GATT. Can WTO law act as a stumbling block for States to address global environmental concerns through trade? As demonstrated by *US–Shrimp*, npr-PPMs addressing environmental concerns at least partly located outside the territory can be accepted, if they comply with the other requirements of Article XX. The sufficient nexus-test relied on by the Appellate Body in that case does not give conclusive guidance for a broader range of environmental concerns. The proposed decision tree has offered a systematic approach to assess the acceptability of non-territorial environmental concerns by looking, firstly, at the location of the concern and the possible environmental effects on the territory of the regulating country; and secondly, at the international recognition and the support for the protected norm. The proposed model allows for a firmer, more in-depth analysis of the jurisdictional issue—of particular importance for cases where the 'sufficient nexus' is less clear, such as climate change, air pollution, or biodiversity. However, despite the structured legal framework, there is no one-size-fits-all. Due to the nature of environmental concerns, as well as the particularities of international relations, a contextual case-by-case analysis, with respect for the interests of importing and exporting countries, as well as producers, people and planet, remains very important.

This contribution has shown that within limits npr-PPMs can serve as an alternative to international inaction. Only where the environmental effects on the regulating country would be too indirect, or where environmental concerns find little or no support in the international community, will States be hindered to adopt trade measures based on the extraterritorial nature of the environmental concern.

[106] See in that regard the proposals made under earlier to rely on the precautionary principle.
[107] Parker (n 99) 116. M Hakimi, 'Unfriendly Unilateralism' (2014) 55(1) HarvIntlLJ 105.
[108] TJ Schoenbaum, 'International Trade and Protection of the Environment: The Continuing Search for Reconciliation' (1997) 91(2) AJIL 299.