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pathways to conflict between the WTO and EU

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Article

Diverging EU and WTO perspectives on extraterritorial process regulation

Laurens Ankersmit, Jessica Lawrence, and Gareth Davies*

I. Introduction

Jurisdictions have increasingly begun to restrict the sale of goods on the basis of the processes involved in production; even if these processes left no trace in the finished product. Products produced by environmentally harmful processes, sweat shops, and child labor are all seen as a distinct group for purposes of taxation and regulation.¹

Such process and production method (PPM) measures are analytically distinct from more conventional product regulation, which concerns itself with the physical aspects of the product and the dangers or disadvantages that this product may create for consumers or the environment in the regulating jurisdiction. PPM measures, by contrast, use regulation and taxation to try and prevent human, animal, or environmental harm outside their jurisdiction, and for this reason are sometimes labeled as extraterritorial measures. Whether or not this label can be justified,² PPM measures certainly raise issues of sovereignty

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¹ See *infra* Part II.A for a longer discussion of the evolution of PPM measures.

² See *infra* Part II.A.

and raise questions about the extent of legitimate national interests. The structure of international trade organizations reflects these concerns. For example, both European Union (EU) law and World Trade Organization (WTO) law have derogations from the basic principles of free trade that may be invoked to protect concerns such as the environment, but the extent to which these concerns must be local remains ambiguous.³

This paper puts forward the thesis that while the EU and WTO will inevitably share a number of legal tools in addressing the legal and policy challenges of PPM regulation, there are also reasons to expect an increasing divergence of approach between them. The WTO considers national rules which take PPM measures into account as threats to the international trading system, and the WTO therefore attempts to limit these national rules. By contrast, for the EU, with its broader mandate and broader legislative powers, attempts to integrate economic and non-economic factors in order to fit its self-defined identity and mission.⁴ This contrast between a relatively hostile WTO and a relatively enthusiastic EU may lead to political, rhetorical, and ultimately legal conflicts. We attempt to chart below the landscape in which this may come about.

The WTO (and previously the GATT) has touched on the legality of PPM measures in several cases, all of which have attracted considerable debate.⁵ While the suggestion so far is

³ See Treaty on the Functioning of the European Union art. 36, Dec. 13, 2007, 2010 O.J. (C 83) 53 [hereinafter TFEU]; Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, 1867 U.N.T.S. 154 [hereinafter Marrakesh Agreement]; General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194 [hereinafter GATT];

⁴ See Treaty on European Union preamble, Feb. 7, 1992, 2006 O.J. (C 321) 5 [hereinafter TEU].

⁵ See Appellate Body Report, *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R (Oct. 12, 1998) [hereinafter *US—Shrimp*] (noting in particular the arguments of the European Communities about the relationship between the environment and the international trade regime); Panel Report, *United States—Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R, (Apr. 20, 1996) (adopted May 20, 1996); Panel Report, *United States—Taxes on Automobiles* (not adopted), GATT Doc. DS31/R (Sept. 30, 1994); Panel Report, *United States—Restrictions on the Imports of Tuna* (not adopted), GATT Doc. DS29/R (May 20, 1994) [hereinafter *US—Tuna II*]; Panel Report, *United States—Measures Affecting Alcoholic and Malt Beverages*, GATT Doc. DS23/R - 39S/206 (Feb. 7, 1992); Panel Report, *United States—Restrictions on the Imports of Tuna* (not adopted), GATT Doc. DS21/R

that reference to production methods to restrict imports, and conceivably as a basis for taxation, is not a priori excluded as a matter of principle, there are still many questions open as to what kinds of production concerns may be legitimately relied upon, and to what extent. Many commentators still consider that the extraterritorial aspect of PPM measures will, and should, mean that they can only be used to justify derogations in a limited number of exceptional circumstances.⁶

By contrast, the European Court of Justice (ECJ) has on multiple occasions accepted production-based concerns as a legitimate reason to restrict imports or make tax distinctions with only limited acknowledgment that such measures are an analytically distinct group. These production-based concerns include not just global issues such as carbon dioxide emissions or species protection, but also matters in which the interest of the restricting state is less obvious. Localized pollution risks in another Member State, for example, have been accepted as a legitimate reason to restrict trade; inter-state paternalism – or mutual concern – appears to be at least partially accepted, as issues of sovereignty and jurisdiction have played little role in the Court's thinking or reasoning.⁷

This permissive attitude has even extended to tax law, allowing production methods to serve as an accepted basis for tax distinctions. This is true even where the consequences of the various production methods are entirely local: taxes on beer that

(Aug. 16, 1991) [hereinafter *US—Tuna I*]; Panel Report, *Belgian Family Allowances*, G/32 - 1S/59 (November 6, 1952) (adopted Nov. 7, 1952).

