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Alexey Vikhlyaev*

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*UNCTAD

Fondazione Eni Enrico Mattei
Corso Magenta, 63, 20123 Milano, tel. +39/02/52036934 – fax +39/02/52036946
E-mail: letter@feem.it
C.F. 97080600154

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The Use of Trade Measures for Environmental Purposes – Globally and in the EU Context

Alexey VIKHLYAEV[*]
UNCTAD

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1. Introduction

This paper derives from a number of drafts developed over time with a view to assessing the scope for and implications of trade measures for non-trade purposes in the multilateral trading system and regional integration arrangements. It draws on the written work and presentations by Thomas Cottier, Professor of European and International Economic Law at University of Berne, Joanne Scott at Harvard Law School, Daniel Esty, Director of Yale Centre for Environmental Law and Policy, Damien Geradin, Assistant Professor of Law at University of Liege, Joost Pauwelyn at the Legal Affairs Division of WTO and Mohan Kumar, Counsellor at the Permanent Mission of India to the WTO. Errors and omissions remain my own.

The paper is organized as follows. Part 2 provides an overview of general issues relating to trade measures for environmental purposes, with special references to the WTO and EU regimes. Part 3 deals with domestic, extra-jurisdictional and institutional aspects of trade and the environment in the WTO and EU. Part 4 offers conclusions and policy recommendations.

2. Trade measures: general issues

The rationale for using trade measures for environmental purposes is that costs differentials arising from lower environmental standards are unfair and distort the prices in the market place[1]. However, to eliminate every cost differential is to eliminate all gains from trade. The issue is whether the cost differentials reflect a legitimate comparative advantage or market or policy failure.

The most radical type of trade measure is a *ban* on imports of a product that has been produced under standards more lax than those imposed on domestic producers.
Article XX - the GATT's *general exceptions* - allows import bans as well as other deviations from the GATT's rules in specified circumstances, including some relating to human, animal or plant life, health or safety, and some relating to the conservation of exhaustible natural resources. The Agreement on Sanitary and Phyto-Sanitary Measures (SPS), concluded as part of the Uruguay Round agricultural negotiations, covers measures relating to human, animal and plant health and

[1] There are special cases, however, e.g. trade measures under the Conventionon on International Trade in Endengered Species (CITES), which have been prompted by non-market imperatives, in the case of CITES - the protection of plants and animals.

safety in agriculture, including, *inter alia*, pesticide and fungicide tolerances, and inspection rules for meat. The Agreement on Technical Barriers to Trade (TBT) is applied multilaterally through the Uruguay Round Final Act and meant to ensure that technical standards and regulations not addressed by the SPS Agreement are not used for protectionist purposes. In the EU context, Article 30 (formerly Article 36) of the EC Treaty provides EU members with a right similar to that of the WTO members if they pursue non-economic goals such as the protection of human health or life, animals, or plants.

Eco-duties countervailing low environmental standards - "implicit subsidies" - appear to be WTO-illegal. Specifically, the Agreement on Subsidies and Countervailing Measures (SCM) defines - for the first time - what a subsidy is and, therefore, what sorts of subsidies are countervailable[2]. The concept of *state subsidy* contained in the EC Treaty is more flexible, but it does not go as far as to include *regulatory subsidies*. Legal considerations aside, eco-duties are susceptible to "capture" by protectionist interests whose ultimate goals are not environmental. Moreover, calculating the proper level of an eco-duty introduces a range of practical problems.

The use of *subsidies* to offset pollution control costs borne by one own's industries appear less offensive and less disruptive than eco-duties, but the effect may be identical. Besides, more often than not, subsidizing polluters violates the *polluter pays principle*[3]. The current situation in the SCM has created a regime that is often described in terms of a "traffic-light". The "green-light" subsidies under the SCM cannot, as a rule, be challenged as long as they meet certain narrowly defined criteria. This category includes certain subsidies for the environment. The "green-light" category, however, expired in 1999 due to a lack of consensus in the Committee on Subsidies to extend the non-actionable subsidies. The EU has instituted strict controls on the type of subsidies that member states can use.

Under the current multilateral trade rules, taxes and charges applied to domestic products can also be applied to similar - *like* in trade parlance- imported products (or exempted on exports) as *border tax adjustments* (*BTAs*). In practice, the usefulness of *BTAs* is limited by the fact that the current WTO rules only allow adjustments for environmental taxes or charges on products (e.g. ozone-depleting substances or non-recyclable packaging) or on *physically incorporated* inputs (e.g. chemicals in plastic products). In contrast, the WTO rules do not allow *BTAs* for environmental

[2] The Agreement (Article I, 1.1 (a)(i)) stipulates that a subsidy must reflect "a financial contribution by a government or any public body". The definition goes on to spell out that subsidies arise only when there is "a direct transfer of funds (e.g. grants, loans or equity infusion), potential direct transfers of funds or liabilities (e.g. loan guarantees").

charges imposed on *production processes* (e.g. carbon dioxide and sulphur dioxide emissions, waste disposal and water effluent) or on *non-physically incorporated* inputs (e.g. energy used in the production process)[4]. Whether the WTO should broaden the scope for *BTAs* to include process-related taxes is a matter of considerable controversy. Tax harmonization is, itself, an extremely complex matter, as illustrated by the attempts to adopt common environmental taxes across the EU. Moreover, taxation is seen by many nations as a core element of national sovereignty.

Switching from fiscal to regulatory measures is fraught with similar difficulties as there are two distinct types of environmental standards or regulations. *Product standards* deal with the characteristics of goods and may operate as barriers to trade, influencing market access. *Production process or methods standards* (*PPMs*) do not regulate the characteristics of products themselves, but the way they are made, and affect the conditions of competition. Standards and technical regulations act like non-tariff barriers, driving a wedge between domestic and border prices and protecting domestic markets, not because they are discriminatory, but simply because they are different.

The concept of *national treatment* (GATT Article III) has been construed in such a way as to permit the application of domestic product standards to imported goods. However, the application of domestic *PPMs* to imported goods would amount to less favourable treatment and hence derive no protection under GATT Article III. While *de jure* the principle of national treatment is preserved, because of the manner in which the term *like* is construed, *de facto* it has been undermined in the case of *PPMs*. In the EU context, the Community's enhanced capacity for harmonization of standards, including *PPMs*, has eased the path from national treatment to mutual recognition. However, the mutual recognition framework in the EU is still partial and increasingly flexible in its scope.

An answer to the question of whether a given product is safe or dangerous depends upon intrinsic product quality and not upon production process. However, the two may be *related*, with production processes impinging upon product quality (*product-related PPMs*). There is a growing list of *PPMs* which are not *related* to the product but which are nevertheless considered to be important for scientific (e.g. climate change, ozone depletion, deforestation) or social (e.g.

[3] In certain cases, polluter gets paid to improve environmental performance.

consumer choice, societal preferences, animal welfare) reasons or sometimes both. Indeed, there are several instances where the importance of *non-product related PPMs* has already been recognised by the international community[5].

PPM-based criteria are used in voluntary trade measures such as *eco-labelling*. Eco-labelling schemes do not link market access to compliance with specific standards and, therefore, are generally WTO-consistent. However, eco-labels do present some problems. First, the last few years have seen the development of a large number of eco-labelling schemes. For instance, in the EU, national schemes are allowed to operate alongside the EC eco-label. Their diversity has created a great deal of confusion and made the monitoring by public authorities extremely difficult. Second, there is a perception that eco-labels, especially those based on non-product related *PPMs*, discriminate against imported products, particularly those originating from developing countries.

International trade policy is affected by the interpretation of what constitutes *quality*. Defined under various legislative instruments, the term *quality assurance* primarily refers to health and safety, which are the ultimate environmental issues. What may be considered by some as product differentiation on health or safety grounds, may be considered by others as a form of trade barrier. It is the function of SPS and TBT agreements to bring order and transparency in this respect. In many instances, however, "private" requirements of importing firms, which generally reflect consumers' preferences turn into binding constraints for producers and exporters.

As there is no universal approach to ensuring coherence of quality requirements prevailing in national, regional and international markets, companies are inclined to adopt the ISO 9000 and ISO 14000 series of standards, or the European Eco-Management Scheme (ECOMAS). The internationally accepted Hazard Analysis of Critical Control Points (HACCP) provides guidelines for the implementation of quality systems in the food chain. These can be considered common elements of most quality standards, adopted already in the main importing countries, including the EU. HACCP, based on hazards and risks analysis, is at the core of the SPS and the TBT.

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[4] See Esty, D. and Geradin, D., *Environmental Protection and International Competitiveness. A Conceptual Framework*, Journal of World Trade, vol. 32, no. 3, June 1998; *Market Access, Competitiveness, and Harmonization: Environmental Protection in Regional Trade Agreements*, Harvard Environmental Law Review, vol. 21, no. 2,1997.

