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ARTICLE

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I. INTRODUCTION

Heating and cooling, producing fuel, and generating electricity can be done with different methods and from a variety of resources. The choice of process and production method (PPM) will, however, be crucial for the environmental impact of the activity. Although each method in the field of energy will have some negative impacts, there is a general consensus in the United States and the European Union (EU) that current use of fossil fuels with their high greenhouse gas (GHG) emissions is unsustainable. Hence, a transition in the energy sector is taking place. On both sides of the Atlantic, initiatives have been taken both on union/federal-level and on state-level to promote renewable energy. Notable measures include tax incentives, subsidies, feed-in-tariffs (FITs),[1] and renewable portfolio standards (RPSs).[2] When it comes to biofuels, only sustainable

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1. A feed-in-tariff is a tariff that is above the market price for energy and is guaranteed to be paid to producers of energy from renewable energy sources over a given period of time. *Today in Energy: Feed-in Tariff*, U.S. ENERGY INFO. ADMIN. (May 30, 2013), https://www.eia.gov/todayinenergy/detail.cfm?id=11471 [https://perma.cc/ULR4-ZNE6].

2. Renewable portfolio standards require that actors such as producers or distributors provide a certain share/quota of their energy from renewables.

alternatives, as defined by specific sustainability criteria, will be eligible for support.[3]

Measures within the diverse range of emerging strategies to tackle climate change and promote the transition of the energy sector represent new forms of intervention in the market and may conflict the traditional conception and values of free trade. These values of free trade have been incorporated in the U.S. Dormant Commerce Clause,[4] EU free movement rules,[5] and World Trade Organization (WTO) agreements such as the General Agreement on Tariffs and Trade (GATT)[6] and the Agreement on Technical Barriers to Trade (TBT)[7]. As a rule, measures are prima facie prohibited in case of discriminatory effects but may be justified on for example grounds of environmental protection.[8] The concept of discrimination in this article refers to both de jure and de facto discrimination as understood in the context of EU and WTO law. It is broader than the concept of discrimination under the Dormant Commerce Clause as it covers most, if not all, cases of undue burden on interstate trade. A measure is generally discriminatory if it explicitly differentiates on the basis of geography or if it, as a whole, has the effect of burdening out-of-state interests more than in-state interests.[9]

Today in Energy: Most States Have Renewable Portfolio Standards, U.S. ENERGY INFO. ADMIN. (Feb. 3, 2012), https://www.eia.gov/todayinenergy/detail.cfm?id=4850 [https://perma.cc/YX7B-7E6H].

3. Assemb. 32, 2006 Leg., Reg. Sess. (Cal. 2006); 40 C.F.R. § 80.1405 (2015); Directive 2009/28/EC, of the European Parliament and of the Council of 23 April 2009 on the Promotion of the Use of Energy from Renewable Sources and Amending and Subsequently Repealing Directives 2001/77/EC and 2003/30/EC, art. 17, 2009 O.J. (L 140) 16, 36–38; *see also* Max. S. Jansson & Harri Kalimo, *On a Common Road Towards Sustainable Biofuels? EU and U.S. Approaches to Regulating Biofuels*, 8 PITT. J. ENVTL.& PUB. HEALTH L., 104, 109 (2014).

4. See U.S. CONST. art. I, § 8, cl. 3, for the constitutional origins of the Dormant Commerce Clause.

5. Consolidated Version of the Treaty on the Functioning of the European Union art. 34–36, 2008 O.J. (C 115) 47, 61 [hereinafter TFEU] (outlining the fundamental principles on free movement of goods).

6. General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194.

7. Agreement on Technical Barriers to Trade art. 2.1–2.2, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1868 U.N.T.S. 120, 121.

8. *See infra* Part IV(A).

9. *See infra* Part III.

Many cases have been initiated that evolve around the trade law compatibility of state measures that explicitly differentiate between in-state and out-of-state products under the U.S. Constitution,[10] the Treaty on the Functioning of the European Union (TFEU)[11] and WTO law.[12] In addition, there have been claims of more indirect discrimination arising from the energy transition. In the United States, conventional industries in states rich with fossil fuels have filed lawsuits with the aim to question the compatibility of the energy transition with applicable free trade regime. For example, both a state-level RPS[13] and a coal moratorium,[14] as well as biofuels sustainability programs,[15] have been targeted. Recently, it has even been argued that fossil fuel

10. *See, e.g.*, Nichols v. Markell, No. 12-777-CJB, 2014 WL 1509780, at *5 (D. Del. Apr. 17, 2014) (in-state requirement repealed, case dropped); Complaint at 1, 20–24, TransCanada Power Mktg. Ltd. v. Bowles, No. 4:10-cv-40070-FDS (D. Mass. Apr. 16, 2010) (in-state requirement repealed, case settled); Missouri *ex rel.* Mo. Energy Dev. Ass'n v. Mo. Pub. Serv. Comm'n, 386 S.W.3d 165, 175 (Mo. Ct. App. 2012) (in-state requirement repealed, case dropped); *see also In re* Review of Proposed Town of New Shoreham Project, 25 A.3d 482, 511 (R.I. 2011) (declining to address the claims of unconstitutionality); Complaint, Riggs v. Curran, No. 1:15-CV-00343-S-LDA (D.R.I. Aug. 13, 2015); Notice of Appeal of Appellants Champaign County and Goshen, Union and Urbana Townships, *In re* Application of Champaign Wind, L.L.C., No. 2013-1874 (Ohio Nov. 26, 2013); Comm'n Review of its Rules for the Alt. Energy Portfolio Standard, No. 13-0652-EL-ORD, slip op. at 4 (Ohio Pub. Util. Comm'n Oct. 15, 2014) (in-state requirement repealed); Review of Amended Power Purchase Agreement, No. 4185 (R.I. Pub. Util. Comm'n Aug. 16, 2010).

11. Joined Cases C‑204/12 & C‑208/12, Essent Belgium NV v. Vlaamse Reguleringsinstantie voor de Elektriciteits- en Gasmarkt, 2014 E.C.R. I-2192, ¶ 40; Case C-573/12, Ålands Vindkraft AB v. Energimyndigheten, 2014 E.C.R. I-2037, ¶ 25; Case C-379/98, PreussenElektra AG v. Schleswag AG, 2001 E.C.R. I-2159, ¶ 26.

12. Appellate Body Report, *Canada – Certain Measures Affecting the Renewable Energy Generation Sector*, ¶ 1.7(c), WTO Doc. WT/DS412/AB/R (May 6, 2013); *see also* Request for Consultations by the United States, *India – Certain Measures Relating to Solar Cells and Solar Modules*, at 1, 2, WTO Doc. WT/DS456/1 (Feb. 11, 2013); Request for Consultations by China, *European Union and Certain Member States – Certain Measures Affecting the Renewable Energy Generation Sector*, at 3, WTO Doc. WT/DS452/1 (Nov. 5, 2012).

13. *See* Energy & Env't Legal Inst. v. Epel, 793 F.3d 1169 (10th Cir. 2015) (deciding whether Colorado's RPS program violated the dormant commerce clause), *cert. denied*, 136 U.S. 595 (2015).

14. *See generally* North Dakota. v. Heydinger, 15 F. Supp. 3d 891 (D. Minn. 2014).

15. Rocky Mountain Farmers Union, v. Corey, 730 F.3d 1070, 1077–78 (9th Cir. 2013); Am. Fuel & Petrochemical Mfrs. v. O'Keeffe, No. 3:15-cv-00467-AA, 2015 WL 5665232, at *2, *4 (D. Or. Sept. 23, 2015).

support would burden nuclear energy, including that from out-of-state.[16] The EU Commission, in turn, advised Austria not to ban the import of nuclear power with reference to its impact on free trade.[17] In the context of WTO law, Argentina has already requested consultations with the EU under the WTO regime to address its claim that EU sustainability criteria on biofuels in practice favour European fuels over Argentinean fuels and, therefore, contradict rules of free trade.[18] Finally, importing states, like the EU, have proposed restrictions on the imports of tar sands,[19] and Canada has stated that it will take action.[20] These cases on PPM rules can be expected to increase with more states taking sustainability action.[21]

Rules and restrictions on PPMs adopted by states raise questions related to the extraterritorial effects and objectives of these rules. The intention here is to illustrate how tests of extraterritoriality are taking shape in trade law. The developments in trade law are framed against the backdrop of limiting negative externalities to optimize utility or welfare as an economic—or perhaps even ethical—theory. Yet, as this article concludes, the question of whose or which externalities are given

16. Amended Complaint, Entergy Nuclear Fitzpatrick L.L.C. v. Ziebelman, No. 15-cv-230 (N.D.N.Y. Aug. 17, 2015).

17. Claus Hecking, *Umstrittenes Umweltgezetz: Osterreich Stoppt Import von Atomstrom*, SPIEGEL (July 3, 2013, 2:47 PM), www.spiegel.de/wirtschaft/soziales/energiewende-oesterreichs-totaler-atomausstieg-a-909206.html [https://perma.cc/8EH2-6KDZ]; Markus Stingl, *Kompromiss im Atom-Streit*, KURIER (Apr. 13, 2012, 3:52 PM), http://kurier.at/wirtschaft/kompromiss-im-atom-streit/774.061 [https://perma.cc/R8HC-N4CM].

18. Request for Consultations by Argentina, *European Union and Certain Member States – Certain Measures on the Importation and Marketing of Biodiesel and Measures Supporting the Biodiesel Industry*, at 3–4, WTO Doc. WT/DS459/1 (May 15, 2013).

19. *See* James Crisp, *Canada Tar Sand Will Not Be Labelled 'Dirty' After All,* EURACTIV.COM (Dec. 17, 2014), http://www.euractiv.com/sections/energy/canada-tar-sands-will-not-be-labelled-dirty-after-all-310910 [https://perma.cc/9DG7-W9H2] (noting that the final agreement on assigning tar sands a higher emission value was never struck and the approach was abandoned in December 2014); *see also* Directive 2009/30/EC, 2009 O.J. (L140) 88, 88–89 (requiring that fuel refiners reduce the GHG intensity of sold fuel).

20. Damian Carrington, *Canada Threatens Trade War with EU over Tar Sands*, GUARDIAN (Feb. 20, 2012, 5:45 AM), http://www.theguardian.com/environment/2012/feb/20/canada-eu-tar-sands [https://perma.cc/JW5N-KLCM].

21. THE EU, THE WTO AND THE NAFTA: TOWARDS A COMMON LAW OF INTERNATIONAL TRADE? 230 (J.H.H. Weiler ed. 2000).

relevance may need to be determined by other principles or perceptions of "fairness."