⁶ See, e.g., Jagdish Bhagwati, *After Seattle: Free Trade and the WTO*, in EFFICIENCY, EQUITY, AND LEGITIMACY: THE MULTILATERAL TRADING SYSTEM AT THE MILLENNIUM 50, 60–61 (Roger B. Porter et al. eds., 2001) (arguing that the WTO needs to become more flexible with regard to process and production methods and trade retaliation); John H. Jackson, *Comments on Shrimp/Turtle and the Product/Process Distinction*, 11 EUR. J. INT'L L. 303 (2000) (arguing that the product/process distinction should not be too rigid); Peter van den Bossche, Nico Schrijver & Gerrit Faber, *Unilateral Measures Addressing Non-Trade Concerns* (2007), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1021946 (arguing that non-trade concerns deserve more attention).

⁷ Case C-277/02, *EU-Wood-Trading GmbH v. Sonderabfall-Management-Gesellschaft Rheinland-Pfalz mbH*, 2004 E.C.R. I-11987.

differ based on brewery size,⁸ and taxes on industrial alcohol that differ based on production method⁹ have both been permitted. These taxes were upheld even though the regulating states had no identifiable direct interest, and suffered no direct consequences, from the production methods employed in the other Member States.

Implicit in these European tax cases is a certain degree of acceptance of national desires to maintain ‘fair competition.’ States may want to apply their production-based tax distinctions extraterritorially, not because foreign production methods affect their interests, but in order to prevent competitive advantages accruing to foreign producers.¹⁰ This “fair competition” debate touches on the very essence of international trade theory, in which mutual benefit is founded on the exploitation of different circumstances, rather than the elimination of difference.¹¹ The extent to which such regulatory and jurisdictional competition is politically acceptable or desirable is a debate ongoing in all federal or international trade contexts,¹² but has been particularly central to EU policy throughout its history.¹³

⁸ Case 127/75, *Bobie Getränkevertrieb GmbH v Hauptzollamt Aachen-Nord*, 1976 E.C.R. 1079.

⁹ Case 140/79, *Chemial Farmaceutici SpA v DAF SpA*, 1981 E.C.R. 1.

¹⁰ *E.g.*, Rob Van der Laan & Andries Nentjes, *Competitive Distortions in EU Environmental Legislation: Inefficiency Versus Inequity*, 11 EUR. J.L. & ECON. 131 (2001); Robert Howse & Michael J. Trebilcock, *The Fair Trade/Free Trade Debate: Trade, Labor and the Environment*, 16 INT’L REV. L. & ECON. 61, 74–76 (1996).

¹¹ See generally ADAM SMITH, *AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS* (1776); DAVID RICARDO, *ON THE PRINCIPLES OF POLITICAL ECONOMY AND TAXATION* (1817), for background on the theories of free trade and comparative advantage.

¹² See *e.g.*, DAVID VOGEL, *TRADING UP: CONSUMER AND ENVIRONMENTAL REGULATION IN A GLOBAL ECONOMY* (1995); Daniel R. Fischel, *The “Race to the Bottom” Revisited: Reflections on Recent Developments in Delaware’s Corporation Law*, 76 NW. U. L. REV. 913, 913–20 (1982); Joel R. Paul, *Free Trade, Regulatory Competition and the Autonomous Market Fallacy*, 1 COLUM. J. EUR. L. 29 (1995); Joel P. Trachtman, *Regulatory Competition and Regulatory Jurisdiction*, 3 J. INT’L ECON. L. 331, 331–48 (2000).

¹³ See, *e.g.*, Daniel C. Esty & Damien Geradin, *Regulatory Co-Operation*, in *REGULATORY COMPETITION AND ECONOMIC INTEGRATION: COMPARATIVE PERSPECTIVES* 30 (Daniel C. Esty & Damien Geradin eds., 2001); Horst Siebert, *The Harmonisation Process in Europe: Prior Agreement or a Competitive Process?*, in *THE COMPLETION OF THE INTERNAL MARKET* (Horst Siebert ed., 1990); David Charny, *Competition Among Jurisdictions in Formulating Corporate Law Rules: An American Perspective on the “Race to the Bottom” in the European Communities*, 32 HARV. INT’L L.J. 423 (1991); Patrick B. Griffin, *The Delaware Effect: Keeping the Tiger in its Cage. The European Experience of Mutual Recognition in Financial Services*, 7

It is tempting to further explain the EU sympathy for production-based measures in terms of identity, mission, and values. The EU certainly has a self-image and political sensitivity in which markets and trade are consciously placed in broader context and integrated with other policies and concerns. This image is profoundly rooted in domestic political and social culture: in the corporate, consensus-based social market models of Northern Europe, mutual interference and policy interconnect-edness are seen as inevitable parts of the collective greater good.¹⁴ Trade as an isolated policy field is unsurprisingly alien to the EU Treaties, law, and way of thinking.¹⁵