[5] For example, the signatories to the Montreal Protocol on Ozone Depleting Substances (ODS) have agreed to impose trade restrictions on goods made with (but not containing) ODS; and the importance of how a good is made is recognised in GATT Article XX (e) regarding the products of prison labour.

While, in general, all trade measures for environmental purposes address risk, lack of certainty and action to be taken in such situations, the levels of risk and uncertainty to trigger an action differ, sometimes significantly. Numerous international instruments incorporate the notion of *precaution* in situations of uncertainty, and regional integration agreements also leave room for measures based on this notion.

Although the term *precautionary principle* is not explicitly used in any WTO agreement, it is woven through a number of current and future possible disputes. The EU believes that trade measures based on this principle are *a priory* compatible with the WTO rules. Others, however, feel there is a need to clarify this relationship. Deceptively simple to define (the *Maastricht Treaty*, the *Rio Declaration*, and the *Cartagena Protocol*), the *precautionary principle* becomes problematic when it comes to putting it into practice, which is, in the end, a matter of policy. A matter that may turn into a nightmare for the multilateral trading system - a policy making process that may seem impossible to bring to rule, containing an unmanageable number of entry points for protectionist influence.

An essential issue is the implications of precaution in the context of trade rules is whether risks assessments need to be carried out prior to the adoption of precautionary trade measures, and which conditions such risks assessments must meet. Another important question is, who has to provide evidence to justify the need for precautionary measures. The allocation of the burden of such proof requires striking a careful balance between different interests at stake.

3. Global *versus* regional

Two core trade and environment concerns are addressed by the multilateral trading system and regional economic groupings, including the EU. First, a balance has to be struck between market access and environmental protection. This balance is struck differently in different agreements. Second, regulatory tensions between jurisdictions with differing environmental standards must be addressed to the extent that these are applied extra-territorially or do not reflect legitimate comparative advantage.

The logic of these concerns is quite clear in the trade and environment issues that have received the most attention in the WTO and EU: (1) *maintenance of domestic health, safety and environmental*

standards, (2) *cross-border, or extra-jurisdictional activity*, i.e. regulatory competition, managing global or regional commons, cross-border pollution; and (3) *trade and environment institutions, rule making and implementation*. These issues have been addressed in different ways in the GATT/WTO and the EU.

3.1 GATT/WTO

3.1.1 Maintenance of domestic standards

Three sets of GATT/WTO rules are most relevant to defining the conditions under which a WTO member can use trade measures to maintain its chosen levels of domestic health, safety and environmental protection: Article XX of GATT, the SPS and the TBT. The general rule under the GATT, the SPS and the TBT is that each country may resort to trade measures to protect life and health, and conserve exhaustible natural resources, and may determine for itself the level of risk it deems appropriate to embody in its product standards. This rule is qualified to ensure that these measures are not misused for protectionist purposes (*non-discrimination*).

At the WTO, the evolution of this general rule has been propelled not by negotiation but by judicial interpretation. The limits of Article XX have been tested in nine cases, four of which are most relevant to trade and the environment: *Tuna I and II, Reformulated Gasoline, Shrimp/Turtle* and *Asbestos*[6]. The salient points of the conclusions are centred on a number of elements such as the function and scope of the preamble, jurisdictional application and the concept of necessity. Importantly, in none of the cases have the panels questioned the environmental objectives or policies of the countries concerned; rather they have only examined the trade measures used to achieve them.

In *Tuna I* it was ruled that it is the inconsistency with the GATT which must be justified not the policy goal itself. The *Tuna II* Panel considered the term "exhaustible natural resources" included living creatures (dolphins) and was not limited to mineral resources or oil as originally intended by the drafters. In the *Reformulated Gasoline Case* the Panel agreed that clean air was also an

[6] *GATT/WTO Dispute Settlement Practice Relating to Article XX, Paragraphs (b), (d) and (g) of GATT*, WT/CTE/W/53/Rev.1, 26 October 1998; www.wto.org/english/tratop_e/envir_e/edis00_e.htm.

exhaustible natural resource. The *Asbestos* case was the first time a Panel or the Appellate Body upheld a trade-inconsistent measure for non-trade reasons - protection of human life and health.

While under GATT trade measures are considered on the criteria of non-discrimination, the TBT goes further to apply the test of *proportionality*, which brings it closer to the EU legal practice. There have hardly been any cases on TBT, but in 33 instances formal consultations have been held on the basis of the Agreement. Allusions to the TBT can be found in the *Gasoline* case. In the *Shrimp-turtle* case, when Article XI was invoked, it had to do with the TBT. There were also links to the TBT in the *Thai cigarettes* and *US automobile tax* cases. In the *Asbestos* case, it was certainly the Canadian position that the TBT applied to the French ban[7]. Some observers maintain that, by refusing to adjudicate the *Asbestos* case on the TBT grounds, the Appellate Body provided an "implicit interpretation" of the TBT Agreement as irrelevant.

There is still a bit of a void in terms of having a detailed interpretation of the TBT from the Appellate Body. Some argue that it may be to the advantage of the developing countries if there is a shift in the WTO jurisprudence from the GATT to the TBT. This would open the door to more product differentiation and more precise rules. However, the jury is out on whether this change would actually make market access for developing countries easier.

An interesting aspect is the relationship of the TBT Agreement to GATT is the MFN. Article 6.3 of the TBT gives members absolute freedom to enter into bilateral mutual recognition agreements. This is one area where discrimination can be done without any regard to MFN obligations. In this context, an interesting question arises as to whether a linkage could be made with Article VII.2. of GATT, which has a conditional MFN clause and gives some negotiating rights to join a special agreement. This link is still missing in the "judicial geometry" of the WTO and potentially could be a point to put on the books in future negotiations[8].

Implementation concerns have certainly been front and centre stage on the agenda of TBT Committee for some time now, driven in part by the triennial reviews that the Committee has to do of the Agreement as well as by larger discussions on the implementation of the WTO Agreements. Useful work is being done by the Director General of the WTO with the various international

[7] The Panel considered the ban as a non-TBT issue, but the exception to the ban was considered a TBT issue. The Appellate Body considered the measure as a whole, and decided the case on the GATT grounds, citing insufficient information as a reason for not deciding it as a TBT case.

[8] The observation was made by Thomas Cottier at the international workshop entitled: *Negotiating Agenda for Market Access: Cases of SPS and TBT*, Geneva, 24-25 April 2001.

standardizing bodies and through the TBT technical assistance programme. Proposals have been made to introduce binding commitments with respect to technical assistance and capacity building. However, without coordination at the national level among standardizing bodies, trade and environment ministries, it is difficult to see such technical assistance really paying off. One of the most drastic proposals is to introduce in the TBT the notion of *precautionary principle*. If implemented, this proposal would have profound implications. On balance, there is a feeling that the TBT is a complex and relatively untested agreement that has been serving the WTO membership well so far. The preference would be to leave it alone in the context of possible set of negotiations.

The SPS marks an important step in the evolution of WTO rules for trade measures. It takes WTO members beyond "non-discrimination", and to a restrictive interpretation of the GATT *general exceptions* by elaborating the applicability of the GATT, Article XX(b). This interpretation is rather "closed" in its tendency to privilege scientific rationality.

So far, the SPS has been tested in three cases. Each of the three pillars under the SPS have now been addressed: human health in *EC - Hormones*; animal health in *Australia Salmon*; and plant health in *Japan - Varietals* cases[9]. In *EC Hormones*, the alleged food-borne risk for human life and health related to contaminants (hormone residues) in foods (meat and meat products); in *Australia - Salmon*, Australia claimed to protect its animals (fish) against the introduction of some 24 salmon diseases; in *Japan Varietals*, Japan wanted to avoid the introduction of the codling moth, considered to be a pest, and thereby protect its plants, by banning certain fruit imports from the United States No further SPS dispute settlement reports are expected in the near future, although the number of SPS-related trade concerns and potential disputes remains substantial.

Two crucial decisions have been taken in respect of the question of when the SPS disciplines apply to trade measures. First, the SPS Agreement was found to apply to all SPS measures affecting international trade, and this is independently from the GATT[10]. Second, it has been established that

[9] See Pauwelyn, J. , *The WTO Agreement on Sanitary and Phytosanitary (SPS) Measures as Applied in the First Three SPS Disputes*, in *Journal of International Economic Law* 1999, pp. 641 -664.

