

Extraterritorial regulation of natural resources A functional approach

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I. Introduction

The EU is currently profiling itself as an environmental frontrunner by actively pursuing the protection and adoption of environmental norms throughout all policy areas. This pursuit of environmental objectives also has an external dimension in that the EU uses trade measures³ to ‘unilaterally’ condition market access for products from third countries on compliance with EU environmental standards⁴. However understandable and perhaps commendable these actions are, by actively trying to export EU norms values through – at least partly – ‘extraterritorial’ application of EU law, they may be in tension with international principles of jurisdiction that are geared towards delimiting international spheres of competence, and more generally with foreign nations’ right to freely make their own decisions regarding the balance to be struck between economic and environmental imperatives.

The most prominent and well-known example of EU externalization of its own environmental regulation in the much-discussed Directive 2008/101/EC (Aviation Directive).⁵ To remind the reader, this Directive included in the EU’s Emission Trading Scheme (EU ETS) emissions from airline companies, including foreign companies, flying to and from EU destinations.⁶ Such regulatory extension was a source of great controversy, as the scheme covered the entire commercial route of planes departing or arriving in the EU, including the flight stretches outside of European airspace.⁷ In response to a preliminary question posed by a British court, however, the Court of Justice of the EU (CJEU) found that the measure was *not* extraterritorial in nature. Among other considerations, the Court motivated its decision by referring to the territorial link of the flights: since all either departed from or arrived in a EU airport, and the EU is free to impose conditions on the commercial activities carried out within

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³ For further background on the EU’s governance through international trade and its effect on achieving non-trade objectives, see the chapter by Joris Larik in this book.

⁴ *Ibid.*, p. 21.

⁵ Directive 2008/101/EC of the European Parliament and of the Council of 19 November 2008 amending Directive 2003/87/EC so as to include aviation activities in the scheme for greenhouse gas emission allowance trading within the Community, OJEU L 8/3 (2009).

⁶ Directive 2009/29/EC of the European Parliament and of the Council of 23 April 2009 amending Directive 2003/87/EC so as to improve and extend the greenhouse gas emission allowance trading scheme of the Community, O J L 140/63, 5.6.2009 (Aviation Directive).

⁷ Article 3 read together with Annex 1 of the Aviation Directive.

its territory, there was no extraterritorial application of the measure.⁸ After all, aviation operators had a choice to *not* enter the European – territorial – market and so could have avoided compliance with EU legislation.⁹ In *ATA*, the CJEU embraced a rather strict interpretation of “extraterritoriality”,¹⁰ by apparently limiting the application of the concept to situations which have no link whatsoever with the regulating entity, and considering situations having *some* territorial link to fall squarely within the territoriality principle. Given the Court’s opposition to the territorial effects doctrine in transnational competition law proceedings,¹¹ this may be surprising. Ultimately, the decision in *ATA* might not so much have been based on international principles of jurisdiction, but rather on the desire to facilitate effective climate change policy.¹² The CJEU’s somewhat artificial reliance on territoriality did little to placate the objections of the EU’s trading partners against the Aviation Directive,¹³ although it is of note that they did not explicitly state that the Directive was illegal under international law.¹⁴ Eventually, in response to international pressure, the EU temporarily excluded aviation from its ETS while efforts were made to negotiate a multilateral solution.¹⁵

The vicissitudes of the Aviation Directive¹⁶ are not unique. A respectable number of this type of trade measures are in existence, not only in the EU but also elsewhere.¹⁷ This chapter reviews three EU legal instruments containing such measures: the Regulation laying down the obligations of operators who place timber and timber products on the market (hereinafter Timber Regulation)¹⁸, the Directive on the promotion of the use of energy from renewable sources (hereinafter RED)¹⁹ and

⁸ Stating that “certain matters contributing to the pollution of the air, sea or land territory of the Member States originate in an event which occurs partly outside that territory is not such as to call into question, in the light of the principles of customary international law capable of being relied upon in the main proceedings, the full applicability of European Union law in that territory.” *ATAA* case, par. 129. *Id.*, para. 128.

⁹ *ATAA* case, par. 127.

¹⁰ Erling, Uwe M., “Introductory note to the court of justice of the European Union: Air Transport Association of America (ATA) et al. v. Secretary of State for Energy & Climate Change”, *International Legal Materials*, Vol. 51(3) (2012), p. 535.

¹¹ See *Wood Pulp*, rejecting the effects doctrine in favor of a territorial ‘implementation’ doctrine. Joined Cases 89, 104, 114, 116, 117 and 125 to 129/85, *A. Ahlstrom Osakeyhtiö and others v. Commission* (“*Wood Pulp*”), Sept 27, 1988, [1988] ECR 5193 (ECJ), para. 16, 17, 18.

¹² De Baere, Geert and Ryngaert, Cedric, “Air Transport Association of America and the EU’s Contribution to the Strict Observance and Development of International Law”, *European Foreign Affairs Review*, Vol. 18(3) (2013), pp. 389, 400-403.

¹³ See Council of the International Civil Aviation Organization (19th Session), *Inclusion of International Civil Aviation in the European Union Emissions Trading Scheme (EU ETS) and its Impact*, C-W/13790, 17 October 2011.

¹⁴ De Baere, Geert and Ryngaert, Cedric, “Air Transport Association of America and the EU’s Contribution to the Strict Observance and Development of International Law”, *European Foreign Affairs Review*, Vol. 18(3) (2013), p. 409.

¹⁵ See European Commission, *ICAO, COM 20/12* (15 Nov. 2012).

¹⁶ For an understanding of the Aviation Directive’s consistency with multilateral trade obligations, see Bartels, Lorand, “The WTO Legality of the Application of the EU’s Emission Trading System”, *The European Journal of International Law*, Vol.23(2) (2012).

¹⁷ Anderson, Belina, “Unilateral Trade Measures and Environmental Protection Policy”, *Temple Law Review*, Vol. 66(751) (1993), p. 763.

¹⁸ Regulation laying down the obligations of operators who place timber and timber products on the market, 12.11.2010 O.J. L 295/23 (Timber regulation).

¹⁹ Directive 2009/ 28, on the promotion of the use of energy from renewable sources and amending and subsequently repealing Directive 2001/77/EC and 2003/30/EC, *OJ* 2009, L140.

the Regulation on trade in seal products (hereinafter Seals Regulation).²⁰ These instruments have been selected because they all contain an extraterritorial component, and because they are all aimed at the protection of natural resources writ large: respectively forests, the atmosphere, and certain animals.

Given the commonality of their goals (the protection of global public goods) one can expect these instruments to follow a similar regulatory pattern, and to be subject to the same standards of legal review. The aim of this contribution is to ascertain whether the measures contained in these instruments are indeed comparable, and - whether or not they are comparable - trade measures aimed at the protection of natural resources pass the test of international legality. When conducting this legality test we use public international law rules of jurisdiction as our normative framework.²¹

For each measure the existing international legal framework, the extraterritorial aspect and their potential trade implications will be examined in turn (Part II). Following this, the unilateral character of the measures will be problematized (Part III), after which the legality of the extraterritorial aspect of the measures will be ascertained (Part IV). Finally, some concluding observations will be made as to the jurisdictional challenges posed by such trade measures pursuing environmental objectives.

II. EU measures protecting natural resources

In this Part, the three selected legal instruments – the Timber Regulation, the Renewable Energy Directive, and the Seals Regulations – will be introduced and contextualized.

The presentation of each instrument follows a similar structure. In the first section, the content of the instrument is briefly presented, with an emphasis on its extraterritorial aspects. The second section sets out the international framework protecting – or not – the same global public good and examines to what extent the EU instrument gives effect to, or at least relates to the international framework. Thirdly, the EU's reasons for unilaterally adopting the said instruments are scrutinized. Fourthly and finally, the international implications of the EU's measures – including international protest and legal challenges – are flagged.