Rejecting the legitimacy of concern about foreign production processes would therefore leave the EU with a trade policy no longer rooted in domestic political preferences, and ideologically rudderless. We suggest in this paper, however, that there are also more concrete and pragmatic reasons for the EU's apparent embrace of PPM measures—something which is also reflected in Commission policy papers and standpoints.¹⁶ The EU has both an institutional and political self-interest in the acceptance of extraterritorial production concerns as legitimate reasons to regulate and tax.¹⁷

COLUM. J. EUR. L. 337 (2001); Anthony Ogus, *Competition Between National Legal Systems: A Contribution of Economic Analysis to Comparative Law*, 48 INT'L & COMP. L.Q. 405, 417–18 (1999); Norbert Reich, *Competition Between Legal Orders: A New Paradigm of EC Law?*, 29 COMMON MKT L. REV. 861 (1992); Jeanne-Mey Sun & Jacques Pelkmans, *Regulatory Competition in the Single Market*, 33 J. COMMON MKT STUD. 67 (1995); Henri I.T. Tjong, *Breaking the Spell of Regulatory Competition: Reframing the Problem of Regulatory Exit* (2000), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=267744.

¹⁴ *Commission Proposals for Improving Our Work, Business and Exchanges with One Another*, at 3–5, COM (2010) 608 final (Nov. 11, 2010) [hereinafter *Commission Proposals*]; Nils Goldschmidt & Michael Wohlgemuth, *Social Market Economy: Origins, Meanings and Interpretations*, 19 CONST. POL. ECON. 261 (2008).

¹⁵ See ERNST B. HAAS, *THE UNITING OF EUROPE: POLITICAL, SOCIAL AND ECONOMIC FORCES, 1950–57* (1958); Stephen Weatherhill, *Competence and Legitimacy*, in *THE OUTER LIMITS OF EUROPEAN UNION LAW* 17, 19–20 (Catherine Barnard & Okeoghene Odudu eds., 2009); Eloi Laurent & Jacques Le Cacheux, *The EU as a Global Ecological Power: The Logics of Market Integration*, available at <http://www.ofce.sciences-po.fr/pdf/dtravail/WP2010-08.pdf>; *infra* Part III.3; *Commission Proposals*, *supra* note 14.

¹⁶ See *infra* Part III.B.

¹⁷ See *infra* Part III.

Internally to the EU, national trade restrictions have always served a useful purpose. The restrictions help identify areas where EU harmonization is necessary, and trigger the harmonization process, effectively expanding the reach of EU law. The primary effect of the famous *Cassis de Dijon* judgment was to justify a major project of European market regulation that continues to this day.¹⁸ Even instances where judgments on trade restrictions do not provoke the Commission to immediate regulation, the judgments place certain issues on the inter-state agenda, and inform states of others' regulatory perspectives. ECJ adjudication can be seen as a form of mediated peer-review or inter-state dialogue, identifying the tensions that the market creates and the possible responses from the national and EU level, therefore encouraging natural regulatory convergence – which in turn often paves the way for EU regulation of the field.¹⁹ Each regulatory expression of a national value can be seen as a first step towards another brick in the house of integration, serving both the expressed goals of the Treaty and the institutional self-interest of the Commission and Parliament, and more arguably of the Council.

Process-based measures fit this pattern, but in a particularly powerful form. PPM-based restrictions translate domestic concerns into international ones, and the apparently internal behavior of a state becomes every other state's business. The acceptance of the legitimacy of such measures is essentially an acceptance of the idea of community, of Union. The pooling of sovereignty inherent in the EU law doctrines of supremacy and direct effect entails a pooling of values and interests.²⁰ PPM

¹⁸ Case 120/78, *Rewe-Zentrale AG v. Bundesmonopolverwaltung für Branntwein (Cassis de Dijon)*, 1979 E.C.R. 649.

¹⁹ See Gareth Davies, *Is Mutual Recognition an Alternative to Harmonization? Lessons on Trade and Tolerance of Diversity from the EU*, in REGIONAL TRADE AGREEMENTS AND THE WTO LEGAL SYSTEM 265 (Lorand Bartels & Federico Ortino eds., 2006); Alex Stone Sweet and Wayne Sandholtz, *European Integration and Supranational Governance*, 4 J. EUR. PUB. POL'Y. 297 (1997).

²⁰ Case 6/64, *Costa v. ENEL* 1964 ECR 585; Case 26/62, *N.V. Algemene Transport-en Expeditie Onderneming van Gend & Loos v. Nederlandse administratie der belastingen*, 1963 E.C.R. 1.

measures can be seen as a test of what the EU is, and as such the EU must accept their possibility – for the same reasons perhaps that the WTO must see PPM measures as alien and, in general, unacceptable.