[10] Before the entry into force of the SPS Agreement, health regulations only had to be justified once a prior violation of one of the GATT principles had been found. Article XX(b) of GATT(human, animal or plant life or health) is, indeed, activated only once a violation of, say, the non-discrimination. provisions (in Articles I or III of GATT) has been established. Under the SPS Agreement, all disciplines apply even if no prior discrimination has been found.

the SPS Agreement applies retroactively[11]. This latter decision means, of course, that many WTO Members will have to re-examine their existing SPS measures, in particular in light of the obligation to base SPS measures on a risk assessment[12].

A crucial distinction was found between the risk assessment required for "food-borne" risks and that for disease or pest risks.[13] It is unclear whether it was the intention of the drafters to make this rather important distinction between two types of risk assessment, and it may be a matter for reconsideration in a future review of the SPS Agreement.

For both categories, the following principles were developed through case law: risk assessment can either be quantitative or qualitative; an acceptable level of risk could even be set at "zero"; the existence of unknown and uncertain elements does not justify a departure from the risk assessment requirement; risk assessment has to be specific enough[14]; the WTO Member imposing an SPS measure does not necessarily have to conduct risk assessment itself and can make use of assessments carried out by other Members or international organizations; a member has an autonomous right to establish a higher level of sanitary protection than would be achieved by a measure based on an international standard.

In the *EC - Hormones* the panel referred to the process of determining and applying the acceptable level of risk as part of "risk management", an exercise in which social value judgements - risk perceptions and tolerance of consumers, social acceptability of certain types of risk, etc. - are crucial."

Members also have to base the SPS measure they finally select on that risk assessment. The exception to this rule, i.e. the possibility of enacting provisional measures, including on the basis of a *precautionary principle*, is qualified by four requirements[15]. The Appellate Body in *Japan -*

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[11] I.e. not only to SPS measures enacted subsequent to the entry into force of the SPS Agreement (post 1 January 1995 regulations), but also to SPS measures passed prior thereto and still in force thereafter (pre 1 January 1995 regulations still in place).

[12] SPS measures cannot be maintained without sufficient scientific evidence. *Japan - Varietals* is the first, and so far the only, dispute where this requirement was expressly addressed.

[13] While risk assessment for "food-borne" risks requires only the evaluation of the potential for adverse effects on human or animal health, risk assessment for disease or pest risks calls for the evaluation of the likelihood of entry, establishment or spread of a disease, and of the associated potential biological and economic consequences.

[14] I.e. a separate risk assessment must be conducted for each substance; also, the studies part of a risk assessment need to be specific enough in that they address the particular kind of risk at stake.

[15] Under Article 5.7 of the SPS Agreement, WTO Members can enact a provisional SPS measure if this measure is: (1) imposed in respect of a situation where "relevant scientific information is insufficient"; and (2) adopted "on the basis of available pertinent information". However, such a provisional measure may not be maintained unless the Member

Varietals - the only dispute so far where the defendant argued that its measure was a provisional one - found that these four requirements are cumulative in nature. The Appellate Body also defined the possibility of taking provisional measures as "a qualified exemption" from the obligation to maintain SPS measures with sufficient scientific evidence, which means that the party imposing a provisional SPS measure has the burden to prove that it meets all four requirements.

In *EC - Hormones*, the EC did not claim that its import ban was a provisional measure. It invoked the *precautionary principle*, which is a "code word" for Article 5.1 of the SPS. The Appellate Body ruled that the *precautionary principle*, other than that expressed in SPS Article 5.7 on provisional measures, does not override the obligation to base SPS measures on a risk assessment. The Appellate Body's note on the status of the *precautionary principle* in international law is of special interest: "it is regarded by some as having crystallized into a general principle of customary international environmental law. Whether it has been widely accepted by Members as a principle of general or customarv international law appears less than clear ... We note that ... the precautionary principle, at least outside the field of international environmental law, still awaits authoritative formulation"[16].

3.1.2 Extra-jurisdictional activity

Determining the scope of trade measures for environmental purposes requires finding an answer to the following question: to which extent may states restrict free movement on the basis of a threat which does not find physical expression in the territory of the state adopting the measure? This question arises both in the context of measures with an *extra-territorial* effect, and also as a result of the "scientization" of dispute settlement under the WTO, as evidenced by the SPS.

The *extra-territorial* issue concerns the legal capacity of member states to restrict trade with a view to protecting environmental resources situated outside of their territory. Almost invariably this issue arises in a context of the application of domestic *PPMs* - as distinguished from *product* standards. The reason PPM related issues are often framed in the language of *extra-territoriality* is simple. Trade measures based on *PPMs* are usually motivated by concerns over environmental

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which adopted it: (1) "seek[s] to obtain the additional information necessary for a more objective assessment of risk'; and (2) "review[s] the . . . measure accordingly within a reasonable period of time".

[16] Cited from Pauwelyn, J. *,The WTO Agreement on Sanitary and Phytosanitary (SPS) Measures as Applied in the First Three SPS Disputes*, in *Journal of International Economic Law* (1999), p. 651.

impact, not in the state imposing the restriction, but in the state from which the goods originate or, in the case of exports, for which they are bound.

The GATT rules do not allow its members to take extra-territorial trade actions, i.e. to use trade measures to enforce a member's own domestic laws in another member state - even to protect animal health or exhaustible natural resources. For instance, WTO members cannot impose any trade restriction or duty surcharge on goods produced in countries with less stringent *PPMs*. There is no agreement in the WTO to harmonize *PPMs* at a high level of environmental protection.

Since *Tuna II,* the *product-process* distinction has been a fairly bright-line bulwark against sliding down a slippery slope of blocking products at the border for activities related to production, including environmental measures. It has been consistently held that GATT Article III (*national treatment*) requires a comparison between products, and not a comparison between the policies or practices of the importing state and the state of origin. Products that are intrinsically comparable will be considered as *like*, regardless of differences in the manner in which they have been produced or harvested. However, the *Shrimp/Turtle* case seems to signal an evolution of the WTO towards dealing with the issues of *PPMs*.

This evolution is not without a legal precedent. The Agreement on Trade-Related Intellectual Property Rights (TRIPs) is essentially an agreement on *PPMs*; it allows countries to discriminate at the border between goods that are identical in every way but that have been produced using different processes, one legal and the other illegal. By redefining *like* goods in its particular context, TRIPs manages to function without eroding the basic principles of national treatment and MFN.

Part of the jurisprudence carried forward from the GATT has been to look at the notion like product in Article III.4 of GATT (*national treatment* of *like* products). The resort to GATT Article III.4 in the *Shrimp-Turtle* and *Asbestos* promoted apprehensions that the concept of a *like* product has been reopened to accommodate non-trade concerns, including environment, labour and other human rights.

Significantly, the "construction" of *like* for the purposes of comparing domestic and imported products, and an answer to the question of whether a given trade measure is discriminatory or not is complicated by the fact that, in the WTO, it is considered as an issue of policy rather than an issue of fact. "Likeness" is conceived as, in part, contingent upon the aim and effect of the measure and

whether it is such as to afford protection to domestic product against a backdrop of consideration of the overall legitimacy of the measure in terms of its regulatory purpose or protectionist aim or effect. This may account for the fact that when it comes to *PPMs* in trade-environment cases, there is consistency in terms of result though not in terms of reasoning.

Arguably, a more targeted option would be to revisit the definition of (product) *related* and make it more "elastic" by including the notion of *related but not detectable PPMs*. In other words, a question could be posed as to whether the fact that any given PPM cannot be detected in the final good also means that it is not related to this product. There are those who argue that certain *PPMs* are not only related to the product but a quintessential part of it even though they cannot be detected.

Scientific progress, particularly biotechnology, as well as "scientization" of trade measures are pushing the limits and relevance of decades old terms such as *like* product. Yet tweaking the definitions relating to the fundamentals of the multilateral trading system is a dangerous path. At some point the international community will probably have to square the circle either through a negotiated solution or by an imposed settlement.

Little progress has been made in dealing with the PPM issue in the context of eco-labelling. The views vary widely. Some think that the TBT covers eco-labelling, others think it does not, while yet others think the TBT covers eco-labelling by exclusion. Discussions in the WTO have focused on multi-criteria eco-labelling schemes, especially those that are based on non-product related *PPMs*. Proposals have been made to extend the coverage of the TBT to include eco-labelling schemes based on non-product related *PPMs*.

The effects of "type-1" eco-labelling on international trade, particularly imports from developing countries, have so far been limited.[17] However, developing WTO members fear that, without strict international disciplines, eco-labelling schemes, especially those based on the life-cycle approach[18], may spin out of control. The EU is very much in favour of developing eco-labelling schemes, the position of the US, especially after the bio-safety negotiations, is no longer very clear. It would appear that the interest in eco-labelling is, at least in part, attributable to the fact that from trade-

[17] "Type-1" eco-labels, in the terminology of the ISO, may be awarded by a third party to products that meet (multiple) preset environmental criteria, generally following a "life cycle" approach.