In this article, PPM rules are analyzed under three jurisdictions: the United States, the EU, and the WTO. The approach is justified by the fact that their rules on interstate trade reflect very similar basic objectives related to anti-protectionism. Moreover, the regimes, to a large extent, share the same structure of rules on prohibition balanced with rules on justification. All in all, the regimes reveal similar syntax. The comparability of the U.S. Dormant Commerce Clause Doctrine with both WTO law and EU free movement law has been highlighted already in previous research.[22]

II. EFFICIENCY AND EXTERNALITIES

Economic integration and trade law rests on the idea of comparative advantages and efficiency gains.[23] This applies for all three jurisdictions.[24] With efficiency so close to the core of trade law, it feels natural to view and explain the law from this perspective. Posner has taken this analysis even a step further, arguing that the efficiency of law is an ethical and scientific theory.[25]

Efficiency is an overarching concept that covers several, partly even conflicting, theories. For example, Jeremy Bentham argued for a utilitarian approach to law reform.[26] In his model, it is utility that should be maximized.[27] However, in trade law, discrimination is prohibited even if it in some circumstances may increase utility in a highly patriotic society. Posner in turn argued that welfare maximization could work as a theory for

22. *E.g.*, Daniel A. Farber, *Environmental Federalism in a Global Economy*, 83 VA. L. REV. 1283, 1300 (1997). *See generally* HARRI KALIMO, E-CYCLING: LINKING TRADE AND ENVIRONMENTAL LAW IN THE EC AND THE U.S. (2006).

23. Jeffrey L. Dunoff, *The Death of the Trade Regime*, 10 EUR. J. INT'L L. 733, 737 (1999); Stephen Kim Park, *Bridging the Global Governance Gap: Reforming the Law of Trade Adjustment*, 43 GEO. J. INT'L L. 797, 803 (2012).

24. *Id.* at 804.

25. RICHARD A. POSNER, THE ECONOMICS OF JUSTICE 13 (1981).

26. *See generally* JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION (Prometheus Books 1988) (1789).

27. *See id.*

explaining law.[28] Apart from the question of whether utility or welfare should be maximized, theories on efficiency also differ with regards to the definition of an efficient state of affairs. For example, efficiency can be defined as Pareto optimality or Kaldor-Hicks efficiency.[29] These definitions of efficiency have been linked to various interpretations of the proportionality test in trade law.[30]

Regardless of which of the above theories on efficiency is adopted, limiting externalities can still play a role. Regulation that forces the polluter to take into account the full costs of the pollution is said to cause an internalization of the externalities. This has been regarded as both efficient and reasonable.[31] It has also caught the attention of some law and economics scholars.[32] Posner viewed it as the duty of the state to take care of the externalities.[33]

While states accept the efficiency benefits of free trade, they are still granted the right to adopt measures that may prima facie contradict the free trade objectives if the measure relies on a valid ground of justification. One way to understand the inclusion of grounds of justification in trade law is that they legitimize measures tackling externalities to achieve an optimal level in the society. The balancing of "economic" and "non-economic" values thus serves this particular objective.[34]

All economic theories, including the free market ideal and the idea of limiting externalities, are value-laden.[35] In accordance

28. POSNER, *supra* note 25, at vii.

29. ROBERT ALEXY, A THEORY OF CONSTITUTIONAL RIGHTS 399 (Julian Rivers trans. 2002).

30. *See* Aurelien Portuese, *Principle of Proportionality as Principle of Economic Efficiency*, 19 EUR. L. J. 612 (2013).

31. *See* ROBERT D. COOTER & THOMAS ULEN, LAW AND ECONOMICS 38–40 (2nd ed. 1997).

32. Particularly, for instance, the Yale School of Law and Economics. *See* Francesco Parisi, *Positive, Normative and Functional Schools in Law and Economics*, 18 EUR. J. L. & ECON. 259, 264 (2004).

33. POSNER, *supra* note 25, at 103.

34. Alec Stone Sweet & Jud Mathews, *Proportionality, Judicial Review, and Global Constitutionalism*, *in* REASONABLENESS AND LAW 173, 206 (Giorgio Bongiovanni, Giovanni Sartor & Chiara Valentini eds., 2009).

35. ROBIN P. MALLOY, LAW AND ECONOMICS, A COMPARATIVE APPROACH TO THEORY AND PRACTICE 48–56 (1990); Kenneth L. Avio, *Three Problems of Social*

with radical libertarian policies, state intervention should also be minimized in the environmental sector. Prohibitions and standards set by governments are thus regarded as less efficient than a model of clearly defined individual rights in resources and social pressure.[36] At the other extreme, environmental protection is regarded as a good per se, without any need for justification in terms of efficiency. According to Ronald Dworkin, wealth and its maximization would not even be a component of social value.[37] Sustainable development has so far been linked to human development under economic law.[38] Yet, that is not the only plausible approach and environmental protection could be a goal of its own.

It is not the intention here to argue what must or should be understood in terms of efficiency. Principles such as coherence, transparency, participation and accountability may equally be elements of justice. The aim is instead to explain how trade law can be understood in terms of efficiency, more specifically through limiting externalities, and what the limits of such approach may be in light of recent case law developments concerning extraterritoriality.

III. EXTRATERRITORIALITY IN THE LAW OF PROHIBITION

A. Background and U.S. Case Law

The PPM may or may not affect the physical characteristics of the end product. For example, biofuels may be produced from various resources with more or less sustainable methods. The difference in the process may to some extent be reflected in the properties of the fuel. Electricity, in turn, is always an identical product regardless of whether it was produced from fossil fuels through a process of high pollution or if it was produced from renewable resources.

Organisation: Institutional Law and Economics Meets Habermasian Law and Democracy, 26 CAMBRIDGE J. ECON. 501, 503 (2002).

36. Libertarian Party, Libertarian Party Platform (June 2014), https://www.lp.org/files/2014_LP_Platform.pdf [https://perma.cc/7FRR-WQ3G].

37. Ronald M. Dworkin, *Is Wealth a Value?*, 9 J. LEGAL STUD. 191, 195 (1980).

38. Emily B. Lydgate, *Sustainable Development in the WTO: From Mutual Supportiveness to Balancing*, 11 WORLD TRADE REV. 621, 632–33 (2012).

State regulations that set sustainability criteria for the PPMs of energy do not primarily target the environmental effects of consumption in the importing state. Such effects would depend on the physical characteristics of the good. Instead, the rules target the sustainability of the production phase, which, with respect to imports, takes place out-of-state. This has raised questions as to what extent state regulation may have extraterritorial effects. Extraterritoriality in the law of justification deals with the geographical scope of the environment that the state aims to protect and will be dealt with in later sections. This section focuses on extraterritoriality in the law of prohibition.

Under international law, states may rely on a broad range of tests in order to establish a link between the state and what is regulated.[39] The jurisdiction of U.S. states is also limited to their territory and states should not regulate in the jurisdiction of other states.[40] One of the objectives of the Dormant Commerce Clause is to guarantee that those without political representation are not burdened.[41] Unlike in international law and EU law where the prohibition of extraterritorial regulation stems from general principles, the extraterritoriality test has become an integral part of the U.S. Dormant Commerce Clause Doctrine, even if it could equally well be viewed as a separate general principle of federalism.[42]

The Dormant Commerce Clause targets protectionism in the form of discrimination but also prohibits extraterritorial measures. A finding of extraterritoriality is often fatal for the

39. S.S. Lotus (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 10, at 18–20 (Sept. 7, 1927).

40. Patrick Zomer, Note, *The Carbon Border War: Minnesota, North Dakota, and the Dormant Commerce Clause*, 8 U. ST. THOMAS L. J. 60, 80 (2011).

41. Goldberg v. Sweet, 488 U.S. 252, 266 (1989) (laying out the Complete Auto test), *abrogated by* Comptroller of Treasury of Md. v. Wynne, 136 S. Ct. 1787 (2015); S.C. State Highway Dep't v. Barnwell Bros., 303 U.S. 177, 185–86 (1938) (laying out the political representation test); *see also* Patricia Weisselberg, Comment, *Shaping the Energy Future in the American West: Can California Curb Greenhouse Gas Emissions from Out-of-State, Coal-Fired Power Plants Without Violating the Dormant Commerce Clause?*, 42 U.S.F. L. REV. 185, 207–08 (2007).

42. Donald H. Regan, *Siamese Essays: (I) CTS Corp. v. Dynamics Corp. of America and Dormant Commerce Clause Doctrine; (II) Extraterritorial State Legislation*, 85 MICH. L. REV. 1865, 1873 (1987).

state measure since it may be either declared unconstitutional,[43] or subject to strict scrutiny.[44] The extraterritoriality test has mostly been applied in connection with price affirmation laws.[45] These are laws by which the state has tried to influence the prices in its market by regulating, for example, that imports should not have been purchased below a minimum price or that companies cannot export to other states for a lower price.

The extraterritoriality test probably could have been applied with equal reference to competitive advantages and protectionist behavior.[46] A characteristic of depriving the competitive advantage of out-of-state industries is namely that it tends to reduce imports and that is what the price affirmation laws appeared to do.[47] The Supreme Court has in any case emphasized the need for economic unity and formulated the extraterritoriality test to prohibit directly regulating out-of-state commerce, regulating conduct wholly outside the state, or practically controlling commerce wholly out-of-state.[48] Finally, the Court may also invalidate a measure if it creates norm conflicts or could create such conflicts if many states adopted similar measures.[49]

43. Nat'l Solid Wastes Mgmt. Ass'n v. Meyer, 63 F.3d 652, 658 (7th Cir. 1995); *see also* Nat'l Solid Wastes Mgmt. Ass'n v. Meyer, 165 F.3d 1151 (7th Cir. 1999) (per curiam).

44. North Dakota v. Heydinger, 15 F. Supp. 3d 891, 910 (D. Minn. 2014).

45. Healy v. Beer Inst., 491 U.S. 324, 332, 336-37 (1989); Brown-Forman Distillers Corp. v. N.Y. Liquor Auth., 476 U.S. 573, 580 (1986); Baldwin v. G.A.F. Seelig, Inc., 294 U.S. 511, 522 (1935).

46. *See* Energy & Envt'l Legal v. Epel, 793 F.3d 1169, 1171–74 (10th Cir. 2015) (upholding Colorado's renewable energy mandate finding it neither a price control statute nor discriminatory to out-of-state consumers or producers), *cert. denied*, 136 S. Ct. 595 (2015); *see also Baldwin*, 294 U.S. at 527 (appearing to have realized the underlying protectionism); Kirsten H. Engel, *The Dormant Commerce Clause Threat to Market-Based Environmental Regulation: The Case of Electricity Deregulation*, 26 ECOLOGY L. Q. 243, 293–94 (1999); *cf.* Report of the Panel, *Canada – Import, Distribution and Sale of Certain Alcoholic Drinks by Provincial Marketing Agencies*, ¶ 5.31, DS17/R (Feb. 18, 1992) (finding discrimination in the case of a minimum price law).