External trade and policy present a slightly different picture. The EU, as a major exporter and importer, has a commitment to and an interest in international free trade. The EU has, however, also made an apparent commitment to the idea of soft power or normative power,²¹ and to the extension of its political influence via the export of norms, such as making economic engagement conditional on non-economic norms.²² This self-assumed role in defining the socio-economic *Leitkultur*²³ is open to numerous criticisms and doubts. The robustness of the commitment may be doubted, with EU rhetoric often masking diverse perspectives within the organization and its Members. Furthermore, the role may be an attempt to compensate for Europe's otherwise political and military weakness.²⁴ In addition, there are forceful normative critiques to be made of the quasi-colonial arrogance which can be attributed to such a role.²⁵

Exerting influence and leveraging domestic change through integration of trade and non-economic norms, however, is a conscious EU policy choice, and there are few contexts which so perfectly match this as PPMs, with their unabashedly universalist character.²⁶ In international trade, therefore, interference in trade flows has to be balanced against the structural or longer-term opportunities that such interferences create. The-

²¹ See *infra* Part III.

²² See, e.g., Ian Manners, *Normative Power Europe: A Contradiction in Terms?* 40 J. COMMON MKT. STUD. 235, 252 (2002); Laurent & Le Cacheux, *supra* note 15.

²³ See generally BASSAM TIBI, *EUROPA OHNE IDENTITÄT, DIE KRISE DER MULTIKULTURELLEN GESELLSCHAFT* (1998).

²⁴ See Manners, *supra* note 22.

²⁵ See *infra* Part II.A.

²⁶ See TEU, *supra* note 4, art. 21; TFEU, *supra* note 3, arts. 191(1), 205, 207. Together these articles emphasize that the EU's actions on the 'international scene,' including its external economic policies, are to be guided by its broader social, constitutional and environmental principles and policies.

se interferences may establish a dynamic or a process which, as is internally the case, helps create multilateral consensus. The EU, despite being often the great power most rhetorically committed to multilateralism, paradoxically, has many reasons to be sympathetic to unilateralism as an agenda-forcing approach.²⁷ Common action and stable convergence require that parties initially articulate their individual values and standpoints, and once again, PPMs are a particularly outspoken way of doing this. The fundamental question facing the EU when a PPM measure obstructs world trade is simply whether it reflects values which suit the EU. The sovereignty issue as such should be of marginal concern to an organization fundamentally committed to eroding sovereignty through transnational law. From this perspective, the threat of PPM measures to the WTO system may be rephrased as an opportunity to embed the WTO more profoundly in wider international law norms.²⁸

This paper has three broad parts. Part II outlines the policy challenges and importance of PPM regulation, particularly in the light of climate change. It looks at PPM measures through three lenses, reflecting central aspects of process-based regulation: extraterritoriality, unilateralism, and the integration of economic and non-economic concerns. Part III considers the capacity of the WTO and EU to meet this challenge and their range of possible responses. The emphasis here is on the EU, where PPMs are a far less explored issue in scholarship, but where there is a surprising amount of implicitly or explicitly relevant law. It looks at existing EU law and policy, particularly cases of the ECJ, and the extent to which these reflect a distinctive stance on PPM measures and their consequences. Finally, Part IV concludes.

²⁷ See *infra* Part III.

²⁸ See Joost Pauwelyn, *The Role of Public International Law in the WTO. How Far Can We Go?*, 95 AM. J. INT'L L. 535 (1995).

II. The Challenge of PPM Measures

PPM measures present several important challenges with respect to the international and European trading systems. First, there is a constitutional challenge: PPM measures attach a price to noncompliance with another state's norms. Where one state is powerful or important for trade, PPMs can be experienced as coercive by other states, and therefore can be viewed as an attack on their sovereignty. The place and meaning of sovereignty in a densely regulated international system is the issue here. Second, PPM measures are unilateral. By exporting their own norms, rather than waiting for multilateral agreement, states can be accused of subverting, preempting or abandoning international regulatory efforts. The extent to which unilateralism may be a complement or an alternative to multilateralism is the issue here. An invariably present suspicion that unilateral regulation is motivated by protectionism as much as by its stated concerns complicates the issue. Third, by their nature PPMs bring together trade and non-trade concerns. This raises questions regarding the extent to which the trade system can and should integrate issues such as environmental protection into its regulatory structure. Joined-up-policy is a cliché of good governance in many domestic jurisdictions, but a systemic challenge in the more fragmented international context.

A. Extraterritoriality

Traditional product-oriented trade measures protect concerns proper to the regulating jurisdiction. For example, a country may restrict, tax, or prohibit the import of a product that may harm the health of domestic consumers. By contrast, PPM measures attempt to address concerns located outside of the territory of the regulating state. For instance, a country may wish to restrict imports of a product because the production harms the health of the workers who created it.²⁹ Indeed, economic

²⁹ Of course, a country may also wish to restrict imports from countries with less stringent regulations in order to protect domestic industries facing higher production costs as a result of higher

measures—such as differential taxation and import restrictions—are an important mechanism for influencing the behavior of actors in foreign states. It is not possible, for example, for a state to directly regulate emissions of greenhouse gases from a factory located in a foreign jurisdiction. However, restricting the import of products from factories with high emission rates can create a powerful incentive to use cleaner production methods. Economic measures based on PPMs are therefore an attractive option for regulators seeking to influence behavior in other jurisdictions.