[18] Eco-labels following the latter approach are frequently based on criteria that relate to only a few aspects of a process of production or of a product. This creates the potential for unwarranted trade restriction, in particular protectionism in disguise.

policy point of view, it involves many complex issues, such as *PPMs*, the definition of international *standards* and the concept of *equivalency*. Up to date, the debates in the WTO on these issues have not advanced too far. In the International Organization for Standardization (ISO), progress has been made in developing guidelines on transparency, conformity assessment and mutual recognition. One thing is clear though: for a standard to be truly international, there is a need to ensure an effective participation of developing countries in standard setting.

The *Tuna II* decision, to permit import restrictions for the protection of health or exhaustible natural resources only within the jurisdiction of the importing party, has significant implications for Multilateral Environmental Agreements (MEAs). Under certain circumstances, it may be WTO-inconsistent for a WTO member to comply with trade restrictions required by certain MEAs. Logically, the mere fact that trade measures MEAs may contain were negotiated and agreed by consensus in a multilateral context should serve as a guarantee against discriminatory action and abuse for protectionist purposes. However, the relationship between WTO rules and MEAs in general is far from clear.

It is estimated that there are more than 500 international treaties and other agreements related to the environment, of which 323 are regional. By far the largest cluster of MEAs is related to the marine environment, accounting for over 40% of the total, and is distinguished by the United Nations Convention on the Law of the Sea (UNCLOS) (1982), new IMO marine pollution conventions and protocols, the Global Programme of Action for the Protection of the Marine Environment from Land-based Activities (1995), as well as the regional seas MEAs and regional fisheries conventions and protocols. Biodiversity-related conventions form a second important but smaller cluster, including most of the key global conventions: the Convention concerning the Protection of the World Cultural and Natural Heritage (1972), CITES (1973), CMS (1979) and CBD (1992). The cluster of nuclear-related MEAs remains important with the addition of 9 global conventions and protocols and several regional agreements.

Two new important clusters of MEAs emerge: the chemicals-and hazardous waste-related conventions that are primarily of a global nature, and the atmosphere/energy-related conventions. Among the former, the Rotterdam Convention (1998) figures prominently, and the new POPs[19] convention was adopted in Stockholm in May 2001. At the forefront of the atmosphere/energy-

[19] Persistent organic pollutants.

related conventions are the Vienna Convention for the Protection of the Ozone Layer (1985) and its Montreal Protocol (1987) and the UNFCCC (1992)[20].

Trade measures included in the MEAs can include bans, product standards, notification or labelling requirements attached to the import or export of goods. In some cases, the MEA itself defines "specific" trade measures to be taken, as for example in CITES, Basel Convention or Montreal Protocol[21]. In other cases, the MEA obliges signatories to fulfil certain objectives, and the signatories may do so by resorting to "non-specific" trade measures, which may have trade implications and therefore interact with trade rules. The distinction between the two types of measures is important. Whereas the first type can claim to be based on some degree of international consensus, the second has no such *prima facie* claim to legitimacy.

The other important distinction from a trade perspective is whether the measures are applied against parties to the agreement or to non-parties who have not voluntarily agreed to be restricted by the terms of the MEA. For instance, 30 members of WTO are not party to Basel Convention, 15 to CITES, 7 to the Convention on Biological Diversity, 8 to the Montreal Protocol (Vienna Convention), and 128 to the Kyoto Protocol of the United Nations Framework Convention on Climate Change.[22]. So far, no trade measure taken pursuant to an MEA has been challenged in the WTO by a non-party. It is unsure whether this would happen in the future but the legal ambiguity surrounding the possibilities of such a challenge causes uncertainty and doubt over the effectiveness and legal status of such measures and thus weakens MEAs[23].

Proposals addressing this problem can be grouped into three categories: *status quo, ex post* or *waiver*s, and *ex ante* or *environmental window*. The proponents of the *status quo* proposals believe that there are already adequate provisions in the WTO rules for addressing trade measures in MEAs. Interestingly, these countries include those who believe that the WTO rules are clear in sanctioning many such measures (e.g. the United States) as well as those who believe the rules are clear in prohibiting them (e.g. India).

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[20] For an overview of MEAs, see *International Environmental Governance*, Report of Executive Director of UNEP, IGM/1/2, 3 April 2001, (Meeting of the Open-ended Intergovernmental Group of Ministers on International Environmental Governance, New York, 18 April 2001.

[21] As far the Motreal Protocol is concerned, such measures are limited to trade bans with non-parties.

[22] For details, see *Matrix on Trade Measures Pursuant to Selected MEAs*, Informal note by the WTO Secretariat, WT/CTE/W/160, 19 September 2000.

[23] The premature implementation by the EU of the Basel Ban Amendment, which is not yet in effect, is one case in point.

The proponents of the *waiver* proposals suggest that the WTO might grant waivers to its rules for trade measures in MEAs that meet certain criteria, either on a case-by-case basis or automatically. Such waivers normally require a three-quarters majority to be approved and are time-limited but renewable. The criteria proposed for trade measures to support environmental objectives include such notions as necessity, proportionality, least-trade restrictiveness, effectiveness, broad multilateral support, and adequate scientific evidence.

The proponents of the *ex ante* or *environmental window* approach argue that greater certainty is needed for negotiators of MEAs and that the waiver approach fails to provide this certainty. They propose a modification of WTO rules, such as an expansion of the *general exceptions* under Article XX of GATT, or the drafting of an understanding, or a non-binding set of interpretative guidelines, that would spell out under what conditions the WTO would accept the use of trade measures taken pursuant to MEAs. A stronger version of this proposal includes the reversal of the burden of proof as a possibility to provide greater security without altering the rights and obligations of WTO members.[24]

3.1.3 Institutions, rules making and implementation

As far as institutions are concerned, the WTO has a very limited mandate. Trade and environment matters are discussed primarily in three fora: *the Committee on SPS*, *the Committee on TBTs*, and *the Committee on Trade and Environment (CTE)*. Discussions are centred on domestic health, safety and environmental protection, and the relationship between the provisions of the multilateral trading system and trade measures for environmental purposes, including those pursuant to MEAs, which is one dimension of the extra-jurisdictional activity. At the insistence of developing countries, the CTE has also been tasked with considering the environmental benefits of removing trade restrictions and distortions and the need to promote sustainable development.

The WTO's *Dispute Settlement Mechanism* (DSM) is a quasi-judicial system that, strictly speaking, does not operate on precedent: panels and the Appellate Body are not bound by previous rulings so the pendulum can, at least in theory, easily swing the other way. However, there is a perception

[24] It is a generally-accepted canon of evidence in civil law, common law and, in fact, most jurisdictions, that the burden of proof rests upon the party, whether complaining or defending, who asserts the affirmative of a particular claim or defence.

that, while the Appellate Body and Panels do not legally bind members of the WTO, their precedent setting value is significant.

For some, this perception is aggravated by the fact that, although dispute settlement bodies arrive at acceptable decisions, the way they do that is questionable. There is little "judicial economy" in the work of panels[25]. On the positive side, this approach ensures that the Appellate Body disposes of the necessary factual assessments by the panel to complete a possible appeal in the event the Appellate Body reverses the panel's first finding of violation[26]. Dealing with more claims may also facilitate the process of implementation of the reports, in that both parties are informed more extensively about their rights and obligations. On the negative side, this practice opens the door to "judicial activism".

The WTO dispute settlement rules are contained in the *Dispute Settlement Understanding* (DSU, Annex 2 to the WTO Agreement), which includes some comments on the philosophy, the direction and the purposes of the dispute settlement procedure. Article 3.2 of the DSU contains an interesting statement which, roughly paraphrased, says that none of the reports of the dispute settlement procedure should result in a change in (addition to, or subtraction from) the rights and obligations of the WTO members. This statement is generally understood as a warning against "judicial activism".

However, at least since the *Shrimp-Turtle*, the judicial process at the WTO took the so-called "evolutionary approach" to interpreting treaty language. The evolutionary development of case law has prompted serious concerns as legal decisions arrived at in the WTO do not necessarily take account of discussions in the CTE or reflect the positions of all member states. The question then: is an Appellate Body function or a negotiating function needed to address extra-jurisdictional problems such as *PPMs* or MEAs?

In the *Shrimp-Turtle* case, the Appellate Body ignored that question, while at the same time suggesting it could uphold border measures that were really targeted at *process* rather than *product*. This issue remains open, and it will be interesting to see where it leads. Thus far, efforts to have a decision-making process or a negotiating process solve some of the environmental clashes with trade have failed. There is a very strong impetus to push those issues in the direction of resolution, and the dispute settlement process is a logical target. However, there is an apprehension that, Article

[25] Traditionally, once a GATT panel had found a violation in respect of one legal claim it did not further address the other legal claims. However, under the new WTO dispute settlement system, with a newly created appeals organ, panels have often opted to examine more than one claim, even if they found a violation under the first claim.