The data and insights gathered in this Part will feed into the legality analysis carried out in the next Part, where it is argued that the legality of a jurisdictional assertion is a function of the character of the substantive norm or value protected by the assertion. Indeed, the more a substantive norm furthered unilaterally has a basis in an international framework supported by States, or in a desire to protect recognized global public goods (and the weaker its impact on the economic or trade opportunities of

²⁰ Regulation No. 1007/2009 of the European Parliament and of the Council on trade in seal products, *O.J. L.286/36* 31.10.2009.

²¹ The measures in question could also be reviewed in light of other legal norms, such as those laid down in the agreements concluded under the auspices of the World Trade Organization (WTO); after all, measures conditioning market access restrict international trade and may thus be in tension with WTO law. A review in light of international trade law is the subject of other chapters in this volume, however. See the chapters by Petros Mavroidis and by Dylan Geraets and Bregt Natens. That being said, in passing, reference is made to trade law, especially where the degree of contestation of the measure is discussed.

foreign operators), the higher the chances that the unilateral jurisdictional assertion will survive legality challenges. In this next Part, the three measures will be tested against this principle.

A. The Timber Regulation

1. Content of the Regulation

The 'EU Regulation laying down the obligations of operators who place timber and timber products on the market' (hereinafter Timber Regulation) prevents the placement on the market of the EU of illegally harvested timber and products derived thereof, and, in so doing, aims to combat illegal logging.²² The extraterritorial aspect of the measure lies in the fact that it establishes due diligence requirements with which operators in the *country of origin* have to comply, so as to prevent the placing on the market of illegally harvested timber.²³

2. International framework

The Timber Regulation is embedded in an international legal framework concerning forest governance. Ever since the end of the Second World War, the Food and Agricultural Organization (hereinafter FAO) Forestry Department has had a specific focus on maintaining the supply of timber.²⁴ From the 1970s onwards, forests acquired an environmental and sustainability value in their own right. Notably the 1972 Declaration of the United Nations Conference on the Human Environment (hereinafter Stockholm Declaration)²⁵ and the 1992 Rio Declaration on Environment and Development (hereinafter Rio Declaration),²⁶ have galvanized international efforts to manage the world's natural resources in a sustainable manner. In Rio, sustainable forestry was included specifically in the Forest Principles,²⁷ and further defined in the Convention on Biological Diversity (CBD)²⁸ as well as the United Nations Framework Convention on Climate Change (UNFCCC).²⁹

²² Regulation laying down the obligations of operators who place timber and timber products on the market, 12.11.2010 O.J. L 295/23 (Timber regulation), Recital 3.

²³ Article 4 and 6 Timber regulation.

²⁴ Jeremy Rayner, Alexander Buck & Pia Katila (eds.), "Embracing complexity: Meeting the Challenges of International Forest Governance. A global assessment report." Prepared by the Global Forest Expert Panel on the International Forest Regime, IUFRO World Series Vol.28 (2010), p.76.

²⁵ Declaration of the United Nations Conference on the Human Environment 1972. Available at: <http://www.unep.org/Documents.Multilingual/Default.asp?documentid=97&articleid=1503> [accessed 15 May 2014].

²⁶ UNCED outcome, Resolution A/CONF.151/26 (Vol. I), adopted by the General Assembly at the UNCED 3-14 June 1992

²⁷ 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.

²⁸ The Convention on Biological Diversity adopted at Rio de Janeiro 1992, article 6(b). Available at: <http://www.cbd.int/convention/text/> [accessed at 18 April 2014].

²⁹ United Nations Framework Convention on Climate Change (UNFCCC), 1771 UNTS 107; S. Treaty Doc No. 102-38; U.N. Doc. A/AC.237/18 (Part II)/Add.1; 31 ILM 849 (1992).

The main impetus for the Timber Regulation was probably the 2001 Bali Declaration,³⁰ which acknowledged the importance of the elimination of the trade in illegally logged timber. Such trade, facilitated by corruption and poor governance, was recognized as a significant cause of forest degradation. Following up on the international consensus reached in Bali, several regional and national initiatives were developed to promote domestic good forest governance.³¹ The Timber Regulation could be considered as one of them.

Regardless of the merits of the Bali Declaration, there is, however, currently no binding international agreement on the combatting of illegal logging of timber.³² Nonetheless, it is of note that, where possible, the Regulation refers to an international mandate which the EU has obtained, *e.g.*, in the context of the United Nations Framework Convention on Climate Change (UNFCCC)³³ and on the basis of the Convention on International Trade in Endangered Species (CITES).³⁴

3. Explaining the adoption of the Regulation

The EU Timber Regulation responds not only to an international concern about illegal logging. It is also part of a detailed EU-wide policy related to forestry management, and could thus be seen as the external extension of its internal protective practices.

After the adoption of the Rio Declaration, in 1993, several general guidelines for sustainable forestry management in Europe were enacted emphasizing the importance of competitive ecological, economic and social sustainable forest management,³⁵ in which due account was given to existing international instruments to guide the general principles upon which the policy should be based.³⁶ The EU adopted a Forest Law Enforcement, Governance and Trade Action Plan (hereinafter EU FLEGT Action Plan) in 2003,³⁷ which was to become the basis for the Timber Regulation. The EU FLEGT Action Plan promotes sustainable forest management in third countries where there is a higher risk of poor governance in forest sectors by

³⁰ Ministerial Declaration, Forest Law Enforcement and Governance East Asia Ministerial Conference, Bali September 2001, p. 2.

³¹ Jeremy Rayner, Alexander Buck & Pia Katila (eds.), “Embracing complexity: Meeting the Challenges of International Forest Governance. A global assessment report.” Prepared by the Global Forest Expert Panel on the International Forest Regime, IUFRO World Series Vol.28 (2010), p. 117.

³² As recognized in Recital 14 Timber Regulation.

³³ Recital 3 Timber Regulation.

³⁴ Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) 27 UST 1087, TIAS 8249, adopted Switzerland 13 January 1976. For the implementation in the EU: Council Regulation (EC) No 338/97 of 9 December 1996 on the protection of species of wild fauna and flora by regulating trade therein, 3.3.1997 O.J. (L61) 1.

³⁵ Communication from the Commission to the Council, the European Parliament, the Economic and Social Committee and the Committee of the Regions on a Forest Strategy for the European Union, 18.11.1998 COM(1998) 649 final, p. 6.

³⁶ Reference is made to the commitments made by EU Member States under the Rio Declaration and the Helsinki resolutions. See Committee on Agriculture and Rural Development, PE 213.578/fin. A4-0414/96, Thomas Rapport, 18 December 1996, paragraph 3.

³⁷ Council Regulation (EC) No 2173/2005 of 20 December 2005 on the establishment of a FLEGT licensing scheme for imports of timber into the European Community, 30.12.2005 OJ L 347 (FLEGT).

emphasizing governance reforms and capacity building.³⁸ It does so by defining the illegal harvesting of timber on the basis of compliance with the national laws of the country of origin.³⁹ The Timber Regulation builds on, and strengthens this EU FLEGT Action Plan: whereas the Action Plan only applied to voluntarily committed partner countries⁴⁰, the Timber Regulation extends obligations to all importers of timber on the European market.⁴¹

The Timber Regulation is not solely established out of an altruistic concern with sustainable forestry, however. The Regulation is also an attempt at “levelling the playing field”, as discussed in the introduction to this chapter: the EU’s subjection of EU producers to a stringent regime aimed at tackling illegal logging *within* the EU would be undermined, and EU producers would be put at a competitive disadvantage, if timber placed on the market by foreign operators were not subject to equally strict rules.⁴² It is of note, however, that the rules applicable to foreign producers are not of the EU’s making: the EU is only redeploying definitions of illegal logging contained in the national laws of the *country of origin*.⁴³ The Timber Regulation should thus primarily be seen as strengthening forestry law *enforcement* rather than setting new rules for forestry governance.