‘Extraterritoriality’ is a controversial concept, particularly with respect to PPMs. Extraterritorial rules attempt to regulate persons, property or acts occurring outside the jurisdiction of the regulating state. Traditionally, a state’s prescriptive jurisdiction was limited to persons, property, and acts within its territory.³⁰ As the Permanent Court of International Justice wrote in the *Lotus* case, “the first and foremost restriction imposed by international law upon a State is that—failing the existence of a permissive rule to the contrary—it may not exercise its power in any form in the territory of another State.”³¹ The reason for this was the traditional international law notion that a sovereign state enjoys exclusive control within its own borders.

It must be noted that the extent to which a state or people was to be considered ‘sovereign’ was historically tied up with colonial notions of cultural, racial, and economic superiority, and often referred to little more than European states and the states they chose to recognize.³² Sovereign states were often

labor, human rights, or environmental standards. The possibility that PPMs permit this type of ‘disguised protectionism’ is discussed further below. See *infra* Part II.B.

³⁰ As well as some exceptional situations in which a state could regulate the conduct of its nationals abroad. See Rep. of the Int’l Law Comm’n, 58th sess, May 1–June 9, July 3–Aug. 11, 2006, 516, U.N. Doc. A/61/10; GAOR, 61st Sess., Supp. No. 10 (2006) [hereinafter ILC Report (2006)].

³¹ S.S. “*Lotus*” (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 10, at 19 (Sept. 7, 1927).

³² For a detailed discussion of the way that international law was historically applied outside of Europe, see MARTTI KOSKENNIEMI, *THE GENTLE CIVILIZER OF NATIONS: THE RISE AND FALL OF INTERNATIONAL LAW 1870–1960*, at 98–178 (2001). See also Antony Anghie, *Finding the*

more than willing to intervene in the affairs of more 'primitive' and 'barbaric' regimes in support of their own commercial or geopolitical interests, or in order to 'protect' (read: civilize) the native peoples.³³ The legacy of colonialism has made many states particularly concerned about extraterritorial action, particularly action designed to influence states' internal policy choices.

In recent years, however, the exercise of extraterritorial jurisdiction among sovereign states (which now includes nations on all continents) has become increasingly common. International law has even come to recognize a number of bases for extraterritorial jurisdiction where there is sufficient connection to the persons, property, or acts to be regulated.³⁴ In commercial law, in particular fields such as antitrust/competition law, extraterritorial rights to regulate have been accepted where an act occurring outside of national borders can be said to have substantial domestic effects.³⁵

PPM measures occupy a middle ground. Because PPMs incentivize, but do not mandate, certain behavior in other states, it is not clear to what extent these types of measures should be considered truly 'extraterritorial.' PPM measures are indeed concerned with behavior that occurs entirely in other jurisdictions. PPM-based trade restrictions influence the behavior of extra-jurisdictional actors by providing economic incentives for compliance. These 'incentives' can skirt very close to coercion where the regulating state or trade bloc is a large and powerful economic force. The effect of such coercion is to reinstate international hierarchies that may ignore the needs of the coerced, and undermine the idea of global equality. Homi Bhabha pithily summarized the issue: "When global government is conducted in terms of coercive conditionality, it is difficult to enter into

Peripheries: Sovereignty and Colonialism in Nineteenth-Century International Law, 40 HARV. INT'L L.J. 1, 6 (1999) ("[S]overeignty was constituted and shaped through colonialism.").

³³ See KOSKENNIEMI, *supra* note 32, at 98–178.

³⁴ See ILC Report (2006), *supra* note 30, at 521 (listing bases for extraterritorial jurisdiction).

³⁵ See *id.* at 526–28.

equitable negotiations with one's allies or one's enemies."³⁶ Indeed, the use of economic coercion has been condemned by the UN General Assembly, which, at the primary behest of the developing states, declared in 1965 that: "No State may use or encourage the use of economic, political or any other type of measures to coerce another State in order to obtain from it the subordination of the exercise of its sovereign rights."³⁷

Even at their most coercive, however, PPM-based measures do not restrain extra-jurisdictional behavior as such. No enforcement takes place outside the borders of the regulating state. Producers are still free to produce their goods in any way permitted under territorial laws.³⁸ The consequence of non-compliance with a PPM-based regulation is merely that the producer may lose access to certain international markets.³⁹ The coercive effect may be large where the regulating state dominates an import market, but where the regulating state makes up only a small portion of the market a producer may choose to ignore the rule largely without consequence. Thus, PPMs have

³⁶ HOMI K. BHABHA, *THE LOCATION OF CULTURE*, at xvi (1994).