3.2 of the DSU notwithstanding, rulings on dispute brought under the GATT/WTO do add to the obligations and detract from the rights of members and this is how counties win or lose their cases. Those, mainly developing, countries that have a problem with "judicial activism" argue that it is for the members themselves to examine whether there is a need to modify trade rules, and, if deemed necessary, proceed on the basis of consensus. This approach would add legitimacy to the multilateral trading system and reduce pressure on dispute settlement mechanism.

The most bold scenario is for the WTO to address environmental concerns as it has addressed a number of other areas of specialized application of trade law: by creating an agreement on trade-related environmental measures (TREMs). One article in TREMs would address *PPMs* and similarly establish the ways in which PPM-based discrimination may and may not be used, according to the types of instruments, the circumstances, and the prerequisite and supplementary measures that accompany them. Another article would spell out what constitutes an MEA, what constitutes a trade measure, how different types of trade measures should be treated, and what types of complementary measures must be applied under what circumstances. The article would also set up a mechanism for dispute settlement. In essence, this would curb unilateral measures by bringing them under multilateral discipline.

In the WTO rule making process, the EU and the US have been the main *demandeurs*. Japan has generally refused to act as a *demandeur* of much of anything in the GATT/WTO, and trade-environment issues are no exception. The developing countries have consistently resisted environment-friendly trade-environment provisions in the GATT/WTO, but at the conclusion of the Uruguay Round were induced to accept those through the *single undertaking*, which included the SPS, TBT as well as other WTO Agreements)[27].

Discussions on trade-environment rule making have been bogged down in a North-South conflict, which can be termed as "mainstreaming *versus* implementation". The proponents of “mainstreaming” - mainly developed countries - argue that transferring specific issues to negotiating bodies may facilitate progress, while a wider coverage of issues in trade negotiations will create a larger “opportunity space” for trade-offs.
The developing countries feel that, an open-ended agenda on trade and the environment would compromise the principle of consensus, upset existing checks and balances, and diffuse the work

[26] The Appellate Body itself cannot make findings of fact nor can it remand a case to the original or another panel.

conducted by WTO, making it more difficult for developing countries to participate effectively in policy making. They argue that "mainstreaming" makes sense only in supportive measures, particularly technology transfer, technical and financial assistance through effective binding provisions in WTO Agreements[28].

Developed countries, led by the EU (and the US), have sought to establish or clarify WTO provisions allowing the maintenance of trade measures that protect the domestic environment and address some extra-jurisdictional activity deemed inappropriate by MEAs. More recently, proposals to this effect have been made by Canada (for criteria for the use of trade measures), Switzerland (MEAs and WTO to restrict to own competencies) and New Zealand (on a consultative mechanism on trade measures). Many developing countries, led by India, Egypt and Brazil, have shown little or no interest in such provisions and instead champion rules that would further limit or raise the costs of maintaining trade measures aimed at protecting the environment, which these countries often consider discriminatory and trade restricting.

The developing countries have instead pushed their own agenda set around the following issues: market access; greater transparency of environmental regulations, with reporting requirements going beyond those already required in the SPS and TBT Agreements; modifying the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS);[29] concluding an agreement on exports of domestically prohibited goods-goods; and developing an understanding that restricts the use of eco-labelling. While views on these proposals are many, the points of convergence are few and concern mainly "win-win" situations, in particular with respect to agriculture, fisheries and environmental services.

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[27] Failure by developing countries to sign the Uruguay Round's single undertaking would have jeopardized MFN treatment of their goods because the United States and the European Union were withdrawing from GATT 1947 and joining GATT 1994, the latter of which constitutes an integral part of the single undertaking.

[28] There is always a possibility of *de facto* "mainstreaming" as environmental issues may be raised in any negotiating group, including under "other business", even if they are not explicitly mentioned in the negotiating mandate. It is all the more important to establish a clear hierarchy between the deliberations of the CTE and those of the negotiating groups in future trade negotiations.

[29] The scope for adjustment here is rather broad and is circumscribed by issues such as access to environmentally friendly technology (Article 7); additional protection of geographical indications (Article 23); patentability of technologies that can harm the environment, with special reference to GMOs (Article 27.2); implementation of effective *sui generis* systems (Article 27.3b); disclosure of origin (Article 29), technology transfer to least developed countries (Article 66.2); and, last but not least, technical and financial assistance to developing countries (Article 67).

3. 2 European Union

3.2.1 Maintenance of domestic standards

Article 28 (formerly Article 30) of the EC Treaty provides that all quantitative restrictions and measures having equivalent effect shall be prohibited. In the *Dassonville* case, the European Court of Justice (ECJ) interpreted the concept of "measures having equivalent effect" as "all trading rules enacted by member states which are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade".[30] As defined in *Dassonville*, Article 28 appears to prevent discriminatory and non-discriminatory environmental measures affecting trade. The *Dassonville* formula has been criticized as being too broad, and a number of authors have advised the Court to reduce the scope of application of Article 28.[31].

Two exceptions, however, temper this sweeping free trade principle. Article 30 (formerly Article 36) allows Member States to adopt measures that are *prima facie* incompatible with Article 28 if they pursue non-economic goals, such as the protection of human health or life, animals, or plants. In addition, the *rule of reason*, which originated in the *Cassis de Dijon* case[32], allows member states to adopt non -discriminatory trade-restrictive measures to protect a series of *essential requirements*, including the protection of health and the environment.

It appears that the EU provides member states with a right similar to that of the WTO members to restrict imports from other member states that do not comply with domestic levels of health, safety and environmental protection. As in the GATT/WTO, these rules are circumscribed by a set of tests that consider environmental as well as trade concerns: the import restriction must be maintained in a manner that provides for national treatment, the MFN treatment, and scientific risk assessment. Unlike the GATT/WTO, the EU also provides for upward harmonization or approximation of member states' standards at a high level of protection. This dual approach has led to more extensive convergence on domestic environmental protection than in the GATT/WTO.

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[30] Case 8/74, Procureur du Roi v. Dassonville et al., 1974 E.C.R. 837.
[31] For details see Steiner, J., *Drawing the Line: Uses and Abuses of Article 30 EEC*, 29 *Common Market Law Review*, 749 (1992), White, E., *In Search of the Limits to Article 30 of the EEC Treaty*, 26 *Common Market Law Review*, 235 (1989).
[32] In its judgement, Case 120/78, Rewe-Zentrale AG v. Bundesmonopolverwaltung fur Branntwein, 1979 E.C.R. 649, the European Court indicated that the principle of mutual recogniton is~~n~~ inapplicable if the standards of the Member State of export are insufficient to ensure an adequate level of protection.

The trade-restrictive effects of product standards, including environmental product standards, have been a major source of concern in the EU. The harmonization of environmental product standards has been used as a prime instrument to ensure the free movement of products, relying more heavily on uniform standards than any other approach. For example, total harmonization regimes have been adopted for vehicle emission standards, chemical substances, pesticides, and batteries. In a number of circumstances, however, the EC has opted for less all-encompassing strategies of harmonization. Thus, in regulating noise-generating equipment, the EC has adopted a strategy of optional harmonization that bars member states from requiring companies to meet national standards that are more stringent than the EC norm. The EC has also undertaken to harmonize certain forms of "pre-standards". For example, harmonized risk assessment procedures have been set up for manufacturers and importers of all new chemical substances. In recent years, the EC harmonization strategy has increasingly relied on *essential requirements* necessary to ensure the free movement of a product. The task of drawing up detailed regulations based on those essential requirements is left to European standardization organizations, such as Comité Européen de Normalisation.

3.2.2 Extra-jurisdictional activity

The EU also goes further than the GATT/WTO in addressing extra-territorial activities[33]. Thus EU rules specifically permit some import bans directed at poor environmental protection that is taking place outside a member state's territory. Perhaps even more significantly, to limit distortions of competition that may be created by inconsistent environmental standards, the EC has increasingly moved to a regime of minimum PPM standards and has adopted a large number of directives dealing with air, water, waste and chemicals.

This approach recognizes that some variation in *PPMs* is legitimate and should be expected given the varying circumstances of the member states. It also protects against the possibility that low *PPMs* reflect regulatory failure, rather than careful matching of environmental requirements to local circumstances. Minimum standards, moreover, reduce the pollution control cost disparities across the member states, narrowing the environmental-cost-based competitive advantage available to producers in low-standard jurisdictions. The adoption of minimum process standards, while helping

[33] External relations competence in trade and environment fields remains with the member states unless a matter is explicitly and unanimously extended to the Communities, presumably in the course of internal harmonization. At the same time, the EC is responsible under international law for compliance with the GATT/WTO owing to full membership of the Communities in the WTO. Members of the WTO may therefore bring complaints in such matters against the EC, one or more member states, or both, due to individual membership in the WTO.

to maintain fair conditions for competition, does not prevent any member state from adopting stricter national standards.