47. Thomas Alcorn, *The Constitutionality of California's Cap-and-Trade Program and Recommendations for Design of Future State Programs*, 3 MICH. J. ENVTL. & ADMIN. L. 87, 122 (2013).

48. *See Healy*, 491 U.S. at 332, 336–37; *Brown-Forman Distillers Corp*., 476 U.S. at 579; Edgar v. MITE Corp., 457 U.S. 624, 641 (1982).

49. *Healy*, 491 U.S. at 336–37; *Edgar*, 457 U.S. at 642.

It has been argued that the extraterritoriality test would only apply to price control schemes.[50] The test was, however, applied in *Edgar v. MITE Corp.*, which concerned an Illinois decision to restrict the acquisition of shares by a non-Illinois company from non-Illinois shareholders.[51] A very different case emerged in Wisconsin, when the State adopted a regulation that restricted the import of waste from other states that was not sufficiently recycled. This measure could be categorized as an end-of-life treatment rule targeting not just specific business transactions but also state-wide policy.[52] The Seventh Circuit ruled against the measure, concluding that such end-of-life treatment rule targeting the policy of other states was extraterritorial.[53] An amended version of the law that only allowed imports from states with a recycling standard also did not survive a legal challenge.[54] Rules on production methods and end-of-life treatment are similar in the sense that both may address aspects of sustainability that often leave no trace in the physical characteristics of the good.[55] Hence, the principle of the case could probably be extended to apply for PPM rules that target state policies or standards.

50. Pharm. Research & Mfrs. of Am. v. Walsh, 538 U.S. 644, 669 (2013); *Energy & Envt'l Legal*, 793 F.3d at 1173–74.

51. *Edgar*, 457 U.S. at 642; *see also* Am. Beverage Ass'n v. Snyder, 735 F.3d 362, 377–79 (6th Cir. 2013) (Sutton, J., concurring) (noting that non-discriminatory state laws may still violate the extraterritoriality doctrine); Gravquick A/S v. Trimble Navigation Int'l. Ltd., 323 F.3d 1219, 1224 (9th Cir. 2003) (stating it would not be prohibited extraterritorial regulation if at least one party of a regulated contract would be located in-state).

52. *See* Nat'l Solid Wastes Mgmt. Ass'n v. Meyer, 63 F.3d 652, 656 (7th Cir. 1995) (discussing the district court's finding that the statute's notable local benefits outweighed its small impact on interstate commerce). As a comparison, in EU public procurement law and under the international Government Procurement Agreement, (sustainability) criteria that apply to general company policy and do not relate to the subject matter of the individual contract are prohibited. Abby Semple, *A Link to the Subject-Matter: A Glass Ceiling for Sustainable Public Contracts?* 9 (Univ. of London Dep't of Politics, Working Paper, 2014).

53. *Nat'l Solid Wastes Mgmt. Ass'n*, 63 F.3d at 658, 661, 663.

54. *See* Nat'l Solid Wastes Mgmt. Ass'n v. Meyer, 165 F.3d 1151, 1154 (7th Cir. 1999).

55. LIFE CYCLE INITIATIVE, TOWARDS A LIFE CYCLE SUSTAINABILITY ASSESSMENT 11 (2011).

B. Creating Incentives Out-of-State and Market Access

Drawing the line between when a state is impermissibly regulating out-of-state conduct and when it is not is no easy task. Some relevance might be given to where the primary transaction takes place. Hence, if the primary transaction is wholly out-of-state, the risk of finding the act unconstitutional is greater than if the primary transaction is an interstate transaction.[56] PPM rules target imports and would, therefore, as a rule, not easily fall inside the scope of illegal extraterritoriality.

The problem of PPM rules is illustrated well by the case of *Rocky Mountain Farmers Union v. Goldstene*, where the court referred to the extraterritoriality doctrine.[57] The case concerned the California Low-Carbon Fuel Standard (LCFS), a standard that is applied to favour low-emitting transport fuels, such as various forms of biofuels.[58] A life-cycle analysis (LCA) was applied to estimate the emissions of fuel pathways.[59] The LCA for a pathway incorporated emissions from growing the feedstock, the refinery process (including efficiency and the source for electricity used in operation), and the transport distances.[60] California had calculated default values for several pathways but also allowed producers to certify the emissions levels of their individual production process.[61] Fuels with high emissions values were not barred from entering the market, but, since the fuels supplied by retailers on average must not exceed certain levels of pollution, those fuels with high emissions are given lower priority.[62]

The LCFS awarded in-state bioethanol a lower default emissions value than for Midwest bioethanol.[63] To that end, both

56. Daniel K. Lee & Timothy P. Duane, *Putting the Dormant Commerce Clause Back to Sleep: Adapting the Doctrine to Support State Renewable Portfolio Standards*, 43 ENVTL. L. 295, 344–45 (2013).

57. 843 F. Supp. 2d 1071, 1090 (E.D. Cal. 2011), *rev'd in part*, 730 F.3d 1070 (9th Cir. 2013) (finding that LCFS regulations were not facially discriminatory nor extraterritorial).

58. *Id.* at 1079–80.

59. *Id.* at 1081.

60. *Id.*

61. *Id.* at 1082.

62. *Id.* at 1082, 1086–87.

63. *Rocky Mountain Farmers Union*, 843 F. Supp. 2d at 1087.

the district court and the Ninth Circuit Court of Appeals addressed the question of discrimination and discussed the doctrine of extraterritoriality. The district court reached the conclusion that the LCFS was unconstitutional.[64] Regulating the emissions of bioethanol used in California would in fact target the production of bioethanol out-of-state. Hence, according to the court, the rule controlled extraterritorial conduct.[65] The reasoning of the district court would, for example, invite the conclusion that measures incentivizing the reduction of GHGs out-of-state are illegal extraterritorial regulation.[66]

The district court also pointed out that if more states adopted similar types of rules, producers would face conflicting norms.[67] This is true in the sense that producers utilizing certain feedstock and production technology might be excluded from one market, but not another. In order to gain access to all states, a producer would need to comply with the state with the strictest regulation. Under this broad interpretation of illegal extraterritorial effect, any PPM rule would likely be prohibited. All PPM rules do at least indirectly affect out-of-state conduct, and so do rules that do not even concern PPMs.[68]

Several scholars have criticized the District Court for the Eastern District of California's application of the extraterritoriality test.[69] Only measures having a direct extraterritorial effect should be prohibited.[70] The traditional test of extraterritoriality has been whether or not the measure can be described as controlling of out-of-state conduct. Limiting the scope of extraterritorial effect would mean that control of conduct occurs when the state is dictating the commercial conduct in another state, but not when it is using its own regulations to influence out-of-state commerce by creating incentives.[71] The

64. *Id.* at 1094.

65. *Rocky Mountain Farmers Union*, 843 F. Supp. 2d at 1105.

66. *Cf.* Alcorn, *supra* note 47, at 165 (appearing to disagree with this reasoning).

67. Rocky Mountain Farmers Union v. Goldstene, 843 F. Supp. 2d 1071, 1092–93 (E.D. Cal. 2011).

68. Alcorn, *supra* note 47, at 163; Engel, *supra* note 46, at 342.

69. *See, e.g.*, Alcorn, *supra* note 47; Lee & Duane, *supra* note 56.

70. Shaffer v. Heitner, 433 U.S. 186, 197 (1977).

71. Robert L. Molinelli, *Renewable Energy Development: Surviving the Dormant Commerce Clause*, RENEWABLE, ALTERNATIVE, & DISTRIBUTED ENERGY

difference between controlling and creating incentives is obviously a fine line. Daniel Farber has argued that the almost per se invalidity of measures caught by the extraterritoriality test forms a reason for a narrow test.[72] He argues that the *Pike* balancing test, where costs and benefits of the measure are compared, is generally a more suitable proportionality test for PPM rules.[73] It would seem justified to conclude that a PPM rule is normally creating only incentives, but it can become obligatory when it makes importation conditioned on state policy, as in the *Meyer* cases.[74]

The Ninth Circuit Court of Appeals reversed the district court's ruling on extraterritoriality.[75] It stated that California had an interest in out-of-state carbon emissions due to its global effects.[76] Therefore, California had the right to try and influence out-of-state conduct through its regulation of contracts in California.[77] It highlighted that there were no evidence of conflicting legal regimes.[78] In addition, no state needs to change its law in order for its industry to get market access in California.[79] In this respect, the case was different from the *Meyer* cases. The Ninth Circuit also stated that the measure did

RESOURCES COMMITTEE NEWSL. (ABA Sec. Env't, Energy & Res.), Sept. 2012, at 5–6. *But see* Margaret Tortorella, Note, *Will the Commerce Clause "Pull the Plug" on Minnesota's Quantification of Environmental Externalities of Electricity Production?*, 79 MINN. L. REV. 1547, 1574–75 (1995).

72. Daniel A. Farber, *Climate Policy and the United States System of Divided Powers: Dealing with Carbon Leakage and Regulatory Linkage*, 3 TRANSNAT'L ENVTL. L. 31, 43 (2014).

73. *Id.*; *see also* Edgar v. MITE Corp. 457 U.S. 624, 643 (1982) (leaving the impression that *Pike* balancing could apply even with findings of extraterritoriality, especially if it cannot be linked to any discriminatory effects).

74. *See* Nat'l Solid Wastes Mgmt. Ass'n v. Meyer, 165 F.3d 1151, 1151 (7th Cir. 1999); Nat'l Solid Wastes Mgmt. Ass'n v. Meyer, 63 F.3d 652, 652 (7th Cir. 1995).

75. Rocky Mountain Farmers Union v. Corey, 730 F.3d 1070, 1107 (9th Cir. 2013).

76. *See id.* 1098–1100.

77. *Id.* at 1098–1101; *see also* Pac. Merch. Shipping Ass'n v. Goldstene, 639 F.3d 1154, 1181–82 (9th Cir. 2011) (finding that a state regulation requiring ocean vessels sailing outside the shore of the state not to exceed a threshold for sulfur emissions, although putting a restraint on vessels from other states entering the waters of the state with imports was not deemed to be regulation controlling out-of-state conduct).

78. *Rocky Mountain Farmers Union*, 730 F.3d at 1105.