³⁷ Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of Their Independence and Sovereignty, G.A. Res. 2131(XX) ¶ 2, U.N. GAOR, 20th Sess., Supp. No. 14, U.N. Doc. A/6014, at 11 (Dec. 21, 1965). *Accord* Charter of Economic Rights and Duties of States, G.A. Res. 3281 (XXIX), art. 32, U.N. GAOR, 29th Sess., Supp. No. 31, U.N. Doc. A/9631, at 50 (Dec. 12, 1974); Declaration on the Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, G.A. Res. 2625 (XXV), U.N. GAOR, 25th Sess., Supp. No. 28, U.N. Doc. A/8082, at 121 (Oct. 24, 1970).

³⁸ One could argue that this is the consequence of a state's lack of jurisdiction to enforce, but the foregoing consideration whether a state has prescriptive jurisdiction could still be answered in the negative. Under this view, a PPM measure would prescribe or proscribe conduct abroad, but only be enforced when products stemming from restricted conduct are imported into the regulating country.

³⁹ See, JASON POTTS, *THE LEGALITY OF PPMs UNDER THE GATT 5-6* (2008), available at http://www.iisd.org/pdf/2007/ppms_gatt.pdf ("[I]t is unclear how a PPM measure (or any other measure implemented through a government's legitimate authority) can be said to 'infringe' upon the national sovereignty of its trading partners. If the implementation of PPM-based policy restricts access to a particular market, then it remains within the authority of the foreign jurisdiction to decide whether or not it wants to access that market. Policies that restrict market access are viable instruments under international law precisely *because* they don't infringe upon national sovereignty.").

only indirect extraterritorial effects, proportionate to the relative size and importance of the importing economy.⁴⁰

In this sense, a PPM measure is no different than a product requirement regulating the physical characteristics of goods. The presence of toxins or other undesirable physical qualities are also the result of production processes, so these rules also seek to regulate behavior in the producing jurisdiction. A producer is only forced to comply with the safety, size, or other product standards an importing state sets if the producer wants to export products to that state.

Moreover, the 'extraterritoriality' of a particular PPM measure is, to some extent, in the eye of the beholder. It can often be argued that the behavior being addressed in fact has a domestic effect. To begin with, some PPM measures are concerned with behavior within another jurisdiction that affects global interests: for example, a measure aimed at addressing climate effects or carbon dioxide emissions. In such a case, the regulating state can claim to be acting in the interests of all. But more specifically, it can claim to be acting in its own interest, and the interests of its citizens. Because the effects of issues like climate change are global in scope, the consequences will also have effects within the jurisdiction of the regulating state. This can be compared with the traditional regulation of products that have harmful effects on persons or things within the territory of the importing state. These are of course legitimate matters for a state to be concerned about. The fact that the source of harm is outside the jurisdiction does not make the concern any less legitimate. Indeed, this type of extraterritorial action producing domestic harm comes close to the doctrine of effects jurisdiction under international law,⁴¹ in which case objections should

⁴⁰ See ERICH VRANES, *TRADE AND THE ENVIRONMENT: FUNDAMENTAL ISSUES IN INTERNATIONAL LAW, WTO LAW, AND LEGAL THEORY* 166 (John H. Jackson ed., 2009).

⁴¹ "[A] state has jurisdiction to prescribe law with respect to . . . conduct outside its territory that has or is intended to have substantial effect within its territory." *RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES* § 402(1)(c) (1987).

focus on the nature, scientific basis, and proportionality of the measure taken.⁴²

Other PPM measures are concerned with some harm which is physically confined to the producing jurisdiction, but where a strong case can be made that outside states have an interest in preventing that harm. Reductions in forests and biodiversity could be seen as examples. It is not unreasonable to claim that the maintenance of global biodiversity—and forests—is in the interest of all mankind, even if a species is confined to a certain area. Once again, such measures can be presented as self-interested and therefore legitimate.

This group of legitimate concerns can be greatly extended if one accepts that people have moral and ethical concern for the wellbeing of other individuals, animals, and the environment. Then measures aimed at preventing abuse of labor or animal cruelty can be seen as preventing domestic consumers from implication in wrongful behavior. A regulating state which prevents the import of sweatshop products or factory-farm meat may claim to be doing what is necessary to protect the moral interests of its citizens and consumers, and enforcing those interests within its sovereign territory.