In certain circumstances, the EU has opted for more flexible strategies of PPM harmonization. For example, the EU adopted a multi-tier harmonization strategy for controlling air pollution from large combustion plants. Considerable controversy has emerged over whether standards should also be differentiated on the basis of differences in ecosystem assimilative capacity[34]. The EU members eventually settled on a strategy of harmonized options, whereby effluent standards or emissions limits would be the general rule but a member state could, under strict conditions, opt for an alternative system of ambient quality standards.

The controversy over which regulatory technique should be used to harmonize industrial processes has never been totally resolved. Members disagreed over how to set emissions limits. Certain member states argued that these limits should be fixed at the EC level on the basis of the *best available techniques*, that is, technology based effluent standards. Other member states argued that effluent limits should be adopted at the national level pursuant to more flexible environmental quality standards. These member states suggested that ambient standards would permit them to take into account their environmental circumstances and to exploit their natural locational advantages. The common position reached by the Council (1995)[35], which has then been formally adopted and become binding law, attempted to reconcile these competing positions. Member state authorities would grant emissions limits to the controlled installations based on the best available techniques, without prescribing the use of any technique or specific technology, but taking into account the technical characteristics of the installation concerned, its geographical location and the local environmental conditions.

In general, minimum harmonization measures, set out in Community *directives*, establish a "floor" of obligations below which member states may not go. The "ceiling", circumscribing the legitimate scope of more stringent measures introduced by member states, is constituted by the EC Treaty and in particular (in the context of goods) by Articles 28-30 thereof.

Somewhat paradoxically, it appears that, in the view of the ECJ, minimum harmonization may sometimes be exhaustive in nature. It certainly seems to be a preference on the part of the ECJ to

[34] Harmonized ambient standards, in contrast with emissions limits, preserve the comparative advantage of industries located in regions that are less polluted or better able to absorb pollution. For instance, the use of water quality standards rather than effluent limits would allow a country to exploit a locational advantage.

interpret environmental directives laying down minimum standards as exhaustive in nature whenever the trade measure is meant to promote environmental protection outside of the territory of the regulating state, even if the directive does not expressly establish the territorial limits to stricter national measures. For instance, in the V*eal Calves in Crate* case[36], the ECJ, while recognizing the "minimum" nature of the obligations laid down in the 1991 directive[37], insists that this directive is such as to lay down "exhaustively common minimum standards". In other words, the directive was interpreted in such a way as to represent both the "floor" and the "ceiling" in terms of member state obligations, thus precluding the member state from recourse to Article 30. This case is distinctly different from, for instance, the *Aher-Waggon* case[38], where the ECJ's approach was consistent with traditional conceptions of minimum harmonization.

There are nuances, of course[39]. Whereas some directives (e.g. *Protection of Calves* of 1991) delimit the territorial scope of application of stricter national measures, others (e.g. *Wild Birds*) do not[40]. Consequently, there is, in respect of the latter, considerable room for manoeuvre. It is therefore significant that the ECJ found that the Danish ban on the marketing of "dead red grouse", a bird species not native to the Netherlands and hunted in the United Kingdom in accordance with the minimum standards laid down in the *Wild Birds* was not compatible with the Directive[41]. The decision implies that the ECJ is sceptical about the legitimacy of trade restrictions adopted with a view to protecting "foreign" environmental goods, at least in so far as these are not conceived as "shared". In this way, just as the protection of consumers in other member states is not, as such, a matter for the national authorities, so too environmental interests may be conceived as territorially bounded, except in the case of those defined as concerning common or shared resources. This ambiguity "mirrors" the WTO approach to *PPMs* and MEAs.

The ECJ approach appears to be distinctly different when it comes to trade measures predicated upon the physical impact of the imported goods on the health of consumers in the importing states. In such cases

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[35] Directive 96/61, supra note 178, at article 9(4).
[36] Case C-1/96 (1998) ECR I-1251. For details see Elworthy, S., *Crated Calves and Crazy Cows: Live Animals and the Free Movement of Goods*, in Holder, J., *The Impact of EC Environmental Law in the Unite Kingdom*, Wiley, 1997.
[37] Council Directive 91/629/EEC OJ 1991 L240/28.
[38] Case C-389/96, judgement of 14 July 1998.
[39] For details see Scott, J. *On Kith and Kine (And Crustaceans): Trade and Environment in the EU and WTO*, Harvard Jean Monnet Working Paper 3/99, Seminar and Workshop on Advanced Issues in Law and Policy of the European Union, NAFTA and the WTO, Harvard Law School, Cambridge, USA, 2000.
[40] Council Directive 79/409/EEC OJ 1979 L103/1.
[41] The Court held that stricter measures could be enacted only in respect of bird species occurring within the territory of the regulating state, or in respect of species which are endangered or migratory which constitute a common heritage of the Community.

considerations of what is "right" and "wrong" in terms of *PPMs* give way to considerations of what is "good" or "bad" in terms of physical impact. The *Hormones in Beef* case is very telling in this regard[42].

The first *hormones* case was brought before the ECJ almost a decade before the EU hormones regime came to form the subject matter of WTO dispute settlement proceedings. While scientific arguments figured prominently in the ECJ and the WTO organs, when it came to evaluating justifications for trade measures, the qualitative threshold for establishing the existence of risk was lower in the EU context. It should, however, be stressed that the reluctance of the ECJ to second-guess legislative policy choices occurred in the context of a trade measures conceived as facilitating rather than impeding market integration. Indeed had the measures not been enacted, the different approaches adopted by the member states to the administration of hormones in farming might have resulted in market fragmentation as a result of member state recourse to the Article 30 EC exception (formerly Article 36). In other words, when a particular trade measure is such as to impede free movement of goods, the ECJ is more inclined to assess the credibility of claims made, and to do so on the basis of scientific rationality.

The uncertainty that continues to characterize the EU approach to the issue of extra-territorial environmental protection is indicative of the fact that the ECJ has not clarified the territorial scope of the EC Treaty environmental exceptions. It is obvious that the reticence of the ECJ on this point is not matched by a similar degree of restraint on the part of various GATT/WTO panels as evidenced by two *Tuna I* and *II* and *Shrimp-Turtle* cases.

3.2.3 Institutions, rule making and implementation

The EU institutions dealing with trade-environment are better developed, perform more functions, and provide more avenues for participation by NGOs than those in the GATT/WTO. Most EU environmental legislation is adopted by population-weighted voting by member states in the Council, subject to parliamentary action, a process known as *qualified majority voting*. The absence of a unanimity requirement makes environmental and standards harmonization in the EU technically easier to undertake than under the GATT/WTO, which requires consensus, while safeguards ensure that national environmental measures will not be replaced by less stringent EU standards.

The EU law enjoys unqualified supremacy in all member states. Moreover, some EU laws may have direct effect in all member states. The status of EU law creates the possibility of legislating

[42] Hormones in beef have been the subject matter of a number of cases before the European Court brought by organizations representing business and agricultural interests: Case 160/88 (1988) ECR 6399; Case 160/88R (1988)

environmental regulations or creating other environmental laws in Brussels that must be enforced by the national courts of all member states despite inaction by a national legislature or the existence of prior inconsistent national law[43]. Such a possibility does not exist in the WTO.

The *Single European Act* (SEA) added several provisions to the EC Treaty designed to address the complexity of the decision making process and the existence of competing interests among Member States. First, the SEA replaced the traditional unanimity voting system by a system of qualified majority voting, *Article 100a(1)* has considerably simplified the decision making process, thus facilitating the adoption of strict emission standards over the objections of laggards. Second, *Article 100a(3)* requires the Commission to "take as a base a high level of protection" in its proposals concerning health, safety, environmental and consumer protection. Third, Article *100a(4)* authorizes, in certain circumstances, member states to apply more strict national standards rather than EU harmonized standards if they deem it necessary to protect the environment.

Selective judicial invalidation of trade measures, sometimes referred to as "judicial bounding", is the mainstay of EU's measures to ensure that product standards do not unduly restrict market access. While the GATT/WTO and the EU each have a rule suggesting that the trade measure in question must be the least trade restrictive means necessary to achieve the measure's legitimate purpose, the ECJ has interpreted the rule potentially more broadly as requiring *proportionality* - a balancing test between the trade restrictiveness of the measure and the purpose of the measure[44]. This test invites a determination by the ECJ as to the importance of the measure's purpose, effectively substituting the Court's judgement about risk aversion for that of national authorities[45].