79. *Id.* at 1102–03.

not target production, trade, or use of ethanol in any other state.[80] What it meant by production is rather unclear. The court also emphasized that the PPM rule did not ban imports or establish any thresholds.[81] Hence, it would seem that the court left open the possibility that PPM criteria for market access may still breach the extraterritoriality principle.

The market access string of the extraterritoriality test would seem closely related to the general test applicable in EU free movement law, which prohibits discrimination in intra-community trade as well as market access hindrances.[82] The European test to determine whether a measure is prima facie prohibited is much broader than the U.S. test of undue burdens, as it is not limited to discrimination but also covers cases of some significant hindrances to market access in general.[83] What recent U.S. case law may suggest is a more limited application of the test, since it would only apply in connection with findings of extraterritoriality. Yet, extending the scope of prima facie prohibited measures that far may not be received well in the United States, bearing in mind the view held by some Supreme Court Justices that the Dormant Commerce Clause Doctrine is too broad.[84] One should also note that defining the boundaries of the market access test in the EU has proved to be problematic.

The question of extraterritoriality has been addressed in at least three further recent cases in the field of energy. In *American Fuel & Petrochemical Manufacturers. v. O'Keeffe*, the district court followed the reasoning in *Rocky Mountain Farmers Union* when it upheld the LCFS as implemented in Oregon.[85] In *Energy & Environmental Legal Institute v. Epel*, Colorado's RPS was at

80. *Id.* at 1102.

81. *See id.* at 1102–03.

82. Max S. Jansson & Harri Kalimo, *De Minimis Meets "Market Access": Transformations in the Substance – and the Syntax – of EU Free Movement Law?*, 51 COMMON MARKET L. REV. 523, 524–26 (2014); *cf.* CTS Corp. v. Dynamics Corp. of Am., 481 U.S. 69, 83–84 (1987) (emphasizing that the measure does not prohibit trade altogether but still finding the act to be prima facie prohibited).

83. *See* Jansson & Kalimo, *supra* note 82, at 524–25.

84. *See* Comptroller of Treasury v. Wynne, 153 S. Ct. 1787, 1811–12 (2015) (5–4 decision) (Thomas, J., dissenting).

85. No. 3:15-CV-00467-AA, 2015 U.S. Dist. LEXIS 128277, at *19 (D. Or. Sept. 23, 2015).

stake.[86] Among other things, the claimants challenged the constitutionality of promoting renewables through an RPS with tradeable renewable energy credits (RECs).[87] The district court ruled that such system regulates the PPM of out-of-state electricity only when imported to Colorado.[88] Moreover, in applying to such inter-state trade, the system only created incentives for certain PPMs and did not set any standard for market access.[89] The approach in other words resembled that of the Court of Appeals in *Rocky Mountain Farmers Union*. The Tenth Circuit Court of Appeals affirmed.[90] It should be emphasized that the Supreme Court has not yet confirmed the narrow interpretation of the extraterritoriality test in the context of PPM rules.

The U.S. District Court for the District of Minnesota appeared to apply a somewhat broader interpretation in *North Dakota v Heydinger*.[91] Minnesota had adopted a coal moratorium by deciding not to grant permits to any new coal plants in-state and by prohibiting imports from out-of-state new coal plants and long-term agreements with energy plants that may increase state power sector carbon emissions.[92] North Dakota and its coal companies challenged the law.[93] The court observed that some electricity cooperatives out-of-state have members in Minnesota.[94] In accordance with the law, these could not be customers of electricity from coal. However, electricity is generated to a multi-state grid. Thus, as a practical matter, the Minnesota law also directly affected transactions with no parties from Minnesota.[95] The court concluded that the law had

86. No. 1:11-cv-00859, 2014 U.S. Dist. LEXIS 60567, at *5 (D. Colo. May 1, 2014).

87. *Id.*

88. Energy & Envt'l Legal Inst. v. Epel, 43 F. Supp. 3d 1171, 1179 (D. Colo. 2014).

89. *Id.* at 1179–80.

90. Energy & Envt'l Legal Inst. v. Epel, 793 F.3d 1169, 1177 (10th Cir. 2015), *cert. denied*, 136 S. Ct. 595 (2015).

91. *See generally* North Dakota v. Heydinger, 15 F. Supp. 3d 891 (D. Minn. 2014).

92. *Id.* at 897.

93. *Id.* at 908.

94. *Id.* at 916.

95. *Id.* at 907.

extraterritorial reach, and the ruling was appealed to the Eighth Circuit.[96]

The ruling in *Heydinger* does not necessary conflict with the case of *Rocky Mountain Farmers Union*. Minnesota targeted electricity directly, which, unlike biofuels and RECs, cannot be physically segregated once it has entered inter-state grids. Hence, the rule would force any party interested to do business in Minnesota to change their whole company policy. In contrast, the California LCFS would apply only to those individual batches imported to California and out-of-state producers could serve the markets of other states with dirtier products.[97]

Some scholars have equally identified the difference between the cases of California and Minnesota, but concluded that the special nature of electricity should not have justified a different outcome in the Minnesota case.[98] Such view would gain some support from the decision in the Colorado case, which was also on electricity trade. An alternative is that the Minnesota case differed from the Colorado case on one critical account—namely, that Minnesota created (absolute) conditions for market access, whereas the two other states only created market incentives in the form of support schemes.[99]

James Coleman has argued that the Ninth Circuit's reversal in *Rocky Mountain Farmers Union* was flawed and that measures to promote renewables would need and should be awarded an exemption by Congress.[100] Looking at recent cases, the arguments for a contrary position appear strong. The extraterritoriality test in the law of prohibition should only exceptionally capture state regulation on the sustainability of PPMs. This conclusion is of crucial importance from the perspective of tackling externalities. A stricter extraterritoriality test would severely restrict a state's ability to take measures

96. *Id.* at 916–17. *See generally* Brief for Petitioner-Appellant, North Dakota v. Heydinger, No. 14-2156 (8th Cir. Jan. 1, 2016).

97. Rocky Mountain Farmers Union v. Corey, 730 F.3d 1070, 1085 (9th Cir. 2013).

98. Alexandra B. Klass & Elizabeth Henley, *Energy Policy, Extraterritoriality, and the Dormant Commerce Clause*, 5 SAN DIEGO J. CLIMATE & ENERGY L. 127, 181–82 (2014).

99. Id. at 165.

100. James W. Coleman, *Importing Energy, Exporting Regulation*, 83 FORDHAM L. REV. 1357, 1384 n.167, 1388–95 (2014).

aimed at reducing externalities burdening its residents related to climate change or air pollution originating in other states.

IV. EXTRATERRITORIALITY IN THE LAW OF JUSTIFICATION

A. Local and Global Objectives

Nations frequently adopt trade restrictions with the objective to protect safety, public health, or the environment within their territories. Criteria on the PPMs may, however, not have any impact on the qualities of the final product that is imported. At the same time, the environmental effects of the PPMs will at least originate in the country where production takes place, which, in the case of imports, is another country. The adoption of PPM criteria has consequently sparked a debate on the question of whether states may justify de jure and de facto discriminatory trade restrictions with reference to the protection of global health and environmental concerns, or even the protection of public health and the environment in other states.[101] It is, in other words, a question of whether or not grounds of justification should have extraterritorial reach.

Treaties like the TFEU, GATT, and the TBT Agreement include the protection of public health as a ground of justification without any explicit limitations to the geographical scope of that objective.[102] In light of the purpose of those trade law regimes, though, some limitations may exist. Namely, with the establishment of a free trade area, states have given up on some of their sovereignty to decide on what goods to allow for import. The grounds of justification can be understood as a safeguard against, for example, environmental threats. Their purpose is not

101. *See* General Agreement on Tariffs and Trade, *supra* note 6, 55 U.N.T.S. at 262.

102. This is in contrast to the SPS Agreement (Agreement on the Application of Sanitary and Phytosanitary Measures, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1869 U.N.T.S. 401), under which the only protection of national resources can justify exemptions to the main free trade principles. The agreement is, however, to some degree of a different nature than the GATT or the TBT. *See generally* KYLE BAGWELL & ROBERT W. STAIGER, THE ECONOMICS OF THE WORLD TRADE SYSTEM (2002) (for arguments of a more narrow interpretation of GATT and the TBT Agreement, which would strengthen coherence with the SPS Agreement).

to offer Member States a tool to use trade policy only in order to pressure other Member States to commit to policy changes, in, for example, the environmental field or human rights protection.

In some early decisions, WTO panels appeared to view it necessary that the justifiable benefit strived for is domestic.[103] In *United States – Tuna (Mexico I)*, the panel condemned unilateral measures on PPMs on the ground that they would endanger the multilateral trade system.[104] The panel still did not fully close the door for accepting measures that target the protection of the environment beyond the national borders.[105] In *United States – Tuna (EC)*, the panel was more favourable towards extraterritorial environmental objectives.[106] The panel concluded that protecting dolphins beyond U.S. borders was a legitimate objective, even if the measure in the end could not be justified as it did not pass the necessity test.[107]

The panel arrived at its conclusion in part by examining Article XX as a whole.[108] Article XX includes grounds of justification such as the protection of public health and the conservation of natural resources.[109] The panel noted that in accordance with Article XX(e) states could also justify restrictions on trade in products of prison labour.[110] Such restrictions would be adopted for moral reasons and would relate to the protection prisoners in foreign states. Hence, it reasoned that environmental protection objectives could at least not categorically be

103. Panel Report, *European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries*, ¶¶ 7.200-.210, WTO Doc. WT/DS246/R (Dec. 1, 2003).

104. Report of the Panel, *United States – Restrictions on Imports of Tuna*, ¶ 5.27, DS21/R (Sept. 3, 1991) GATT BISD (39th Supp.) [hereinafter *United States – Tuna (Mexico I)*]; *see also* Panel Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, ¶¶ 7.40–.61, WTO Doc. WT/DS58/R (May 15, 1998).

105. *United States – Tuna (Mexico I)*, *supra* note 104, ¶¶ 5.25–.27.

106. *See* Report of the Panel, *United States – Restrictions on Imports of Tuna*, ¶¶ 5.13–.20. DS29/R (June 16, 1994) [hereinafter *United States – Tuna (EC)*].

107. *Id.* ¶¶ 5.13–.20; *see also* Report of the Panel, *Canada – Measures Affecting the Exports of Unprocessed Herring and Salmon*, ¶¶ 4.2–.7, L/6268 (Mar. 22, 1988), GATT BISD (35th Supp.); Report of the Panel, *United States – Prohibition of Imports of Tuna and Tuna Products from Canada*, ¶¶ 4.4–.15 L/5198 (adopted Feb. 22 1982), GATT BISD (29th Supp.), at 91, 112-14.