4. International implications

The Timber Regulation affects international trade in the sense that the unilaterally established due diligence system (DDS) increases the administrative burden for producers and makes them vulnerable to potential “market power abuse” by the EU, thus raising the cost of international trade. Since the majority of these producers come from countries with a relatively weak regulatory framework in place, it might be expected that the Timber Regulation will substantially raise costs for foreign operators, thereby potentially restricting the international trade in timber. The transaction costs for producers are further increased because several countries have put in place legislation with a similar aim but establishing slightly different requirements.⁴⁴

As it may be assumed that producers from poorer countries will have greater difficulty fulfilling the DDS requirements, *de facto* they may be discriminated against when it comes to accessing the EU market, although one should admit that the Timber Regulation offers several options to mitigate this risk.⁴⁵

³⁸ Recital 2 FLEGT.

³⁹ Article 2(g) FLEGT.

⁴⁰ Article 3(1) FLEGT.

⁴¹ Article 1 Timber Regulation.

⁴² Article 2(c) Timber Regulation.

⁴³ Recital 7, 9, Article 4(1) Timber Regulation.

⁴⁴ Jeremy Rayner, Alexander Buck & Pia Katila (eds.), “Embracing complexity: Meeting the Challenges of International Forest Governance. A global assessment report.” Prepared by the Global Forest Expert Panel on the International Forest Regime, IUFRO World Series Vol.28 (2010), p. 117.

⁴⁵ Where appropriate, technical and other assistance is offered to operators. See Article 13, Article 3, 20(2) Timber Regulation.

B. The Renewable Energy Directive

1. Content of the Directive

The Directive on the promotion of the use of energy from renewable sources (hereinafter RED) is the latest EU Directive promoting the use of energy from renewable sources.⁴⁶ The Directive establishes a 10 percent mandatory renewable energy target for transport fuels to be reached in 2020,⁴⁷ of which at least 35 percent should be derived from the use of biofuels or bioliquids.⁴⁸ The Directive further establishes that *imported* renewable energy will count in the calculation of the Member's emissions reduction target, when they comply with the sustainability criteria as set out by the Directive.⁴⁹ The observance of these sustainability criteria is enforced through a detailed outlining of acceptable mechanisms ensuring the sustainability of biofuels and bioliquids production.⁵⁰

The extraterritorial aspect of the RED lies in the EU's unilateral establishment of the sustainability criteria. These criteria determine what qualifies as sustainable biofuels, and apply to the entire production process,⁵¹ including processes in non-EU countries of origin. Admittedly, imports of biofuels into the European market which do not comply with RED's sustainability criteria are not prohibited. However, as the use of such imported biofuels would not count towards EU Member States' mandatory renewable energy targets, it is unlikely that "unsustainable" biofuels would be competitive in the European market. Thus, the RED indirectly regulates the production process of biofuels in the country of origin, and accordingly applies, at least in part, extraterritorially.

2. International framework

While the sustainability requirements in RED are formally determined unilaterally by the EU, they do find their roots in internationally identified concerns related to the production of biofuels and bioliquids, concerns with respect to biodiversity, food security and indirect land use. These concerns have to a certain extent found their way into the final version of the RED. For one thing, the RED provides that biofuel production land should not be derived from areas designated for nature protection as appointed by relevant national law or competent authority, or the protection of rare and endangered species included in lists drawn up by intergovernmental organizations or the International Union for the Conservation of Nature (hereinafter ICUN).⁵² For

⁴⁶ Directive 2009/ 28, on the promotion of the use of energy from renewable sources and amending and subsequently repealing Directive (RED) 2001/77/EC and 2003/30/EC, *OJ* 2009, L140, p. 6

⁴⁷ Recital 8, Article 3(4) RED.

⁴⁸ Article 17(2) RED.

⁴⁹ Recital 65, Article 17(1) RED.

⁵⁰ Article 17(5) RED.

⁵¹ Communication from the Commission on voluntary schemes and default values in the EU biofuels and bioliquids sustainability scheme, C 160/1 19.6.2010 at 2.2.3.

⁵² Recital 69 RED, article 17(3)(b), article 18(4). The ICUN is the oldest global environmental organization with a membership of both governmental and non-governmental organizations. It operates

another, the RED relies on the Food and Agriculture Organization's (hereinafter FAO) definition of "primary forests", and provides that these cannot be used for the conversion of land to support the production of biofuels.⁵³ Furthermore, biofuels derived from biodiverse grasslands will not be considered as contributing to the mandatory renewable energy target.⁵⁴ Risks related to food security and social sustainability were addressed by reference to the Conventions of the International Labour Organization⁵⁵, the Cartagena Protocol on Biosafety⁵⁶ and CITES. Limitations to the origin of land find their justification in the European commitment to combatting climate change.⁵⁷ Finally, RED relies on several transnational voluntary certification schemes already addressing the sustainability of biofuels.⁵⁸

An overarching international framework of biofuels is lacking, however. In fact, one of the motivations for the use of EU-determined sustainability criteria was precisely to influence the international debate,⁵⁹ rather than *vice versa*. Arguably, consumer objections against conversion of highly biodiverse land or land designated for nature protection purposes for the production of biofuels is strongest in Europe, thus influencing the EU's progressive stance.⁶⁰ Ultimately, this makes the EU's unilateralism less strongly rooted in an international framework, although it is clearly geared towards protecting global public goods.

3. Explaining the adoption of the Directive

The EU should certainly be commended for requiring the production of biofuels to be sustainable. Still, other - less environmentally oriented motives - have also influenced the EU's increased focus on biofuels.⁶¹ This is not surprising, as the EU is one of the world's main producers of biodiesel, and international trade in biodiesel has increased considerably.⁶² In fact, RED pursues several objectives at the same time: next to

on the basis of knowledge provided by scientists and exports spread across 160 countries. See <http://www.iucn.org/about/> [accessed at 04 June 2014].

⁵³ Recital 69, article 17(3)(a) RED. "Primary forests" are determined as "Naturally regenerated forest of native species, where there are no clearly visible indications of human activities and the ecological processes are not significantly disturbed". See Forestry Department Good and Agriculture Organization United Nations, "Global Forest Resources Assessment 2010, Terms and Definitions", Forest Resource Assessment Programme, Working Paper 144/E (2010), p. 12.

⁵⁴ Reference is made to the Convention on Biological Diversity (Biodiversity Convention) 1760 UNTS 79; 31 ILM 818, adopted at Rio de Janeiro 1992, article 6(b): parties are obligated to integrate biodiversity in all relevant sectors.

⁵⁵ See Article 17.7 RED.

⁵⁶ Cartagena Protocol on Biosafety to the Convention on Biological Diversity (Cartagena Protocol), 2226 U.N.T.S. 208; 39 ILM 1027 (2000); UN Doc. UNEP/CBD/ExCOP/1/3, at 42 (2000).

⁵⁷ Recital 1, 70, 71 RED.

⁵⁸ Ponte, Stefano and Daugbjerg, Carsten, "Biofuel Sustainability and the Formation of Transnational Hybrid Governance", DRAFT [check after 27 June if citation is possible].

⁵⁹ Kulovesi, K., Morgera E., Muñoz M., "Environmental integration and multifaceted international dimension of EU law: unpacking the 2009 Climate and Energy Package", CMLR, 48 (2011), p. 878-879.

⁶⁰ Recital 69 RED.