If this seems far-fetched, it may be noted that the alternative is to make a distinction between protecting legitimate physical interests (health) and legitimate economic interests (quality regulation), but not illegitimate moral interests. That distinction is hard to maintain: all states lay down laws reflecting collective moral preferences, and from a welfare perspective regulating to prevent moral harm is not different from regulating to prevent other harms. If consumers authentically consider the presence of exploitative goods in shops to be harmful to their—perhaps collective—wellbeing, just as the presence of toxic or defective goods would be, then it would be arbitrary to preclude the necessary protective measures because of the non-

⁴² See, e.g., *id.* § 403 (describing the limits of ‘reasonable’ extraterritorial effects jurisdiction).

physical nature of the harm. If there is broad democratic support for PPM measures concerned with labor, social, environmental, and animal rights based on ethical perceptions, they are arguably analytically no different from consumer protection rules based on physical harm.

Indeed, a given measure can invariably be recast as 'outwardly-directed' or 'inwardly-directed,' depending on the interests emphasized. For example, a measure prohibiting the import of shoes produced through child labor could be characterized as 'outwardly-directed' or 'extraterritorial' by declaring that its primary aim is the protection of children in foreign states. Alternatively, such a measure can be characterized as 'inwardly-directed,' and a proper exercise of sovereign jurisdiction, by presenting the regulation as aimed at protecting domestic consumers from the moral taint of purchasing the products of child labor.⁴³ Every assertion of jurisdiction can be countered with an assertion of extraterritoriality, and vice versa.

Of course, some assertions of extraterritoriality or of internal moral protection are more easily defended than others. For instance, it may be difficult to cast Israel's restrictions against the import of non-Kosher food as extraterritorial measures seeking to coerce producers in other states to use Kosher production methods.⁴⁴ On the other hand, it may be unconvincing to claim that the moral welfare of end consumers is at

⁴³ See Steve Charnovitz, *The Moral Exception in Trade Policy*, 38 VA. J. INT'L L. 689, 695 (1998) (characterizing these type of measures as "outwardly-directed," but recognizing the arbitrariness of this determination). See also Lorand Bartels, *Article XX of GATT and the Problem of Extraterritorial Jurisdiction: The Case of Trade Measures for the Protection of Human Rights*, 36 J. OF WORLD TRADE 353, 356 (2002) (noting that the argument for allowing WTO Members to ban the import of products that violate human rights during their production in an effort to protect "public morals" is among the least controversial PPM-related proposals at the WTO); Nicolas F. Diebold, *The Morals and Order Exceptions in WTO Law: Balancing the Toothless Tiger and the Undermining Mole*, 11 J. INT'L ECON. L. 43, 69 (2007) (arguing that the public morals exception could be used to justify an animal welfare measure on moral grounds and thus bypass the issue of extraterritoriality).

⁴⁴ See WTO Secretariat, *Trade Policy Review, Report by the Secretariat, Israel*, Sec. III ¶¶ 27, 48, WT/TPR/S/157 (Mar. 24, 2006) ("[S]ince December 1994, Israel has maintained a ban on imports of non-kosher meat and meat products. However, the Government permits limited domestic production, sale, and consumption of non-kosher meat.").

risk if the producing state merely has more relaxed regulation on pollution, social rights, labor rights, or land usage than in the importing state, and consumers in the importing state seem indifferent to their economic support for these standards. In such contexts the suspicion of economic motives is raised, something discussed more in the following section.

Since PPM measures generally restrict trade, the derogations permitted by the appropriate regulatory system are the locus for adjudication on the limits of the kind and extent of self-interest which is to be acknowledged, and the weight to be accorded to freedom from de facto coercion. As will be explored below, the EU, both internally and externally, has taken a more liberal approach than the WTO with respect to the extent of permissible extraterritorial action to protect what it considers to be important values.⁴⁵

B. Unilateralism

Process-based regulations are not necessarily unilateral—indeed, a number of multilateral environmental agreements contain such measures.⁴⁶ However, the unilateralism of the process-based measures that have been challenged before the WTO and ECJ has proven one of their more objectionable aspects. While closely linked to the issue of extraterritoriality, unilateralism provides a distinct lens, less constitutionalist and more systemic, through which to look at PPM regulation and to

⁴⁵ See *infra* Part III.1.B.

⁴⁶ See, e.g., Convention for the Prohibition of Fishing with Long Driftnets in the South Pacific, Nov. 24, 1989, 1899 U.N.T.S. 3 (prohibiting the use of long driftnets in the South Pacific); Convention on the Conservation of Antarctic Marine Living Resources, May 20, 1980, 1329 U.N.T.S. 47 (setting limits on the harvest of krill and crab); Basel Convention on the Transboundary Movements of Hazardous Wastes and their Disposal, Mar. 22, 1989, 1673 U.N.T.S. 57 (taking an ‘integrated life-cycle’ approach to waste management and prohibiting the export of waste to countries with inadequate environmental rules); Montreal Protocol on Substances that Deplete the Ozone Layer, Sept. 16, 1987, 1522 U.N.T.S. 3 (obliging parties to ban the import of ozone-depleting substances, and to consider a ban on the import of products that use the controlled substances in their production practices).

highlight certain specific policy problems.⁴⁷ First among these is that a country's motives may be more likely to be seen as suspect where the country acts unilaterally. Second, unilateral action means that the regulator is attempting to set international standards without the agreement of other sovereign states, raising questions as to the legitimacy of those standards and the consequences for multilateral efforts.