108. *United States – Tuna (EC)*, *supra* note 106, ¶¶ 5.13–.20.

109. *Id.*

110. *Id.* ¶¶ 5.16–.17.

prohibited.[111] An alternative reading of XX(e) would have been plausible. One could understand the permitted objective of protecting foreign prisoners to form *lex specialis* in relation to the public morals,[112] which is referred to as a ground of justification in Article XX(a).[113] Consequently, XX(a) and other paragraphs under Article XX may not necessarily have the same geographical scope as Article XX(e).

As a side note, in *United States – Tuna (EC)*, the Europeans together with several other states argued against unilateral PPMs with extraterritorial environmental objectives.[114] However, the EU has, as a union, more recently developed criteria for sustainable PPMs that apply globally, for example, to biofuels. The devil is probably in the detail and the position of the EU may be related to precisely how the criteria have been implemented.

A note by the secretariat after *United States – Tuna (EC)* stated that the protection of resources *within the nation* may be a ground of justification.[115] The dispute settlement bodies had to return to this issue in *United States – Shrimp*.[116] There, the Appellate Body discussed the objective of protecting turtles outside of U.S. waters.[117] The Appellate Body pointed out that the species of turtles in question are endangered and that they migrate.[118] The migration of turtles may be a crucial point. Since turtles migrate, it was no longer possible to separate domestically protected and foreign turtles. In other words, the environmental protection objective of the United States concerned a global resource. Although the Appellate Body finally concluded that the

111. *See id.* ¶¶ 5.16–.17, 5.20.

112. *United States – Tuna (EC)*, *supra* note 106, ¶ 3.41.

113. General Agreement on Tariffs and Trade, *supra* note 6, 55 U.N.T.S. at 262.

114. *See United States – Tuna (Mexico I)*, *supra* note 104, ¶ 4.11 (noting the EU's disproval of the United States' unilateral PPM measure under the Marine Mammal Protection Act).

115. Note by the Secretariat, *GATT/WTO Dispute Settlement Practice Relating to Article XX Paragraphs (b), (d) and (g) of GATT*, ¶¶ 27–30, WTO Doc. WT/CTE/W/53 (July 30, 1997).

116. Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, ¶¶ 132–33, WTO Doc. WT/DS58/AB/R (Oct.12, 1998) [hereinafter *United States – Shrimp (AB)*].

117. *Id.* ¶¶ 115–134.

118. *Id.* ¶¶ 132–33.

design of the U.S. law was arbitrary, it has accepted that measures, in principle, could be justified with reference to the protection of migratory species.[119]

The United States later abolished the arbitrary elements of the law, but the law was still challenged by Malaysia. The Appellate Body in *United States – Shrimp (Article 21.5)* noted that, in accordance with the Rio Declaration of 1992, states should, as far as possible, aim to address global environmental challenges through international consensus.[120] The Appellate Body recognized that although the declaration sets a preference for international action, it does not exclude the possibility of unilateral measures.[121] In addition, it is non-binding and may only serve as a source for interpreting WTO provisions. Hence, WTO law could at least not categorically prohibit the extraterritorial scope of justifications.[122]

It may be recalled that while the United States has defended its federal PPM rules in the WTO, there has been great scepticism in the United States toward PPM rules adopted by its states and their compatibility with the Constitution.[123] Similarly, the EU Commission has generally been very sceptical of unilateral PPM criteria. The disapproval of Dutch labels on sustainable forestry illustrates this.[124] However, some Member States have recently developed sustainability criteria for solid biomass that relies on a life-cycle assessment,[125] and the

119. *United States – Shrimp (AB)*, *supra* note 116, ¶¶ 133, 177–186.

120. Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products: Recourse to Article 21.5 of the DSU by Malaysia*, ¶ 124, WTO Doc. WT/DS58/RW (Oct. 22, 2001).

121. *Id.*

122. *United States – Tuna (EC)*, *supra* note 106, ¶ 3.16. The United States also argued Article XX(c) illustrated the same point, since, under that paragraph, states may implement restrictions on the import and export of gold and silver. *Id.*

123. *See supra* Part III.

124. *Compare* JOCHEM WIERS, TRADE AND ENVIRONMENT IN THE EC AND THE WTO: A LEGAL ANALYSIS 360–361 (1st ed. 2002) (finding that sustainable forest management is an acceptable objective), *with* Case C-448/01, EVN AG & Wienstrom GmbH v. Austria, 2003 E.C.R. I-14527 (reflecting the Commission's long-standing view that environmental and social PPMs unrelated to the characteristics of the end product may not be applied as, e.g., award criteria in public procurement, even if that position is overruled by the ECJ).

125. *See, e.g.*, Erin Voegele, *UK Sets Sustainability Standards for Solid Biomass*, *Biogas*, BIOMASS MAG. (Aug. 22, 2013), http://biomassmagazine.com/

Commission appears to have encouraged such development without any notable concerns for the functioning of the internal market.[126]

The EU has perhaps not adopted any consistent view on extraterritoriality.[127] However, in principle, the United States and the EU could advocate for a different interpretation in WTO law than either applies in its own trade regime because, within their own systems, the United States and the EU try to foster coherency and mutual trust, which may provide stronger arguments against extraterritoriality than would be the case in the more heterogenic WTO community.[128]

It has indeed been argued in the context of EU free movement law that member states can only justify measures with reference to the protection of health and environment within its national borders.[129] However, Advocate-General van Gerven once took the view that when environmental issues can have trans-frontier effects, a Member State should be justified in trying to reduce it even if the source is located outside its jurisdiction.[130]

articles/9363/uk-sets-sustainability-standards-for-solid-biomass-biogas [https://perma.cc/5CYU-YGZ7]. *See generally* U.K. DEP'T OF ENERGY & CLIMATE CHANGE, IA NO: DECC0134, IMPACT ASSESSMENT: PROPOSALS TO ENHANCE THE SUSTAINABILITY CRITERIA FOR THE USE OF SOLID AND GASEOUS BIOMASS FEEDSTOCKS UNDER THE RENEWABLES OBLIGATION (RO) 7–8 (2013), https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/415168/RO_Biomass_Sustainability_Govt_Response_Impact_Assessment.pdf [https://perma.cc/55LA-ZYYJ] (revealing that the preparatory works contained some discussion on the relation to EU free movement law); MINISTRY OF ECON. AFFAIRS, HANDBOOK ON SUSTAINABILITY CERTIFICATION OF SOLID BIOMASS FOR ENERGY PRODUCTION (2013), http://english.rvo.nl/sites/default/files/2013/12/Module_200.pdf [https://perma.cc/PM4S-2SM8] (discussing similar criteria developed in Belgium and the Netherlands).

126. *Commission Staff Working Document: State of Play on the Sustainability of Solid and Gaseous Biomass Used for Electricity, Heating and Cooling in the EU*, at 9-11, SWD (2014) 259 final (July 28, 2014).

127. WIERS, *supra* note 124, at 363–65.

128. THE EU, THE WTO AND THE NAFTA: TOWARDS A COMMON LAW OF INTERNATIONAL TRADE?, *supra* note 21, at 138.

129. Case 8/74, Opinion of Advocate General Trabucchi in Procureur du Roi v. Gustave Dassonville, 1974 E.C.R. 837, ¶ 5; *see also* Case C-5/94, The Queen v. Ministry of Agric., Fisheries & Food *ex parte* Hedley Lomas (Ireland) Ltd., 1996 E.C.R. I-2553, ¶ 20; ANDREAS R. ZIEGLER, TRADE AND ENVIRONMENTAL LAW IN THE EUROPEAN COMMUNITY 84 (1996).

130. Case C-169/89, Opinion of Advocate General van Gerven in Criminal Proceedings Against Gourmetterie Van den Burg, 1990 E.C.R. I-2151, ¶ 7; *see*

The case van Gerven analyzed, referred to as *Van den Burg*, related to a Dutch ban on the import of red grouse, a bird not found in the Netherlands.[131] Although a bird conservation directive authorized states to adopt stricter measures, the ECJ concluded that such measures could only relate to domestically occurring migratory and endangered birds.[132] The court interpreted the directive and Article 36 of the TFEU jointly, which resulted in some confusion as regards to the applied principles.[133] The protection of migratory birds appeared justifiable, but it was left unclear as to whether this stemmed from the Treaty or the Directive. The case, however, gives some reason to believe that the ECJ is sympathetic to the objective of protecting global harms.[134] This is further supported by its reasoning in a case on the compatibility of airports with international customary law with the application of the EU Emissions Trading System on airlines from outside countries landing within the EU.[135] Although the case did not relate to free movement law, it is worthy of note that the court made reference to the global impacts of pollutions outside EU airspace to support the argument that the EU had an interest to regulate flight emissions outside its airspace and that the extraterritorial reach of the ETS was justifiable in light of international law.[136]

The issue of extraterritoriality in law of justification has also been tackled under the Dormant Commerce Clause.[137] The U.S. Supreme Court has ruled that prima facie prohibited measures may be justified in case of a legitimate *local* goal.[138] This would

also Ludwig Krämer, *Environmental Protection and Article 30 EEC Treaty*, 30 COMMON MKT. L. REV. 111, 136 (1993).

131. *See* Case C-169/89, Criminal Proceedings Against Gourmetterie Van den Burg, 1990 E.C.R. I-2160, ¶ 2.

132. *Id.* ¶ 12.

133. *See id.* ¶¶ 8–9.

134. *Id.* ¶¶ 11–12.

135. Case C-366/10, Air Transp. Ass'n of Am. & Others v. Sec'y of State for Energy & Climate Change, 2011 E.C.R. I-13833, ¶¶ 108, 125, 128.

136. Case C-366/10, Air Transp. Ass'n of Am. & Others v. Sec'y of State for Energy & Climate Change, 2011 E.C.R. I-13833, ¶ 129.

137. Zomer, *supra* note 40, at 31–32; *see also* DAMIEN GERADIN, TRADE AND ENVIRONMENT: A COMPARATIVE STUDY OF EC AND US LAW 66 (1997) (rejecting any extraterritorial dimension with regards to the grounds of justification in US and EU Law).

138. Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970).

imply that states may introduce measures to protect its own local environment, but not to protect the environment of other states. The Court has also highlighted that states have no legitimate interest in protecting non-residents.[139]

However, lower courts have ruled that the protection of out-of-state wildlife is a legitimate objective. [140] Protecting wildlife would in part also protect the fauna of the state implementing the measure at least when the animals are migratory. What is more, at least on one occasion, a lower court has concluded that protecting out-of-state health was a legitimate objective when adopted in conjunction with the objective of protecting in-state reputation.[141] This would suggest that the protection of out-of-state interests might be thought of as acceptable at least when the measure in part also advances some in-state objective. It must be emphasized that these rulings do not form precedents. They however illustrate the difficulty of defining the concept of "local."