⁶¹ Afonis, Stavros, Stringer, Lindsay C., "European Union leadership in biofuels regulation: Europe as a normative power?", *Journal of Cleaner Production*, Vol.32 (2012), pp. 115, 300.

⁶² Other major producers are Argentina, the United States, and Brazil. Kwant, Kees and others, 'Overview of World Bioenergy Trade: IEA Task 40', IEA Bioenergy ExCo65, Nara, Japan, 12 May – 14 May 2010. Available at: <http://www.ieabioenergy.com/wp-content/uploads/2013/10/ExCo65-P1-Overview-of-World-Bioenergy-Trade-Task-40-Ir-K.-Kwant.pdf> [accessed at 5 April 2014].

combatting climate change, it aims to diminish the transport sector's reliance on oil, create job opportunities in rural areas, to stimulate investment in the energy sector and to create a competitive internal market.⁶³ Thus, by advocating specific standards rivalling those of its competitors, the EU aims to further the trade interests of its own producers instead of merely promoting the use of renewable energy.

4. International implications

Given the economic importance of biofuels, the RED has significant trade implications. In particular, the Directive increases production costs, as producers have to comply with divergent standards, depending on the country of importation – although the sustainability criteria in the RED to some extent overlap with those in established voluntary guidelines.⁶⁴ Furthermore, the RED's definition of highly biodiverse grassland is relatively vague,⁶⁵ leading to legal uncertainty in third countries where this type of land is abundant, such as Brazil.⁶⁶ These points of critique have caused other leading producing countries of biofuels to protest the sustainability criteria contained in the RED,⁶⁷ and have led to the initiation of a dispute settlement procedure at the WTO.⁶⁸

C. The Seals Regulation

1. Content of the Regulation

The Regulation on trade in seal products (hereinafter Seals Regulation)⁶⁹ sets out conditions for the import of products derived from seals.⁷⁰ It aims to improve animal welfare and is grounded in the moral belief vested among citizens of the EU that the nature of seal hunt is cruel.⁷¹ The extraterritorial aspect of the measure is that it unilaterally establishes conditions under which seal hunt conducted outside the EU is

⁶³ Green Paper, "A European Strategy for Sustainable, Competitive and Secure Energy", COM(2006) 105 final 8.3.2006, p. 3. *Communication from the Commission - an EU Strategy for Biofuels*, COM(2006)34 def., 8 February 2006, p.3

⁶⁴ Article 18(4) RED. See Pavlovskaja, Evgenia, "Mechanisms to control the fulfillment of the EU sustainability *Legal Studies Research and Essays*, Vol. 2(1) (January 2014), p. 17, 28.

⁶⁵ Article 17(3)(c) RED.

⁶⁶ Douma, Wybe Th., van de Velde, Steffen (eds.), "EU environmental norms and third countries: the EU as global role model?", *CLEER Working Paper* CLEER WP 2013/5, p. 12.

⁶⁷ WTO news, "Concerns raised over trade restrictions on dairy products, biofuels, cars and seafood", 18 October 2013. Available at: http://www.wto.org/english/news_e/news13_e/good_18oct13_e.htm [accessed at 18 April 2014].

⁶⁸ Request for the Establishment of a Panel by Argentina, *European Union – Anti-dumping Measures on Biodiesel from Argentina*, WT/DS473/5, 13 March 2014. Request for Consultations, *European Union-Anti-Dumping Measures on Biodiesel from Indonesia*, WT/DS480/1, G/L/1071, G/ADP/D104/1, 17 June 2014.

⁶⁹ Regulation No. 1007/2009 of the European Parliament and of the Council on trade in seal products, *O.J. L.286/36* 31.10.2009 (hereinafter Seals Regulations).

⁷⁰ Art. 3 Seals Regulation.

⁷¹ Preamble Seals Regulation recital 1, 4, 11 relating to cruelty and humane treatment. Preamble recital preamble 5, 9, 10 relating to animal welfare..

deemed “humane”; products that do not meet these conditions cannot be traded between third countries and the EU (nor within the EU for that matter).⁷²

2. *International framework*

It is somewhat challenging to distinguish the appropriate international legal framework in which the Seals Regulation could be embedded, as the Regulation does not have one primary goal.⁷³ The Regulation mentions animal welfare in connection with the moral concerns that would exist among European consumers over the manner in which seals are hunted and killed.⁷⁴ This suggests that both the protection of animal welfare and the protection of ‘public morals’ are objectives of the regulation.⁷⁵ Animal welfare as an objective of the Seals Regulation may find some support in international treaties concerned with maintaining biodiversity (Biodiversity Convention) and the protection of endangered species (CITES). Since seals in general are not an endangered species, and CITES is as such not aimed at improving the welfare of individual animals, CITES can hardly be seen as a basis for the Regulation, however.⁷⁶ In reality, the EU has very much been a first international mover when it comes to promoting animal welfare.⁷⁷ and the Seals Regulation fits this mould. ,

3. *Explaining the adoption of the Directive*

During the legislative process towards the Regulation, several scientific assessments were undertaken of the most important issues raised in relation to seal hunt.⁷⁸ Notably, a report by the European Food Safety Authority (EFSA) exerted influence on the Commission, a report which concluded that in principle humane killing was possible during seal hunt, but that practice had shown that, in general, insufficient caution was taken and seals accordingly suffered.⁷⁹ The report could however not comprehensively

⁷² Exceptions to the conditional trade ban are contained in Article 3.1, 2(a), 2(b) Seals Regulation.

⁷³ Sellheim, Nikolas, “The goals of the EU seal products trade regulation: from effectiveness to consequence”, *Polar Record, First View Articles*, First published online 27 January 2014, p. 13. Available at: <http://dx.doi.org/10.1017/S0032247414000023> [accessed at 2 April 2014].

⁷⁴ Seals Regulation, Preamble, recital 10.

⁷⁵ Sellheim, Nikolas, “The goals of the EU seal products trade regulation: from effectiveness to consequence”, *Polar Record, First View Articles*, First published online 27 January 2014, p. 2. Available at: <http://dx.doi.org/10.1017/S0032247414000023> [accessed at 2 April 2014].

⁷⁶ Commission of the European Communities, Proposal for a Regulation of the European Parliament and of the Council concerning trade in seal products COM/2008/0469 final 23.7.2008, p. 7. See also Council Regulation (EC) No 338/97 of 9 December 1996, on the protection of species of wild fauna and flora implements the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES 1973) within the community, *O.J. L* 61, 3.3.1997, Annex.

⁷⁷ Since 1974, the EU has a history of regulating the protection of animal welfare (Committee on Agriculture and Rural Development, Report on the evaluation and assessment of the Animal Welfare Action Plan, 2006-2010 A7-0053/2010, p. 6). It has to some extent been successful in promoting its Animal Welfare Strategy at the international level. DG SANCO, Evaluation of the EU policy on Animal Welfare and the Possible Policy Options for the Future, J7296 22.12.2010, p. 3.

⁷⁸ de Ville, Ferdi, “Explaining the Genesis of a Trade Dispute: the European Union’s Seal Trade Ban”, *Journal of European Integration*, Vol.34(1) (2012), p. 48.

⁷⁹ European Food and Safety Authority (EFSA), “Animal welfare aspects of the killing and skinning of seals. Scientific Opinion of the Panel on Animal Health and Welfare”, *the EFSA Journal* (2007), p. 3.

conclude how far-reaching this difference between theory and practice was.⁸⁰ Ultimately, the moral choice was made to ban seal products given their apparent impact on animal welfare.