Not unlike in the WTO, there is a North-South split within the EU in the trade and environment rule making. Germany, the Netherlands and Denmark traditionally support stringent standards and other environment friendly measures, whereas Greece, Italy, Portugal and Spain tend to favour weaker standards and measures; and France and Britain usually fall somewhere in between. However, the

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ECR 4121, Case 34/88 (1988) ECR 6265, Case 376/86 (1988) ECR 0209, Case C-331/88 (1990) ECR I-4023, Case 68/86 (1988) ECR 0855.

[43] Supremacy of Community law is not as firmly enshrined in reality as case law suggests. It depends on legitimacy and persuasion. Rules that are inconsistent with international obligations negotiated by the Community and member states cannot and do not provide such qualities in incidents of protectionist policies.

[44] To pass this test, trade restrictions must be (1) pertinent, that is, there must be a causal relationship between the measure adopted and the attainment of the objective pursued, and (2) the least restrictive method of attaining their objective.

[45] It is to be noted that the ECJ has been careful about intruding on national judgements in adjudicating disputes over import restrictions adopted for the purposes of domestic health or environmental protection.

relatively concentrated EU distribution of power in the hands of *demandeur* countries has facilitated environmental convergence.

The EC remains heavily dependent on national environmental efforts. Its only recourse is to initiate legal proceedings against a particular member or members before the ECJ. This procedure is extremely slow and to date has proven a rather weak deterrent against slack environmental performance. There are proposals for the Commission to play a more central role in implementation and enforcement. Yet, because the current political context is dominated by the principle of subsidiarity, it is unlikely that the powers of the Commission will be increased.

The implementation record of EU is more impressive than that of WTO. A very large proportion of environmental directives have been implemented by all the member states. At the same time, there are wide disparities in the levels of implementation and enforcement of these standards among EU Members. While Germany, Denmark, and the Netherlands, have established sophisticated implementation and enforcement mechanisms, others, e.g. Greece, Italy, and Spain, have failed to develop such mechanisms and generally have weaker implementation and enforcement records.

The EU expansion, which could lead to an organization with 30 or so members by 2010 may create an "implementation gap" that will make "hollow" any harmonization or approximation of standards. The fact that for most EU candidates integration overlaps with transition makes this enlargement the most difficult and complex environmental challenge the EU has ever had. The desire to avoid "*acquis*-picking", where countries choose the easy elements of the integration "menu", or the situation of "multi-speed" Europe, prompted the insistence on the implementation of the entirety of the *acquis* by the new members. The danger of this approach, however, is that, besides the "implementation gap", there will be an ever increasing gap between the contents of the *acquis* and the requirements of the various member states. Deepening and widening at the same time appears to be feasible only within a "multi-speed" Europe. It is no surprise that the total output of new environmental rules in the EU has slowed down considerably in recent years, with revised and updated legislation accounting for a much greater share than primary legislation. This trend can reasonably be expected to continue.

It took about thirty years to reach agreement on some one hundred thousand national regulations and standards and even today, in some areas, the *internal market* is far from being completed. The two instruments to ensure free circulation within EU are either the mutual recognition of legally

marketed goods and services, or the technical harmonization of legislation. According to the ECJ, any product legally manufactured and sold in one Member State should in principle enjoy free access to the other member states markets. Some member states, e.g. Germany, objected to this approach and invoked grounds for special protection of health and the environment. This left the Commission with no other option but to promulgate legislation on technical harmonization. Fearing that lack of harmonization of standards and specifications could undo 20 years of hard work, the EU wanted the preparation of the acceding countries to the *internal market* to be at the heart of a pre-accession strategy. In case candidate countries acceded to the EC without their legislation being harmonized, current member states could retaliate. Adjustment strains in both the current and the new member states would again segment the *internal market*, particularly in sectors where liberalization under the Europe Agreements had been rather limited.

In the Europe Agreements, the countries in accession commit themselves to ensuring that their future legislation will be compatible with EC specifications and standards as far as possible. However, the Copenhagen European Council (1993) wanted these countries to harmonise their standards before their accession to the EU, in an attempt to avoid the distortion of competition and industrial relocation. By applying for membership, the countries in accession have made it clear they are ready for harmonization. However, by requiring these countries to adopt the same legal restrictions on economic activity as it has itself, the EU risks undermining many of the advantages of mutual trade.

4. Conclusions

"Integration of markets also means integration of market failures" (Opschoor, H.), including those relating to natural resource and environmental management. Trade measures can be part of environmental problems or part of the solution to these problems.

Multilateral trading system and the international environmental regime have emerged as the two main sources of international rule making. Environmental issues have found their way on the trade agenda because there are objective linkages between trade policy and environmental policy at the international level. In fact, neither environmental policy nor trade policy can succeed without the other. Importantly, the evolution of rules relating to trade and the environment has to a large extent been propelled not by negotiation but by judicial interpretation.

On balance, the multilateral trade rules are friendly to the environment within the jurisdiction of a WTO member with relatively stringent environmental standards. However, qualifications of these rules may be - and are - used to attack the WTO legality of national environmental laws. While the free trade provisions of the WTO have an extremely broad scope, the environmental exceptions are narrowly defined. The sense of imbalance is heightened by the fact that the exposure goes one way: either the public health or environmental protection standard is deemed appropriate, or it is not allowed to stand. Given this imbalance, the GATT/WTO approach is not likely to increase environmental protection in countries with relatively low standards. In other words, the "net result" of the WTO rules is the maintenance of, rather than improvement in, the level of global environmental protection.

The GATT/WTO dispute settlement and its transmutation into a judicial system is a fascinating example of how international law changes and affects the internal structures of regional economic groupings, including the EU. With the advent of the WTO, additional factors have arisen owing to the new automaticities of the system. They are of practical importance both in terms of defensive and offensive use of the system. Countries are faced with a process of claims and responses, and the fact that "the life of law has not been logic: it has been experience" (Holmes, J.). The EU ranges among the main users of, and commands extensive expertise and experience in, dispute settlement under GATT/WTO. The interpretation of GATT Article XX has shown a measured evolution towards a more environmentally friendly stance. The development has not been linear, however, with the conclusions of some panels not being adopted or the Appellate Body not upholding panel conclusions. The precedent setting value of these conclusions as well as their actual or potential effects on the rights and obligations of WTO members remain open questions.

The EU approach to "judicial bounding" reflects more careful balancing of trade and environment goals than does the WTO's. Contrary to the WTO practice, the EC Treaty also recognizes the importance of the principle of preventive action, the *polluter pays principle*, and the *precautionary principle* as core policy rules governing EU action. While the GATT/WTO and the EU each require trade measures to be *necessary* and *least trade restrictive*, the ECJ balances these requirements in terms of *proportionality*. The proportionality test effectively substitutes the Court's judgement about risk aversion for that of national authorities.

Trade and the environment rule making is a function of economic integration. Experience with the WTO and the EU goes to show that trade liberalization, at some point, leads to the adoption of flanking policies which can balance its positive and negative effects. As integration deepens among members of an economic organization, previously "domestic" regulations such as environmental rules, product standards and competition policy find their way onto the common agenda. More importantly, trade liberalization inherently starts to require, rely upon and develop positive rules, i.e. it depends on common and shared standards and perceptions, or at least, on mutual recognition of national or regional standards.

Product standards may act as barriers to trade and influence market access, process standards influence the costs structure of production and conditions of competition. Market access has been central to the development of GATT/WTO and the EU. Competitiveness concerns are increasingly cited as a reason not to proceed with further trade liberalization. These concerns have so far been dismissed in the WTO as a non-issue, whereas in the EU they have been causing the member states to explore measures to ensure that competition is not distorted by variations in environmental rules.

The premises underpinning the GATT/WTO and the EU legal orders have traditionally been distinct in terms of their approaches to standards and their effects on trade . Whereas Community law is predicated upon the concept of *mutual recognition* of standards, subject to exceptions, the GATT rests upon a foundation of *national treatment*, again subject to exceptions. Nonetheless, the GATT/WTO effectively departs from this principle of national treatment, in favour of mutual recognition, when it comes to the issue of *PPMs*. While in certain respects Community law may also treat product standards and *PPMs* differently, the consequences of this are less pronounced in terms of the premises underlying the system.