In sum, it would appear that neither the U.S. nor the EU regime contradicts the WTO law praxis to include global effects, although, admittedly, undisputable precedent is lacking.[142] It would seem difficult to argue that a state should not have the right to adopt trade restricting measures that may protect global environmental resources because even if the behavior that is targeted takes place abroad, the environmental effects of the measure will at least indirectly take place within domestic borders and each state should have the right to protect against harm inflicted on its territory.[143] To put it differently, not

139. Edgar v. MITE Corp., 457 U.S. 624, 644 (1982).

140. Cresenzi Bird Importers Inc. v. New York, 658 F. Supp. 1441, 1448 (S.D.N.Y.1987), *aff'd*, 831 F.2d 410 (2d Cir. 1987); Palladio Inc. v. Diamond, 321 F. Supp. 630, 635 (S.D.N.Y. 1970), *aff'd*, 440 F.2d 1319 (2d Cir. 1971); A. E. Nettleton Co. v. Diamond, 264 N.E.2d 118, 122–23 (N.Y. 1970).

141. Gov't Suppliers Consolidating Servs., Inc. v. Bayh, 975 F.2d 1267, 1279–80 (7th Cir. 1992) (concerning a ban on export of food in a truck that had been used to import garbage).

142. LUDWIG KRÄMER, E.C. TREATY AND ENVIRONMENTAL LAW 111–14 (3d ed. 1998) (arguing for global effects as legitimate objectives in and EU law context); *see also* GERADIN, *supra* note 137, at 32, 32 n.104 (pointing out the uncertainty regarding this question). *Compare* KRÄMER, *supra*, *with* ZIEGLER, *supra* note 129, at 86–88 (presenting a more critical opinion).

143. ROBERT HOWSE, THE WTO SYSTEM: LAW POLITICS AND LEGITIMACY 112–113 (2007).

accepting any global harm as a ground for justification would significantly restrict the right of states to tackle externalities.

B. Global Environmental Protection, the Energy Sector, and De Minimis

Clean air and climate change concerns are global interests much like migratory turtles. GHGs have a global reach and their emission in any country or state will harm all states.[144] Thus, reducing carbon dioxide in any part of the world will create global environmental benefits and therefore also local benefits for the state adopting the measure.[145] PPM requirements that also cover energy imports would contribute to less pollution abroad, which also should improve the air domestically. The Ninth Circuit appeared to endorse this view when, in its analysis of the compatibility with the Dormant Commerce Clause of the sustainability requirements on biofuels in California's LCFS, it concluded that GHGs emitted as a result of PPMs in any state would hurt California to a similar extent.[146] PPM criteria that tackle GHGs should serve a legitimate objective also in EU and WTO law,[147] even if some authors have expressed reservations in this regard.[148]

Concerns that states with vast market power would gain extensive influence over environmental policy worldwide form the primary argument against a broad geographical scope for legitimate objectives.[149] Where powers such as the United

144. Thomas R. Karl & Kevin E. Trenberth, *Modern Global Climate Change*, 302 SCI. 1719, 1719–20 (2003); Joseph Allan MacDouglad, *Why Climate Law Must Be Federal: The Clash Between Commerce Clause Jurisprudence and State Greenhouse Gas Trading Systems*, 40 CONN. L. REV. 1431, 1435 (2008); Rachel Feinberg Harrison, Comment, *Carbon Allowances: A New Way of Seeing an Invisible Asset*, 62 SMU L REV. 1915, 1917 (2009).

145. *See* Zomer, *supra* note 40, at 65 (discussing GHG emission mitigation as a global/federal public good from the perspective of non-discrimination).

146. Rocky Mountain Farmers Union v. Corey, 730 F.3d 1070, 1080–81 (9th Cir. 2013).

147. CHRISTINA VOIGT, SUSTAINABLE DEVELOPMENT AS A PRINCIPLE OF INTERNATIONAL LAW: RESOLVING CONFLICTS BETWEEN CLIMATE MEASURES AND WTO LAW 226–27 (2009).

148. PETER VAN DEN BOSSCHE & WERNER ZDOUC, THE LAW AND POLICY OF THE WORLD TRADE ORGANIZATION 619 (2013); PETROS C. MAVROIDIS, THE GENERAL AGREEMENT ON TARIFFS AND TRADE 209–13 (2005).

149. MAVROIDIS, *supra* note 148, at 212; HOWSE, *supra* note 143, at 111.

States, China, or the EU implement PPM requirements that also apply to imports, the exporting industry of smaller nations will have little option but to change their production and processing methods if they wish their industry to survive. The same concerns apply to some extent of course to environmental and health regulation that apply directly to products and not PPMs. However, criteria for sustainable PPMs could be regarded as an even more aggressive form of social or environmental imperialism practiced by those states that throughout history have gained their economic advantages over the developing world in part due to lax past environmental regulation.

Farber has argued that a balance should be struck between localism and globalism.[150] A model of localism, where states can only justify the protection of their own environment, would seem insufficient, as it would turn a blind eye to the need of protecting global environmental harm, whereas a model of globalism, where even the out-of-state share of environmental effects form part of the legitimate objective, may shift too much power to nations with economic power.[151] A test that focuses on global effects, which may reach the state adopting the restriction, would offer some type of compromise between the two extremes. Yet, such test will be difficult to apply consistently in practice.

Even if states may have a legitimate interest to address global GHGs, it has been argued that other pollutants emitted in processing resources to generate energy only have a local reach.[152] For example, wind and hydropower stations mainly interfere with the local ecology, even if some GHGs are emitted.[153] However, even if effects are mainly local, they will in the long term become global. Importantly, soil or water pollution as well as biodiversity effects are not necessarily any less severe than emissions and pollution in the air. Various forms of air and water pollution cause environmental harm that will travel from one end of the United States, the EU, or even the world, to the

150. Daniel A. Farber, *Stretching the Margins: The Geographical Nexus in Environmental Law*, 48 STAN. L. REV. 1247, 1273 (1996).

151. *Id.* at 1270–73.

152. Zomer, *supra* note 40, at 72.

153. Joseph V. Spadaro, *Greenhouse Gas Emissions of Electricity Generating Chains: Assessing the Difference*, 42 INT'L ATOMIC ENERGY AGENCY BULL. 19, 20 (2010).

other end.[154] As all environmental effects, sooner or later, will have a global impact and consequently and will also reach the state with the intention of adopting a restrictive measure, all measures promoting environmental protection can be claimed to benefit also the local environment. Consequently, Engel has argued that states do have a legitimate interest in mitigating all environmental harm that emerges out-of-state.[155]

The difficulties associated with the distinction of global environmental effects from purely local effects in out-of-state territories have sparked proposals of some form of de minimis rule.[156] Wiers suggests that the environmental objective should be accepted only if the threat would have a direct, substantial and foreseeable effect on the domestic environment.[157] In the energy sector, GHG emissions belong to those environmental concerns that are clearly not purely foreign and would not be affected by a de minimis threshold. The test would give green light to the objective of fighting global climate change. Such test may, however, have implications for other forms of pollution and environmental risks. These include noise (from wind turbines), soil contamination, biodiversity loss (from biofuels feedstock plantation), waste (in the form of solar panels) or interference with waterways (hydropower).

In reality, even without a de minimis test, there is a definite possibility that when the cross-border environmental benefit is very minimal, the state implementing the PPM rule will fail to defend its measure as proportional. Some caution is still called for. Any de minimis or proportionality test would need to be applied so that it would not create a bias against slowly accumulating severe effects nor against rare but severe incidents, such as nuclear accidents. Hence, any potential test could take into account both the magnitude and the probability of cross-border harm, but would need to be applied with a long-term perspective on the effects. It should also be highlighted that such

154. Anne Havemann, Comment, *Surviving the Commerce Clause: How Maryland Can Square Its Renewable Energy Laws with the Federal Constitution*, 71 MD. L. REV. 848, 873 (2012).

155. Engel, *supra* note 46, at 342–48.

156. *See, e.g.*, Jansson & Kalimo, *supra* note 82.

157. WIERS, *supra* note 124, at 274.

tests creating a de minimis threshold would, to a small degree, bar states from tackling externalities.

C. Purely Out-of-State Effects

1. Protection of Out-of-State Environment

Global environmental effects are in part local in the sense that some of the effects eventually will impact the state that adopts the restriction on PPMs. Although arguably all environmental effects have this characteristic, a de minimis rule would lead to the categorization of some effects with primarily out-of-state consequences as falling outside the scope of legitimate objectives. Section IV(C) of this paper tackles the question of whether even protective measures against purely out-of-state effects could be justifiable and the theory of a de minimis rule consequently could be discarded.

While some have argued that the interest protected cannot be purely foreign;[158] others have still not excluded the possibility that states could have extraterritorial legitimate interests under each of the three jurisdictions.[159] This aspect is relevant not only in establishing whether, in the first instance, there are any legitimate objectives but also in the analysis of whether the environmental benefit is proportional in light of the restriction on trade.

Under the U.S. Dormant Commerce Clause, the harm shall be local in accordance with the test established through case law.[160] The theory on the exclusion of purely foreign effects from the geographical scope of public health and environmental protection as grounds of justification has also never really been put to test in WTO law, since appellate bodies have always, due to the facts of the case, been able to avoid addressing the

158. Case C-5/94, The Queen v. Ministry of Agric., Fisheries & Food *ex parte* Hedley Lomas (Ireland) Ltd., 1996 E.C.R. I-2553, ¶ 20; Case 8/74, Opinion of Advocate General Trabucchi in Procureur du Roi v. Gustave Dassonville, 1974 E.C.R. 837, ¶ 5; ZIEGLER, *supra* note 129, at 84–90.

159. KRÄMER, *supra* note 142, at 134; Howard F. Chang, *Toward a Greener GATT: Environmental Trade Measures and the Shrimp-Turtle Case*, 74 S. CAL. L. REV. 31, 32 (2000); Engel, *supra* note 46, at 342–48.

160. Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970).

question.[161] The same is true for ECJ case law. For example, in *Van den Burg*, the court ruled that states could justify stricter national rules on bird conservation only if the birds occurred domestically, where migratory or had been listed as endangered.[162] It thus rejected the protection of most birds that occur out-of-state. The court may have only interpreted the secondary legislation and intended to indicate that the provision in the directive awarding Member States some flexibility did not have an extraterritorial dimension. Alternatively, the ECJ took the position that Article 36 of the TFEU should cover domestic interests and global interest related to for example migratory species.[163] The addition of the interest to protect endangered species could be explained by the fact that a serious threat of extinction is related to global biodiversity and thus also a sufficient concern for states where the species do not occur. The ruling of the ECJ, however, did not explicitly address these aspects.