4. International implications

Despite its relatively small economic importance, the trade impact of the Seals Regulation was felt by the main producers of seal products, most of whom are located *outside the EU*. Under the Regulation, these producers can only import their products into the EU when their products fall within one of the narrow exceptions related to traditional hunting and marine resource management. Given these trade restrictions, Canada and Norway challenged the Seals Regulation before a WTO Panel and later the Appellate Body (AB).⁸¹

The Appellate Body (hereinafter AB) in this case found the exceptions to the import ban on seal products violated Article I:1 and the requirements of the Chapeau of Article of the GATT 1994⁸², although in principle the conditional import ban fell within the scope of the public morals exception.⁸³ Of particular relevance to this chapter is the AB's discussion of the question of extraterritoriality: the AB held that the Seals Regulation did not impose extraterritorial obligations, as it was designed to address seal hunting activities occurring "within and outside the Community" and the seal welfare concerns of European citizens.⁸⁴ As parties had not addressed the systemic impact of an implied jurisdictional limitation of Article XX(a) GATT, the AB refrained from further commenting on the issue.⁸⁵ This reasoning is similar to the one applied by the CJEU in the aforementioned *ATAA* case: for both the CJEU and the AB, the existence of a territorial (EU) link between the legal instrument and its object of regulation suffices to dispel extraterritoriality concerns.

⁸⁰ *Id.*

⁸¹ Panel, *European Communities – Measure prohibiting the importation and marketing of seal products*, WT/DS400/R, WT/DS401/R, 25 November 2013

⁸² Appellate Body report, *European Communities – Measures Prohibiting the Importation and Marketing of Seal Products*, WT/DS400/AB/R, WT/DS401/AB/R, 22 May 2014, paras. 5.95, 5.290.

⁸³ AB Report, EC- Seals, para., 5.167,

⁸⁴ AB Report, EC- Seals, para.5.173.

⁸⁵ *Ibid.*

III. The unilateral character of the measures: a comparison

The Timber Regulation, the RED and the Seals Regulation all condition the import of a natural resource into the European market on satisfying certain environmental requirements to be fulfilled by the producer in the country of origin. As these measures impact producers based elsewhere, at least if they want to access the EU's market, they could be considered as partly extraterritorial, even if the trade measure itself is taken on EU territory.

As the measures emanate from one actor, without the latter's consent, they could all be characterized as *unilateral*.⁸⁶ Still, these instruments are less unilateral than may appear at first sight. For one thing, some of them are partly based on legal norms developed within a multilateral context. This is the case, for example, in relation to the RED, the sustainability criteria of which find their origin in the Biodiversity Convention, the Cartagena Protocol, several International Labour Conventions and CITES. Other measures rely in part on international voluntary certification schemes (such as, in relation to the Timber Regulation, the Forest Stewardship Council certification scheme).⁸⁷

For another, the Timber Regulation and the RED allow operators to rely on a variety of methods to show compliance with the conditions included in the measures, and offer the possibility to enter into a voluntary partnership agreement, appoint a European monitoring organization⁸⁸ and prevent overlap with existing certification schemes.⁸⁹ This demonstrates that the EU gives due consideration to the fact that producers in third countries might have difficulties fulfilling all the requirements due to insufficient resources or a missing infrastructure. The Seals Regulation stands out in this respect and may be said to more “unilateral” than the Timber Regulation and the RED.⁹⁰

Thirdly, some of the measures reflect international developments that have a similar objective. The Timber Regulation, for instance, is rather strongly situated in

⁸⁶ Although there is no international definition of the term “unilateral”, they are qualified here as “the expression of will of only one states or group of states without the consent of affected states”. See Dupuy, Pierre-Marie, “The Place and Role of Unilateralism in Contemporary International Law”, *European Journal of International Law* Vol. 11(1) (2000), p. 20. Also Vranes, Erich, *Trade and the Environment, Fundamental Issues in International Law, WTO Law and Legal Theory*, Oxford University Press (2009), p. 174.

⁸⁷ It should be noted that the use of voluntary certification schemes is a double-edged sword. On the one hand, it can diminish the administrative burden for producers and lowers market barriers. On the other hand, voluntary certification schemes can have an uneven impact on trade. This unevenly divides the burden of costs shared by producers from different countries. See Marx, Axel, Cuypers, Axel, “Forest certification as a global environmental governance tool: What is the macro-effectiveness of the Forest Stewardship Council?”, *Regulation & Governance*, Vol. 4(4) (2010), p. 412

⁸⁸ Recital 7, Recital 9, See article 3 and Article 20(2) Timber Regulation.

⁸⁹ Communication from the Commission on voluntary schemes and default values in the EU biofuels and bioliquids sustainability scheme, C 160/1 19.6.2010, at 1.

⁹⁰ This was also noted by the WTO Appellate Body: as article 6 of the Implementing Regulation left full discretion to the recognized body designated to assess compliance with the conditions of importation, the application of the conditional import ban did not pass the “test” of the Chapeau of Article XX. AB report, EC- Seal Products, paras. 5.326, 5.337.

multilateral efforts underling the significance of responsible forest management. Although no international agreement on illegal logging exists, an international consensus was, and is, crystallizing on the basis of which the EU seems to justify the move forward with its own regulation, as could also be gleaned from the new EU Forest Strategy 2013.⁹¹

The level of reflection of international developments is somewhat more diffuse with respect to the RED. As indicated earlier, the sustainability criteria in the RED can, to a certain extent, be traced back to multilateral conventions on the protection of biodiversity, climate change and labour standards. However, the measure as a whole does not reflect an international consensus as to what constitutes *sustainable* production of biofuels. This has become especially apparent in the context of the WTO, where other main producers have challenged the sustainability criteria featuring in the RED. The main concern over the Directive appears to be grounded in the existing scientific uncertainty regarding the adequacy of the sustainability criteria used by the EU.⁹² Ultimately, the Directive may appear as a convenient congregation of interests in, on the one hand, maintaining an environmentally-friendly reputation and on the other, promoting a more competitive, independent and sustainable energy sector in the EU. This congregation of interests may not fully be reflective of an international consensus.

The Seals Regulation, finally, is the least reflective of international developments. Admittedly, there is an embryonic international legal framework regarding the protection of animal welfare, but there is no international consensus regarding the welfare of seals. The EU does not hide that its efforts to regulate the seal hunt are justified by animal welfare concerns existing among the citizens of the *European society*,⁹³ rather than of international society at large.⁹⁴

⁹¹ The Legally Binding Agreement on Forests Commission Staff Working Document, *Accompanying the document* Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, A new EU Forest Strategy: for forests and the forest-based sector, COM(2013) 659 final/SWD(2013) 343 final, 20.9.2013, p. 4. The EU links this new Forest Strategy with international forestry discussions.

⁹² See the objection of Brazil, which requested the EU to remove trade barriers for its agriculture and agro-energy products. UNCTAD, “The Emerging Biofuels Market: Regulatory, Trade and Development Implications”, UNCTAD/DITC/TED/2006/4, New York and Geneva 2006, p. 5.

⁹³ Commission staff document, annex to the Communication from the Commission to the European Parliament and the Council on a Community Action Plan on the Protection and Welfare of Animals 2006-2010. See also Communication from the Commission to the European Parliament and the Council on a Community Action Plan on the Protection and Welfare of Animals 2006-2010. European Parliament, Committee on the Internal Market and Consumer Protection, “Internal Market and Consumer Protection Committee Chair Announces Strong Committee Vote in Favour of a Ban on Seal Products in the EU”, 2 March 2009. Available at: <http://www.europarl.europa.eu/document/activities/cont/200903/20090303ATT50685/20090303ATT50685EN.pdf> [accessed at 10 April 2014].