There are, of course, other reasons as to why the *PPMs* issue has proved more contentious in the WTO - as opposed to the EU - context. Most obviously, the Community's enhanced capacity for harmonization of standards, including minimum standards for *PPMs*, is of crucial practical and conceptual significance in easing the path from national treatment to mutual recognition. In the environmental policy area, mutual recognition of *PPMs* in the Community operates against a backdrop of a shared regulatory framework constituted at Community level and gradual move towards establishing minimum *PPMs*. By contrast, the WTO does not attempt to harmonize environmental product standards. The TBT and SPS Agreements merely urge WTO Members to

base their regulatory requirements on international standards. In economic terms, greater divergence among the WTO membership accounts for the difference in these two approaches.

The multilateral trading system may be reaching the point where a framework of analysis is beginning to shift from the *functionalist* paradigm to *constitutionalism*, i.e. a framework which is capable of taking into account - and reasonably balance - a broader range of issues and legitimate interests in its operation and dispute resolution[46]. Such interests are, on one hand, horizontal and related to subject matter. They are, on the other hand, also vertical interests, affecting the balance of power between different levels of governance - national, regional and international. The WTO is getting increasingly involved in non-trade or para-trade issues such as international intellectual property protection, sanitary and phytosanitary standards (*Codex Alimentarius*), the environment. It is increasingly developing into a cornerstone of international economic constitution-building.

The *essential requirements* harmonization strategy used in the EU seems like an especially useful precedent for the WTO as it moves into the area of positive rule making. The central characteristic of this approach is that harmonization is limited to the adoption of core standards, and that the task of developing the detailed product specifications is left to European standardization organizations. As far as international standards are concerned, two lessons can be drawn from the eco-labelling debate: there is a need to define what an "international standard" is, and to ensure effective and representative participation of WTO member states at all levels of development in international standard setting.

The development of environment friendly trade rules depends on the relative power and interests of *demandeur* states in a particular organization. At the same time, the pace and completeness of national implementation of trade-environment rules appear to parallel roughly each country's position in the process of trade-environment rule making. These two trends suggest that further development of trade and environment rules will take place along regional paths. The EU maintains the most well-developed trade-environment rules, because it is the organization with the deepest integration and power there is relatively concentrated in favour of *demandeurs* countries.

The comparative analysis of trade and environment issues within the GATT/WTO and the EU also suggests a regionalization of trade and environment rule making, with the EU (and some other regional groupings) moving along its distinctive policy making path, and the GATT/WTO barely

moving at all. The biggest drag in the WTO has to do with the so-called "implementation issues" such as finance, access to environmentally sound technologies and, perhaps to a lesser extent, capacity-building. Progress is likely to continue to be slow, and my actually become even more difficult as other countries, such as China and Russia, join the WTO. Similar concerns exist with respect to the EU enlargement, which can provoke gaps in implementation as well as between the contents of the environmental *acquis* and the requirements of the various member states. In practice, even though the candidate countries sign up to the *acquis communautaire* in principle, there must be rather lengthy transition periods before the whole package can conceivably be in place.

Normally, harmonization does not precede free trade, it follows it. Tariff removal is bound to leave new members more vulnerable as their standards and technical regulations in these countries are not sophisticated enough. This vulnerability will be compounded by the fact that in the year 2001, free trade is supposed to cover 96 percent of EU exports to the countries in accession, but only about 70-80 percent of these countries' exports to the EU, since agricultural products are excluded. It would seem more reasonable for the EU to take a relatively hard line in relation to aspects of the *acquis communautaire* that directly affect competitiveness and market access, e.g. industrial pollution controls, while being less concerned about more general aspects, e.g. EU drinking water standards.

The language of science is spoken both in the WTO and the EU. However, when it comes to evaluating justifications for restricting trade, the qualitative threshold for establishing the existence of risk appear to be lower in a EU context, at least in so far as substances which are generally accepted as dangerous are concerned. This reflects not merely the uncertainty which characterizes costs and benefits in a context of unknown (unknowable) risk, but also the modern conceptions of science - and economics - as capable of delivering merely a version of the "truth", which has its roots in the premises, methodologies and values of the system within which it is articulated.

Whatever the differences in legal orders are, the basic fact remains that different (groups of) nations have different levels of tolerance for environmental - and health - risks[47]. Scientific progress and the "scientization" of trade measures make the use of trade measures for environmental purposes an increasingly difficult balancing act in the multitude of "truths" produced by social science, societal preferences, cultural values, traditions - on top of differing levels of economic development. The

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[46] See Cottier, T. *Dispute Settlement in the World Trade Organization: Characteristics and Structural Implications for the European Union*, Common Market Law Review, 35, 1998, pp. 325-378.

[47] The absorptive capacity of their natural environment also differs greatly.

concept of "scientific diplomacy" is becoming more and more relevant to the trade and the environment agenda. Much international disagreement on trade and environmental issues has to do with the relative weights assigned to science and societal preferences. While science is an essential element in assessing potential health and environmental risks, the management of such risks is *in fine* the responsibility of policy-makers. Decisions to avert potential risks are called for also in cases where science does not provide a full answer, or when it provides several alternatives. Promotion of "scientific diplomacy" may prove instrumental in handling the implications of *precautionary principle* in the context of trade rules.

The issue of "product *versus* process" has emerged as the major stumbling block in advancing the trade and environment agenda. There are two facets to this issue though. One is *process standards* and their influence on market conditions. The other, arguably much more important, aspect is the (quality of) *political process*. While discussions of trade measures for environmental purposes tend to be couched in the language of economics and competition law, the underlying problems do not reflect exclusively, or arguably even principally, economic or competitiveness concerns. Rather, they bear testimony to the moral dimension of nations' relationship with nature. So far as trade measures for non-trade purposes reflect the diversity of national values and of the norms giving expression to these values, they pose a formidable challenge to international trade.

Central to this challenge is the well-known fact that the capacity of states to regulate in areas such as the environment is contingent, in practice, upon their capacity to demand compliance with these standards on the part of their trading partners. Dealing with this challenge though judicial or quasi-judicial means has its limitations. For instance, application of the *proportionality principle* is a matter of judgement. It is becoming increasingly clear that not only are courts structurally ill-equipped for dealing with trade measures for non-trade purposes, but this gives rise to profound issues of legitimacy, which, ultimately, have consequences for the acceptance of their decisions and their authority. It is thus the quality of the political process, in terms of interest representation and participation, which is largely viewed as providing the basis for the evaluation of national measures, rather than the substantive merits of the decision from the perspective of the actor enjoying the power of review.

A widespread procedural turn in European Community law is indicative in this respect: approaching legitimacy through the lens of *process* rather than *outcome* and insisting not only upon an expanded participatory basis in (national and international) decision-making, but also upon civic

deliberations. In the WTO, increasing emphasis is being placed on the duty to negotiate and the procedural mechanisms underpinning the certification process. The right to be heard, to appeal, seek review of a certification decisions, and to receive reasoned notification of outcome, are increasingly cited as a factor in invalidating the trade measure in question. These are, in the broadest terms, the seeds of a *process-based* - as distinguished from *product-based* - approach which both the WTO and the EU should develop.

In future, the legitimacy of trade measures for environmental purposes will be judged not merely on the basis of procedural considerations, including the obligation to negotiate seriously, but in the light of their responsiveness to the particular circumstances prevailing in a given state, and their flexibility in acknowledging the equivalence or comparability of different conservation policies adopted by their trading partners. It may be anticipated that measures premised upon a case by case approach, as distinguished from an overall national policy based approach, may have a higher chance of success. In the years to come, preference will be given to non-unilateral measures, i.e. those based on negotiations, international (regional) standards or MEAs.

All said and done, the final conclusion of any study on trade measures for environmental purposes is bound to be unremarkable. Trade measures are seldom the *first best* policy tools to achieve environmental objectives, be it in the multilateral or regional context. They may not be even the *second best* tools. E.g. some argue that the adoption of "home country" standards by TNCs is a superior policy choice (Bhagwati, J.). Which is not to say that trade measures are not necessary. They certainly are, and the PIC[48] Agreement (the Rotterdam Convention), Basel Convention and CITES are very indicative in this regard. However, promoting the *first best* approach is important because it can address the division between the private and the social cost at the source of the environmental problem. It ensures that global or national environmental concerns are met in a manner that is consistent with global or national trade concerns. It is always the least distortive and most efficient measure that can achieve a particular result. It can guide the consultative process between the parties. In the case of a dispute, for instance, the transfer of technology may achieve the primary objective, i.e. protect the environment, avoid a costly (in political and economic terms for all parties) dispute settlement case and thereby reduce the potential for discriminatory or arbitrary measures. There is nothing particularly new about the *first best* approach, but it can go a long way towards finding solutions to the most intractable trade and environment problem - that of *PPMs*. Examining incentives and enabling measures to assist all countries to move towards more

[48] Prior Informed Consent.

environmentally friendly *PPMs* (and comply with provisions of MEAs) may be more useful than pursuing the PPM debate in the context of trade rules.