The debate on the protection of extraterritorial effects mirrors the discussion in legal theory as to whether the goal of maximization of utility or welfare should also include the positions of foreign individuals.[164] To the extent environmental effects do not affect the territory of a state in any sense, states would have limited interests in environmental protection. In principle, a nation could argue that it aims to eliminate the externalities of some out-of-state minority that has been unsuccessful to push for their interests in the legislative process in their own state. There are, however, problems with that approach. Such minority would normally have a voice and representation in the legislative process of their own state and interference by another state would appear undemocratic. Future generations would obviously not have a voice but it would be difficult to justify why a state knows the preference of future

161. Appellate Body Report, *European Communities – Measures Prohibiting the Importation and Marketing of Seal Products*, ¶ 5.173, WTO Doc. WT/DS400/AB/R & WT/DS401/AB/R (May 22, 2014) [hereinafter *EU – Seals (AB)*]; *United States – Shrimp (AB)*, *supra* note 116, ¶ 133.

162. Case C-169/89, Criminal Proceedings Against Gourmetterie Van den Burg, 1990 E.C.R. I-2160, ¶¶ 11–12.

163. *Id.* ¶ 16.

164. POSNER, *supra* note 25, at 53–54.

generations in another state better than that state itself. Potentially, the state adopting the PPM rule could try and argue that on the basis of scientific evidence the polluting state is endangering its future existence and that it therefore is evident that it is harming the utility and/or welfare of its future generations.[165]

Apart from the concerns related to future generations, it should also not be forgotten that the state adopting the measure often has at least a minimal environmental interest because of the global nature of any pollution. Simultaneously, by furthering the interests of its own population and a small group of out-of-state individuals, the state taking action may in fact tilt the outcome of the out-of-state legislative process, which may have been the societal optimal internalization of externalities for that state. These opposing interests appear very difficult to reconcile.

2. The Morality Approach

The interest of any state to mitigate the out-of-state share of environmental effects could alternatively be regarded as a moral concern. WTO panels and appellate bodies have often made references to other international agreements. These may be relevant, as they illustrate the context in which the GATT and the TBT are to be interpreted. Both the Stockholm Declaration of 1972 and the Rio Declaration of 1992 include a commitment by the signatories not to cause environmental damage abroad.[166] In case a state imports products that have been produced in a manner that is harmful to the environment, the importing state contributes to the environmental damage by increasing the demand of the product. The obligation that stems from these declarations could even be read to indicate that there actually is not only a right to take restrictive actions on PPMs abroad but an

165. WORLD COMM'N ON ENV'T & DEV., OUR COMMON FUTURE 43 (1987). This so-called Brundtland report emphasized that economic development should compromise neither present nor future generations. *Id.* Under trade law, externalities may be tackled, but, with a lack of representation, the interests of future generations may often be neglected.

166. U.N. Conference on Environment and Development, *Rio Declaration on Environment and Development*, U.N. Doc. A/CONF.151/26 (Vol.1) (Aug. 12, 1992); U.N. Conference on the Human Environment, *Declaration of the U.N. Conference on Human Environment*, U.N. Doc. A/CONF.48/14/Rev.1, at 5 (1972).

international moral duty.[167] Yet, the declarations are not legally binding.

Moving to a legal analysis of legally binding trade law, this paper notes that the existence of public morality as a ground of justification in the TFEU and the WTO Agreements may prove crucial, as it would at least leave the door open for the argument that out-of-state environmental effects may fall within the scope of the legitimate objective. The grounds of justification listed in Article 36 of the TFEU include public morality and policy.[168] Public morality is also mentioned in Article XX(a) of the GATT.[169] Although there is no explicit reference to morals in the TBT agreement, the panel has stated that the open list in Article 2.2 TBT invites parties to rely on public morals as a justification ground.[170]

The concepts of public policy and morality are fairly abstract and vague. In WTO law, for example, public morals have been defined as "standards of right and wrong conduct maintained by or on behalf of a community or nation."[171] The ECJ has accepted that limitations on the import of pornographic materials were justifiable on moral grounds, and Member States have a wide discretion in defining their moral policy.[172] In *Omega Spielhallen*, the ECJ stated that games simulating acts of homicide could be banned on moral grounds and referred to general principles of EU law stemming from internationally recognized human rights.[173] Internationally recognized principles were also referred to in *Dynamic Medien*, where the court accepted that the protection of young children may require

167. WIERS, *supra* note 124, at 296 n.245; HOWSE, *supra* note 143, at 107 n.39.

168. TFEU, *supra* note 5, art. 36.

169. General Agreement on Tariffs and Trade, *supra* note 6, 55 U.N.T.S. at 262.

170. Panel Report, *European Communities – Measures Prohibiting the Importation and Marketing of Seal Products*, ¶ 7.418, WTO Doc. WT/DS400/R (Nov. 25, 2013) [hereinafter *EU – Seals*].

171. Panel Report, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, ¶ 6.465, WTO Doc. WT/DS285/R (Nov. 10, 2004).

172. Case 34/79, Regina v. Henn & Darby, 1979 E.C.R. 3797, ¶¶ 15–16.

173. Case C-36/02, Omega Spielhallen- und Automatenaufstellungs-GmbH v. Oberbürgermeisterin der Bundesstadt Bonn, 2004 E.C.R. I-9641, ¶¶ 34–35.

limitations on the distribution of videos and images.[174] In addition, even if the protection against gambling is difficult to link directly to any international treaty or principle, the ECJ has in several cases confirmed that limitations to gambling may be implemented on public policy and moral grounds.[175] The same approach has applied in WTO law.[176] All in all, moral objectives do not need to correspond with any broad international consensus, but must reflect concerns that can, from an international perspective, be regarded as genuinely moral concerns.

Even if public morality and policy would be a valid ground of justification, the measures still need to be proportional. One could argue that the purpose of a restriction taken by a government on moral grounds is, at least in part, to protect the moral consciousness of its people. Under such view, most measures would easily be deemed suitable and necessary. This approach has never been adopted in EU law. Instead, the proportionality of the measure has been tested in relation to more concrete objectives, for example, child protection,[177] or the ECJ has opted not to discuss alternative measures in detail.[178] In sum, no signs have emerged that public morals would extend to the protection of environmental effects out-of-state.

The boundaries of public morals as a ground for justification have been extended the furthest in WTO law through a recent decision in the *EU – Seals* case. The case concerned an EU ban on the sale and import of seal products due to evidence that many are killed in an inhumane manner.[179] Only limited exceptions

174. Case C-244/06, Dynamic Medien Vertriebs GmbH v. Avides Media AG, 2008 E.C.R. I-533, ¶¶ 39–44.

175. Case C-65/05, Comm'n v. Greece, 2006 E.C.R. I-10344, ¶ 31–38; Case C-243/01, Criminal Proceedings Against Piergiorgio Gambelli & Others, 2003 E.C.R. I-13076, ¶ 63; Case C-275/92, Her Majesty's Customs & Excise v. Gerhart Schindler & Jörg Schindler, 1994 E.C.R. I-1078, ¶¶ 60–61.

176. Appellate Body Report, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, ¶¶ 296–99, WTO Doc. WT/DS285/AB/R (Apr. 7, 2005) (concerning the application of the GATS); *see also EU – Seals (AB)*, *supra* note 161, ¶¶ 5.177–.179 (accepting the protection of seal welfare was accepted as a genuine moral objective in the EU without any discussion on international moral views).

177. *Dynamic Medien*, 2008 E.C.R. I-533, ¶ 46.

178. *Omega Spielhallen*, 2004 E.C.R. I-9641, ¶ 39.

179. *See EU – Seals*, *supra* note 170, ¶¶ 7.1, 7.4.

covering, for example, seal products sold by Greenlandic Inuits, were granted.[180] The panel seemed to acknowledge the links between health, environment, and morals as it ultimately concluded that animal welfare could in principle be protected on moral grounds.[181] It seemed to imply that the legitimate ground of protection was thus seal welfare and the moral implications thereof for EU citizens.[182] The Appellate Body seemed to approve this interpretation, but added that it had no intention to rule on the territorial scope of the grounds of justification.[183] Hence, the legitimate objective could not be interpreted to have been the protection of animal health out-of-state.

By linking animal welfare to morality, the panel and the Appellate Body established a broad interpretation that extended morals beyond the protection of vulnerable people against the negative effects they may inflict on themselves through the consumption of goods that are considered morally questionable. The unwillingness to rule on the territorial scope of the grounds of justification and the subsequent proportionality analysis also reveal a broadening of the public morals exception in another dimension. To begin with, seals were not deemed migratory nor did the AB refer to any benefits on global biodiversity resulting from seal protection. The focus was instead on the moral well-being of EU citizens. With a ban on seal imports, the utility of EU citizens were presumed to increase because they would no longer participate through consumption in the inhumane killing of seals and the total number of inhumanely killed seals would globally drop.[184] Much analysis was devoted to verifying that the number of seals killed inhumanely could be presumed to fall as a result of the ban.[185]

On the one hand, the protection of public morals and the protection of the animal's health or the environment out-of-state

180. *E.g.*, *EU – Seals*, *supra* note 170, ¶¶ 7.1, 7.4. The exemptions complicate the analysis of whether the law actually represented a PPM rule since the ban was in part linked to the identity of the hunter and the type of the hunt. *See id.* ¶ 7.3. This aspect is, however, not crucial for the analysis in this article.

181. *See id.* ¶¶ 7.3, 7.274, 7.404.

182. *Id.* ¶¶ 7.409-.410.

183. *Id.* ¶ 5.173.

184. *Id.* ¶¶ 5.198, 5.222–.226.

185. *EU – Seals*, *supra* note 170, ¶¶ 5.234–.254.

becomes so intertwined in *EU – Seals* that morals as a ground of justification in practice extends to the protection of "purely" extraterritorial health and environment, which was portrayed as partly problematic above. On the other hand, by extending the interpretation of public morals the panel and the Appellate Body invited states to tackle also moral externalities.