⁹⁴ Beqiraj, Julinda, “The Delicate Equilibrium of EU Trade Measures: The Seals case”, *German Law Review*, Vol. 14(1) (2013), p.297. This focus on *European consumers* may also explain why transit of seal products through EU territory is not covered by the regulation. Howse, Robert, Langille, Joanna, Permitting Pluralism: The Seal Products Dispute and Why the WTO Should Accept Trade Restrictions Justified by Non instrumental Moral Values, *The Yale Journal of International Law*, Vol. 37(367) (2011), p. 384.

IV. Reviewing the extraterritoriality of EU unilateralism regarding protection of natural resources

The three discussed EU legal instruments all have an extraterritorial dimension, insofar as they purport to regulate conditions in third countries, provided that operators based there intend to access the EU market. The exercise of such extraterritorial jurisdiction is controversial under rules of public international law. After all, the basic jurisdictional notion is that States will primarily apply their laws to conduct occurring within their own territory, in legal doctrine referred to as the “territorial principle”.⁹⁵ Economic operators’ activities are no longer confined to the territory of a single State, however, but straddle different States. Any State with which the operator or its transaction has a nexus may then feel inclined to apply its law.⁹⁶ Such regulation has an extraterritorial dimension in that it may apply to the foreign portions of the operator’s activities, thus potentially encroaching on other nations’ sovereignty and imposing multiple regulatory burdens on economic operators.

In the field of environmental regulation with respect to production processes, with which we are concerned here, international solutions in the form of common substantive standards and enforcement procedures have long been preferred, and the unilateral conditioning of imports via production process standards has been the exception rather than the rule.⁹⁷ Nonetheless, as the discussed EU measures demonstrate, the use of unilateral trade measures with extraterritorial effect may well become a more common instrument to protect certain environmental values and natural resources where multilateral negotiations have been slow to progress,⁹⁸ and where the effectiveness of domestic regulation aimed at environmental protection could be undermined by foreign operators.

While such unilateral measures are extraterritorial insofar as they impose standards on foreign production processes, technically speaking, the trade measures are aimed at conduct *within* the territory of the regulating State, namely territorial market access. Thus, unlike pursuant to classic extraterritoriality, the regulator applies its laws on the basis of a clear nexus with its own territory.⁹⁹ At first sight, it is difficult to contest that such action is justified by the territorial principle, even if the action is aimed at changing behavior abroad.

⁹⁵ Bianchi, Andrea, “Jurisdictional Rules in Customary International Law, p. 87. In Meessen, Karl M. (ed.), *Extraterritorial Jurisdiction in Theory and Practice*, the Hague: Kluwer Law International (1996) (arguing that any assertion of jurisdiction outside of the territory of the regulating State is suspicious and should be deemed unjustifiable until proven otherwise).

⁹⁶ Compare Kaul, Inge *et al* (ed.), *Global Public Goods*, New York: Oxford University Press (1999), p. xxi (drawing attention to the growing gap between policy-making and the State’s territory).

⁹⁷ Zerk, Jennifer A., *Extraterritorial jurisdiction: lessons from Business and Human Rights Sphere from Six Regulatory Areas*, Working Paper of the CSR Initiative, June 2010, p. 188.

⁹⁸ CLEER, “EU environmental norms and third countries: the EU as global role model?”, Wybe Th. Douma, Steffen van de Velde (eds.), p. 20.

⁹⁹ Francioni, Francesco, “Extraterritorial Application of Environmental Law”, p. 123. In Meessen, Karl M. (ed.), *Extraterritorial Jurisdiction in Theory and Practice*, the Hague: Kluwer Law International (1996).

International trade law has not yet fully come to grips with this jurisdictional challenge.¹⁰⁰ Also in jurisdictional theory, which has traditionally concerned itself with criminal and antitrust matters, has this recent challenge gone largely unheeded. In this Part, we tentatively attempt to fill this gap. The research question here is whether the unilateral pursuit of environmental protection through trade measures, with the attendant extraterritorial effects, is countenanced by the international law of jurisdiction.

As extraterritoriality often raises red flags in international relations, it is key to have a clear understanding of the concept up front. When considering its ordinary meaning, an extraterritorial measure is a measure taken by a State aimed at regulating conduct outside its borders. Accordingly, this State does not entertain a territorial link with this conduct. In classic jurisdictional theory, extraterritorial measures are frowned upon, as the right of a State to legislate, adjudicate and enforce norms is territorially bound.¹⁰¹ This principle emanates from the fundamental structure of the international legal order as a system of sovereign States holding the right to exercise their competences over their designated territory and the population residing within it.¹⁰² The law of jurisdiction, and in particular its cornerstone the territorial principle,¹⁰³ ensures that conflict is prevented between States as to which State is entitled to exercise its competences. As extraterritorial jurisdiction upsets this regulatory balance between States, such jurisdiction is only allowed on the basis of a number of limited permissive grounds, notably personality, security, and universality (which were mainly developed in the criminal law).¹⁰⁴

Applying this jurisdictional framework, to the extent relevant, to our referent object, the environment and natural resources, one may submit that a State is allowed to exercise jurisdiction in order to address environmental harm arising outside its territory where such harm has been caused by a State's own national (nationality principle) or caused effects within its own territory (objective territoriality).¹⁰⁵ It may appear that the latter principle may have some traction with respect to unilateral trade measures, insofar as it justifies jurisdictional claims over extraterritorial conduct causing immediate and substantial adverse effects on the environment within the territory of the regulating State.¹⁰⁶ However, in respect of unilateral measures addressing threats to global public goods, the territoriality principle has less explanatory value, as such threats are not aimed at the territory of a particular State. After all, the

¹⁰⁰ This challenge typically comes to the fore where international trade and non-trade objectives overlap. For a discussion of jurisdiction and non-trade objectives within the WTO, see the chapter by Petros Mavroidis in this book.

¹⁰¹ Buxbaum, Hannah L., "Territory, territoriality, and the resolution of jurisdictional conflict", *American Journal of Comparative Law*, Vol. 57(2) (2009), p. 632.

¹⁰² Bianchi, Andrea, "Jurisdictional Rules in Customary International Law", p. 76, 83. In Meessen, Karl M. (ed.), *Extraterritorial Jurisdiction in Theory and Practice*, the Hague: Kluwer Law International (1996).

¹⁰³ Maier, Harold G., "Jurisdictional Rules in Customary International Law", p. 67. In Meessen, Karl M. (ed.), *Extraterritorial Jurisdiction in Theory and Practice*, the Hague: Kluwer Law International (1996).

¹⁰⁴ Ryngaert, Jurisdiction in international law, p. 86; Shaw, Malcom N., *International Law*, Cambridge: Cambridge University Press (2008), p. 645 -646.

¹⁰⁵ As for the latter is concerned, logically, it cannot be assumed a State would have consented to a prohibition to protect itself against harm solely because this harm originates outside of its territory. See Maier, Harold G., "Jurisdictional Rules in Customary International Law", p. 69. In Meessen, Karl M., *Extraterritorial Jurisdiction in Theory and Practice*, the Hague: Kluwer Law International (1996).

¹⁰⁶ Compare, in a competition law context: Case T-102/96 *Gencor* [1999] ECR II-753, para. 90.

territoriality principle, as traditionally conceived, is, just like the other principles of jurisdiction, largely directed to facilitating *reactive* measures in situations where one State suffers direct environmental harm caused by another State. In contrast, unilateral measures tackling environmental global public goods challenges are *proactive* rather than *reactive*: they aim to benchmark global minimum standards for production processes taking place extraterritorially, without such processes causing direct harm to the regulating State.

It has been suggested that such measures should be considered as “territorial extensions” of domestic or EU law rather than extraterritorial measures, in that, while, being focused on circumstances abroad, the underlying policy decision and the trade impediments are based in the territory of the regulating State.¹⁰⁷ Following this line of argument, unilateral trade measures are not extraterritorial because they are instrumental to the promotion of internal policy objectives.¹⁰⁸ Moreover, they may be considered as effectively multilateral, as they protect global public goods which no single State can reasonably object to. This more relaxed approach to territoriality may arguably be better suited to the transnational regulatory challenges currently posed to States and world public order.¹⁰⁹

On the other hand, unilateral measures promoting environmental norms (potentially) provoke resentment from third countries, as the international outcry following the adoption of the EU Aviation Directive testifies to. Third States seem to take the view that the regulating State, or the EU, fails to adequately take account of their interests, and unfairly and illegitimately forces such measures upon them to advance national interests. This foreign protest, if couched in legal terms, may affect the international legality of unilateral trade measures.¹¹⁰ Indeed, such protest could be seen to signal a (perceived) conflict of the measure with state sovereignty in violation of the doctrine of jurisdiction as previously outlined.

Can a middle way be found between these different approaches – the one emphasizing *territoriality* and the other denouncing *extraterritoriality*? Let us first observe that it need not be fatal to a jurisdictional assertion that it *also* protects national interests. After all, States will normally only adopt regulation when it is also in their interest. Typically, they act unilaterally to protect the integrity of *internal* regulation, the effectiveness of which would be frustrated if it is not ‘extraterritorialized’.¹¹¹ This means that for the objective of a measure to be fulfilled, it is necessary to regulate certain conduct outside the territory of the regulating state, thereby indirectly affecting

¹⁰⁷ Scott, Joanne, “Extraterritoriality and Territorial extension in EU Law”, *American Journal of Comparative Law*, Vol. 62(1) (2014), p. 3.

¹⁰⁸ Scott, Joanne, “Extraterritoriality and Territorial extension in EU Law”, *American Journal of Comparative Law*, Vol. 62(1) (2014), p. 19 – 20.

¹⁰⁹ Bianchi, Andrea, “Jurisdictional Rules in Customary International Law, p. 100, in Meessen, Karl M. (ed.), *Extraterritorial Jurisdiction in Theory and Practice*, The Hague: Kluwer Law International (1996) (arguing that, as certain contemporary concerns are no longer exclusively domestic issues, the question of jurisdictional competence should evolve and should no longer be looked at primarily in terms of connections with a State’s territory).

¹¹⁰ Buxbaum, Hannah L., “Territory, territoriality, and the resolution of jurisdictional conflict”, *American Journal of Comparative Law*, Vol. 57(2) (2009), p. 674.

¹¹¹ See in general Scott, Joanne, “Extraterritoriality and Territorial extension in EU Law”, *American Journal of Comparative Law*, Vol. 62(1) (2014).

foreigners.¹¹² At the same time, this ‘extraterritorialization’ also safeguards the competitiveness of domestic operators, who may be put at a disadvantage by the lax domestic regulation which their foreign competitors are subject to.

It is argued here that that, where the protection of domestic trade interests may only be incidental to the protection of *global interests*, such as the protection of natural resources,¹¹³ ‘extraterritorial’ levelling of the regulatory playing field may be considered to be legitimate, , even in the face of international protest, especially where the global interests to be furthered have a normative basis in international legal or political instruments.¹¹⁴ After all, such measures do not just promote parochial interests, but international interests to which the entire international community may already have subscribed, or *would* subscribe were it not for collective action failures. When the asserting State can make a *prima facie* case that the measure is aimed at the protection of global public goods such as the atmosphere or marine resources¹¹⁵, the burden of proof may shift to the opposing State to show that the measure is not so aimed, but instead essentially furthers national interests.

Different types of extraterritoriality could thus be distinguished, based on the “function” fulfilled by the extraterritorial aspect of the measure. This function could then serve as an indication of the measure’s legality under international law.

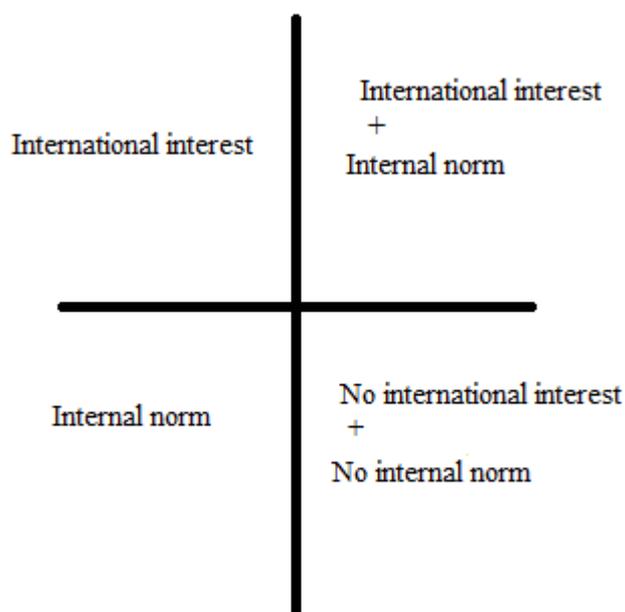
¹¹² A distinction can be made between measure have direct and indirect extraterritorial effect. See Vranes, Erich, Trade and the Environment, *Fundamental Issues in International Law, WTO Law and Legal Theory*, Oxford University Press (2009), p. 165 referring to Schlochauer, H.J., *Die Extraterritoriale Wirking von Hoheitsakten nach dem Öffentliche Recht der Bundesrepublik Deutschland und nach Internationalem Recht* (Frankfurt am Main: Vittorioao Klostermann (1962).

¹¹³ What may ultimately be decisive is whether the extraterritorial aspect of a measure has an outward-looking purpose, rather than just being “domestically written”. See Goyal, Anupam, “The WTO and International Law, Towards Conciliation”, *Oxford University Press* (2006), p.193.

¹¹⁴ De Baere, Geert and Ryngaert, Cedric, “Air Transport Association of America and the EU’s Contribution to the Strict Observance and Development of International Law”, *European Foreign Affairs Review*, Vol. 18(3) (2013), p. 401-402.

¹¹⁵ Public goods are defined as non-excludable an non-rival in consumption. See Kaul, Inge, “Global Public Goods: Explaining their Underprovision”, *Journal of International Economic Law* Vol. 15(3) (2012), p. 731.

In a graphic form, the distinction would look as follows:



An ‘interest’ in this graph should not necessarily be understood as a positive legal norm. In fact, in areas where such – multilaterally agreed – norms exist, unilateralism may be less called for, as states parties to the relevant agreements are expected to faithfully give effect to the norms. Unilateralism may prove more necessary where due to political constraints, a multilateral legal solution is not forthcoming, whereas in the interest of protecting global public goods it should. Ideally, for legitimacy reasons, this interest is recognized in an informal or formal legal or political instrument, which confers some normative status on it. As it happens, given the decreasing importance of formal international law-making,¹¹⁶ we have recently witnessed a rise in informal instruments that aim to protect common or global interests.¹¹⁷ Thus, unilateral measures could be justified insofar as they have their basis in such ‘informal’ rather than formal law. In fact, a similar approach was taken by the WTO Appellate Body in the *United States-Import Prohibition of Certain Shrimp and Shrimp Products* (hereinafter *US – Shrimp*) case, where it cited international environmental norms enshrined in declarations and a ministerial decision rather than in formally binding legislation, as a basis to justify unilateral trade measures aiming to provide extraterritorial environmental protection.¹¹⁸ However, even where no formal or informal instrument can be identified, a unilateral assertion can still be justified provided that it vindicates an *interest* of the international community in confronting and regulating collective action problems arising in relation to the governance of global public goods, even if this interest has not

¹¹⁶ Krisch, Nico, “The Decay of Consent: International Law in an Age of Global Public Goods”, *American Journal of International Law* Vol.1(107) (2014), p. 34.