To what extent could the reasoning in *EU – Seals* then be transposed to PPM cases in the energy sector? In its proportionality review, the Appellate Body considered sustainability labels as a potential alternative to the ban but concluded that labels in this case could not achieve the same objective.[186] The reason for this is that no hunting method guarantees humane kills of the seals.[187] A labeling scheme may thus only result in increased hunts as the hunters need more attempts to get humane kills and thus to serve the EU market.[188] Energy may be decisively different in this respect, as the sustainability of the PPM is easier to control and labeling a viable alternative. Even if moral concerns may arise, states would not need to introduce import restrictions, but could allow its individual consumers to make the decision to buy or not to buy certain forms of energy on the basis of their moral beliefs. This would allow consumers to terminate their personal contribution to what they feel as immoral and to some degree cause a reduction in the morally questionable activity worldwide. The role of the state would be narrowed down to ensuring that the information on the PPMs of imports is provided on the market. Going beyond that could be argued to constitute a form of moral imperialism.

Labeling fuels in accordance with their sustainability would not be too much of a problem. Admittedly, electricity would present its own challenges as power along wires cannot be segregated and individually labeled. Instead, the labeling system would need to be linked to contracts, which gives rise to its own technical complexities. As a practical matter, electricity trade between WTO parties is still very limited.

186. *EU – Seals*, *supra* note 170, ¶ 5.278–.279.
187. *See id.* ¶ 5.278.
188. *Id.* ¶ 2.14.

On a final note, even if public morals were legitimate and applicable grounds of justification in *EU – Seals*, the Appellate Body in the end concluded that the ban fell foul of the GATT due to the arbitrary discriminatory nature of the law when taking into account the exemptions that had been awarded to, for example, Inuit communities.[189] This highlights the importance of the details of any state measure in ensuring compatibility with trade law.

3. High Degree of Regional Integration as an Explanatory Variable?

The United States (and also, in fact, the EU) has created not only a free trade regime but also an area of free movement of persons. Citizens of each state may move easily in the common territory of the union. This could create a heightened interest for the people of one state in the (environmental) policies of other states within the union. Yet, they lack political representation in other states and representation through union and federal institutions respectively may only partially compensate. These observations on the functions of unions and federal states could actually provide at least some argument for why globalism—defined by Farber as the acceptance of pure foreign out-of-state environmental protection as a legitimate objective[190]—could get a stronger foothold in trade law of closer unions like the EU and the United States. However, as the discussion in previous sections revealed, globalism has in fact gained more of a foothold under WTO law than in the closer European union. What about the United States' doctrine?

The test applied in the context of the U.S. Dormant Commerce Clause states that the harm must be local.[191] Thus, in the United States, it has also been argued that mitigating purely out-of-state environmental harm does not form a legitimate objective.[192] The Supreme Court would appear to accept this

189. *EU – Seals (AB)*, *supra* note 161, ¶¶ 5.338–.339.

190. Farber, *supra* note 150, at 1272.

191. *See* Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970).

192. GERADIN, *supra* note 137, at 66 (drawing the same conclusion with regards to EU law).

approach.[193] The U.S. doctrine appears even more hostile toward globalism than EU free movement law, not to mention WTO law. The extraterritoriality doctrine in law of prohibition condemns measures that represent the exercise of control over out-of-state conduct.[194] This already reflects scepticism against the objective of states to affect activities in other territories.

Moreover, under the Dormant Commerce Clause, public morality has rarely been discussed as a legitimate objective. For example, in 2014, a case was brought relating to the constitutionality of a California regulation[195] that prohibited selling eggs from hens that were kept in cages below a minimum size stricter than the federal standard.[196] Among other things, the complaint has argued that the law breaches the Dormant Commerce Clause.[197] The emphasis in the arguments was mostly on the potential reduction of salmonella risks stemming from the well-being of the hens and the contribution that would have for local public health in California.[198] However, some NGOs have, in their amici curiae, claimed that protection against animal cruelty is a valid local objective as it links to both health and morality.[199] This view could gain support from the fact that the U.S. Constitution is regarded as leaving questions of morality largely to the states.[200] Yet, there is still much uncertainty around the question of whether morality would be accepted as a ground of justification since there are no strong precedents on pure moral concerns as legitimate local objectives under the Dormant Commerce Clause.

All in all, empiricism would not support the theory of a positive link between "common union territory" and globalism. On the contrary, with a closer union appears to come a stronger

193. C & A Carbone, Inc. v. Town of Clarkstown, 511 U.S. 383, 393 (1994).

194. *See supra* Part III.

195. CAL. CODE. REGS. tit. 3, § 1350 (2013).

196. Missouri v. Harris, 58 F. Supp. 3d 1059, 1062 (E.D. Cal. 2014).

197. Complaint ¶ 8, *Harris*, 58 F. Supp. 3d 1059 (No. 2:14-cv-00341-KJM-KJN).

198. *Harris*, 58 F. Supp. 3d at 1065.

199. *E.g.*, Brief for Animal Legal Defense, Fund, Compassion Over Killing, Inc. & Farm Sanctuary, Inc., as Amici Curiae Supporting Respondents, Missouri v. Harris, 58 F. Supp. 3d 1059 (E.D. Cal. 2014) (No. 2:14-cv-00341-KJM-KJN).

200. Robert J. Pushaw Jr., *The Medical Marijuana Case: A Commerce Clause Counter-Revolution?*, 9 LEWIS & CLARK L. REV. 879, 886–87 (2005).

rejection of globalism. In fact, the prohibition of extraterritoriality in the United States has been linked to national solidarity and structural federalism.[201] The explanation may also relate to the relationship between free trade and morality. The federal system of the United States creates a union that, at least in theory, should rely on common fundamental values. Consequently, states would have no independent morals to protect. Strong unionism would thus nullify morality arguments and hence leave the globalist approach without any valid justification.

V. CONCLUSIONS

This article started with the presumption that states as parties to a free trade regime may utilize the grounds of justification to successfully defend attempts to limit externalities. Subsequent analysis revealed that only the U.S. Dormant Commerce Clause contains an extraterritoriality test in the law of prohibition. Although the courts might be shaping a test that strikes down measures such as PPM rules that simultaneously have a form of extraterritorial effects and that hinder market access, such a test should usually not bar the implementation of schemes for promoting renewable energy, at least as long as they do not have facially discriminatory components such as in-state quotas or requirements.

The analysis of extraterritoriality in law of justification proved more complex and the tests may set some limitations to permitted measures for dealing with externalities across all three jurisdictions. Namely, it follows from the principle of representation that the externalities targeted should be those experienced on in-state territory. Environmental externalities experienced purely by out-of-state individuals are for them to tackle through their in-state legislative process. Yet, there are almost no environmental effects that would not become global in the long term. Here a de minimis threshold may restrict the efforts of a state to tackle such minimal effects. Such threshold may arise either as a separate test or as a consequence of the

201. Baldwin v. G.A.F. Seelig, Inc., 294 U.S. 511, 523 (1935); Am. Fuel & Petrochemical Mfr. v. O'Keeffe, No. 3:15-cv-00467-AA, 2015 WL 5665232, at *9 (D. Or., Sept. 23, 2015).

proportionality review under which smaller benefits may be more difficult to justify.

The dilemma can also be seen as a clash between the interests of the state adopting the measure to tackle its minimal environmental externalities and the interest of the state of production to defend its national status of a domestically optimal level of internationalization of externalities. The question is whether trade agreements offer legally valid arguments to challenge what often is perceived as eco-imperialism. Even if there is no explicit limitation on the use of minimal environmental interests to defend PPM rules, the argument that they are disproportionate and arbitrary is to be expected. Especially in close unions such as the EU and the United States, solidarity between the states would also offer an argument why states perhaps may not adopt PPM rules with minimal environmental gain as the measure simultaneously would nullify the democratic decision of the producing state to optimally internalize the externalities for its people through less strict environmental criteria. While this argument would not be equally strong in a WTO context, one should keep in mind the political reality and the fact that an interpretation of the WTO agreements too open to eco-imperialism may estrange developing countries from the organization.

The limits that stem from the extraterritoriality test as applied in connection with environmental grounds of justification were not the full story. It was explained that both the EU and the WTO have included the protection of public morals as a ground of justification in their trade law regimes. Some goods and services are considered immoral because of how they may harm the utilizer at the stage of consumption. Rather than a question of utility maximization, the prohibition of these may potentially relate to the effect they would have on vulnerable individuals in the long-term and thus also on societal burden and stability. In other words, the public morals exemption could in this context be linked to either utility or welfare maximization.

Transposing the public morality exemption to the context of environmental externalities out-of-state gives a different picture. Moral externalities may arise, for example, from knowledge that personal consumption contributes to out-of-state pollution and results in a higher total pollution. Dealing with these would not

serve welfare but may increase local utility. Yet it should be reminded that trade law does not welcome measures tackling externalities that extreme patriots are burdened buy as a consequence of trade with out-of-state actors. Approving other purely emotional dimensions could consequently be regarded as incoherent. Moreover, a broad reading of public morals may shake the foundations of free trade. First, it would open the possibility to question almost any PPM rule that is different in another state. Secondly, it may be practically difficult to separate prohibited patriotic emotions from other emotions.

While the U.S. regime seems to be hesitant with respect to moral justifications and the EU has so far generally not opened the door for any other moral justifications than those relating to the protection of vulnerable consumers, the WTO appears to be moving in direction of accepting a broader range of moral grounds for justifying prima facie prohibited measures. On the one hand, this could be explained by the fact that the WTO is such a large community of states that flexibility with regards to moral conceptions must be maintained. On the other hand, the possibility to justify concerns about moral externalities related for example to the environmental effects of PPMs out-of-state invites some eco-imperialism that may be particularly harmful on the global arena due to the whole history of imperialism as practiced by current western developed states, together with the fact that their environmentally harmful actions throughout history has laid the foundations for the global economic divide.

The rejection of the moral argument leaves us with the environmental interests. The likely failure to defend minimal environmental benefits under either justification or proportionality tests would cement the idea of a de minimis threshold. In other words, states much present evidence that there is a need of protection against cross-border environmental effects that exceed a certain threshold. Admittedly, this does bar states from dealing with a small degree of actual local environmental externalities.

What is the significance of all of this for the energy transition? States should, under all three jurisdictions, have a right to defend limitations extending also to the PPMs of imported energy at least if the environmental effects will clearly be cross-border. This would apply certainly for GHG emissions

and in many cases other air pollution. Measures of promoting renewable energy at the expense of fossil fuels would in other words enjoy strong a strong legal position. In contrast, restrictions on activities with primarily local soil or water pollution or on local biodiversity would be more difficult to justify. Equally, restrictions on imports of energy from nuclear fission would also face more hurdles in the argumentation of justifiability due to the relative weakness of the moral argument and the possibility that accident risks are deemed to fall below a de minimis threshold.

In conclusion, trade law regimes analyzed in this article would appear quite favorable for the energy transition toward renewables. Extraterritoriality tests may instead set stricter limits on state competence to impose PPM rules in other sectors.