¹¹⁷ Krisch, Nico, “The Decay of Consent: International Law in an Age of Global Public Goods”, *American Journal of International Law* Vol.1(107) (2014), pp. 7-8. While these informal measures might not be as effective in terms of enforcement (Abbott, Kenneth W., Snidal, Duncan, “Hard and Soft Law in International Governance” *International Organization*, Vol.54(421) (2000), p. 429.) , they can be understood as signaling recognized interests of states or the global community.

¹¹⁸ Appellate Body, *United States- Import Prohibition of Certain Shrimp and Shrimp Products (US-Shrimp)*, WT/DS58/AB/R, adopted on 12 October 1998, para. 154-158, referring, *inter alia*, to the Marrakesh Decision on Trade and Environment, which in turn makes reference to the Rio Declaration on Environment and Development and Agenda 21.

(yet) risen to the level of an international norm. Given the scale of the global public goods challenges facing humanity, a somewhat looser interest-based rather than a slavish norm-based approach may be required, as the latter may effectively be a recipe for doing nothing.

Accordingly, where the extraterritorial aspect of a measure serves to implement an international interest or norm, as well as to safeguard the integrity of an internal interest or norm, it is presumptively permissible. The more a measure moves away from this double basis, the weaker this presumption of permissibility becomes. Thus, unilateral State action protecting purely domestic concerns, should be deemed presumptively unlawful where it is not accompanied by domestic regulation nor based on an international interest or norm. Instead, it could be considered to be a disguised form of protectionism. Legality concerns, although to a somewhat lesser extent, could also be raised over unilateral action that is based on an international interest but is not supported by concomitant domestic regulation. This may happen when a State imposes trade restrictions on foreign operators based on human rights or environmental considerations enshrined in international conventions, where internally it fails to implement and apply these conventions. Such action lacks even-handedness, and disingenuously subjects foreign operators to the international norm while exempting its own operators from its application.¹¹⁹ Indeed, a legal norm could be deemed a higher threshold to reach compared to the identification of an interest since the former is scrutinized by a formal domestic law-making process. Here the application of these different thresholds is justified because it is in line with the general principles of jurisdiction in international law, more specifically the territorial principle, to require from states to develop a formal legal norm imposing the international interest pursued in the state's territory, prior to an extraterritorial application of such measures. Similar concerns of legitimacy could be raised over unilateral action that is based on a purely domestic norm rather than an international interest or the protection of a global public good: such action raises legitimacy concerns as it imposes on foreign nations and their operators norms that are not universally shared.

V. Concluding observations

Unilateral measures risk being used for protectionist purposes,¹²⁰ or being seen as imperialistic, even when pursuing international objectives. These concerns should be taken seriously, and suggest that international consensualism should be the preferred method to tackle international challenges pertaining to natural resources. Nevertheless, one has to admit that, in the face of multilateral political deadlock, international law as we traditionally conceive of may be incapacitated in reaching an agreement to protect valuable natural resources such as biodiversity, clean air, a stable climate, or rainforests. Unilateral action may then be called for as the second best alternative.

Unilateralism enables like-minded countries to strengthen their level of environmental protection without having to overcome difficulties inherent to a divided political world order. Such “constructive unilateralism” answers to a notion of fairness,

¹¹⁹ For a discussion on the analysis of even-handedness, see AB, *Seals- Products*, paras. 115- 130.

¹²⁰ Lin, Jolene, “Governing Biofuels: A principal-agent analysis of the European Union Biofuels Certification Regime and the Clean Development Mechanism”, *Journal of Environmental Law*, Vol. 24(1) (2011), p. 73.

and elicits debate and cooperation among states. At the same time, unilateralism might lead to an international backlash where other states perceive it as unfair and illegitimate extraterritoriality, and for that reason refuse to further cooperate with respect to the protection of global public goods.¹²¹ Unilateral measures with extraterritorial effect may then be at risk of defeating their own purpose.

This chapter proposes a middle way, which does justice to, on the one hand, the interests of unilaterally acting states that are bent on breaking an unjustifiable international political impasse, and on the other, the ‘target’ states’ sovereign right to autonomously determine the level of protection regarding their own natural resources in the face of foreign “eco-imperialism” or plain protectionism. This approach may usefully inform international regulatory practice, and possibly even judicial decision-making, with respect to balancing trade and non-trade extraterritorial objectives.

In this chapter, this approach has been applied to three EU legal instruments which aim at pursuing natural resource objectives, with a view to assessing the international legality of the ‘extraterritorial’ trade measures they contain. Of the three measures – the Timber Regulation, the Renewable Energy Directive (RED), and the Seals Regulation – the Timber Regulation seems to be the most legitimate one, as it is most firmly embedded in both an existing international and *internal* regulatory interest.¹²² The RED, for its part, appears to be less firmly embedded in international norms or interests, and thus less legitimate. Indeed, it seems premature to conclude that an international norm exists with respect to what ‘sustainable biofuels’ precisely are (this is also borne out by the main biofuel producers’ resistance against the EU Directive). That being said, the development of laws on the production of biofuels in different countries signals the existence of an international trend to mitigate risks associated with such production.¹²³ The RED’s sustainability criteria contribute to this trend, which may soothe concerns over the extraterritorial aspects of the RED, and in turn allow for the justification of the RED. From a legality perspective, however, it remains somewhat problematic that the sustainability criteria of RED are not truly *embedded* in international norms or interests, but have instead been developed unilaterally – even if defensibly – by the EU.

The extraterritorial aspects of the Seals Regulation, finally, while certainly accommodating a European consumer concern with the welfare of seals, are the most problematic of the three instruments discussed. While the international community is to a certain extent concerned about animal welfare in general,¹²⁴ there is no specific international norm relating to the protection of seals welfare. On the contrary, the legal challenges brought against the Seals Regulation appear to suggest a divergence of

¹²¹ Rao, J. Mohan, “Equity in a Global Public Goods Framework “, p. 70. Available in Kaul, Inge *et al* (ed.), *Global Public Goods*, New York: Oxford University Press (1999).

¹²² *Supra* pp. 4-7. The *internal* interest regarding the sustainable management of forestry is apparent from the 1998 EU Forest Strategy and subsequent EU-wide measures. See *supra* note 34 and 35. As there is no international *definition* regarding unsustainable forestry, EU regulators could have fallen into the trap of idiosyncratically defining it and unilaterally imposing it on third countries. Wisely, they have not done so, however, instead deferring to the laws of the country of origin. In light of these considerations, the extraterritorial aspect of the Timber Regulation can be deemed permissible.

¹²³ See *supra* pp. 8-9.

¹²⁴ See for the influence of the EU’s “five freedoms” regarding animal welfare on international discourse: above note x.

opinion regarding the perceived ‘immorality’ of seal hunting methods, thus casting doubt on the existence of a shared understanding regarding the acceptability of such methods.¹²⁵ Since no international norm appears to exist, and only a diffuse internal norm based on a perceived European consensus, one may be hard-pressed to conclude that the extraterritorial aspect of the Seals Regulation might be justified.

It is hoped that the general evaluative framework proposed in this chapter, as well as its application to the selected legal instruments, may weigh on national and regional law-making and international dispute-settlement with respect to natural resources. As far as the latter is concerned, however, we are cognizant of the limitations resulting from mandate, applicable law, and party submissions.

¹²⁵ Note that the AB seemed to question the credibility of the moral objection to seals hunt to a certain extent: “We found that the European Union did not show that the manner in which the EU Seal Regime treats seal products derived from IC hunts as compared to seal products derived from “commercial” hunts can be reconciled with the objective of addressing EU public moral concerns regarding seal welfare.” AB report, *EC-Seal Products*, para. 5.338.