To begin with, unilateral PPMs are seen as suspicious because they can easily be used as covert instruments of protectionism.⁴⁸ A government that regulates production methods may do so not in order to protect a 'legitimate interest,' but instead to 'level the playing field' or to impose an additional burden on foreign producers to keep them from gaining a competitive advantage over their domestic counterparts.⁴⁹ For example, a government that requires its own producers to use expensive 'dolphin-safe nets' may worry that this will give foreign 'dolphin-unsafe' producers a cost advantage, and regulate imports accordingly. For this reason, some commentators have argued that unilateral PPMs pose a particular danger to the international trading system.⁵⁰ The legitimacy of international trade agreements comes partly from the classical economic perspective that trade is beneficial precisely because different jurisdictions have different advantages, whether these be natural, social, or legal

⁴⁷ See, Philippe Sands, 'Unilateralism', *Values, and International Law*, 11 EUR. J. INT'L L. 291, 293 (2000); Bernhard Jansen, *The Limits of Unilateralism from a European Perspective*, 11 EUR. J. INT'L L. 309, 310 (2000).

⁴⁸ See e.g., Candice Stevens, *Syntheses Report: Trade and Environment: PPM Issues*, in TRADE AND ENVIRONMENT: PROCESS AND PRODUCTION METHODS 7, 19 (1994) ("[T]he use of PPM-based trade restrictions could serve all types of protectionist aims as countries seek to maximize the competitiveness of domestic industries.").

⁴⁹ Robert Hudec, for example, provides the following compelling example of how finely-drawn tariff classifications can be used for protectionist purposes: "Everyone has heard the story of the 1904 German tariff concession to Switzerland lowering the tariff on 'Large dapple[d] mountain cattle reared at a spot at least 300 meters above sea level and having at least one month's grazing each year at a spot at least 800 meters above sea level.' . . . Ultra-fine tariff distinctions were a well established tradition among the trade negotiators who, forty-three years later, wrote the GATT." Robert E. Hudec, "Like Product": *The Differences in Meaning in GATT Articles I and III*, in REGULATORY BARRIERS AND THE PRINCIPLE OF NON-DISCRIMINATION IN WORLD TRADE LAW 101, 109-10 (Thomas Cottier & Petros C. Mavroidis eds., 2000).

⁵⁰ See e.g., Thomas J. Schoenbaum, *International Trade and Protection of the Environment: The Continuing Search for Reconciliation*, 91 AM. J. INT'L L. 268, 291 (1997).

advantages. Specialization and exchange is therefore mutually beneficial. However, if differences between jurisdictions are seen as obstacles to trade, and states attempt to compensate for them by national regulation, the fundamental economic advantage of trade is gone. PPM measures can be precisely attempts to do this—equalizing national conditions to protect domestic producers. As a result, some commentators continue to advocate a tough anti-PPM position. As Thomas Schoenbaum wrote, “It may be objected that this policy invalidates many ‘good’ PPM regulations that protect dolphins and other aspects of the environment, but there simply is no principled way to permit ‘good’ PPM regulations without opening the door to unacceptable abuses.”⁵¹

In response, it might be noted that the problem of disguised protectionism is no less acute with respect to product-related measures. The long history of challenges to product-related measures at the WTO and ECJ is a testament to this.⁵² Nevertheless, PPM-based measures are particularly susceptible to protectionist manipulation because they are so directly linked to important, but indirect, aspects of production cost, such as labor and environmental standards.

It may be argued that this type of protectionism is not necessarily a bad thing. PPM-based measures are in some sense attempts to prevent foreign producers from reaping the benefit of lower human rights, labor, environmental, or other standards. Unilateral PPM-based measures may be intended to force foreign producers to internalize negative externalities—as, perhaps, domestic producers are required to do. Protecting domestic producers and protecting foreign actors in that case could be said to go hand in hand.

This brings us to the second major problem posed by unilateralism. Unilateral actions are taken in situations where

⁵¹ *Id.* at 291.

⁵² See *infra* Part III.1–2.

negotiation with other states has not taken place or failed to produce the desired outcome. This raises a legitimacy issue. It could be argued that if the interest at stake is genuine, it should be possible to come to a multilateral agreement to regulate. Where an issue affects multiple states, those states all have some interest in designing the rules that will govern it. Imposing coercive unilateral measures to regulate issues with widespread causes and effects denies the rights of other affected states to have a say in the decision-making process. In cases where states disagree strongly about the legitimacy of a particular measure it must be asked why the opinion of the unilaterally regulating state should prevail over all others.⁵³

Even assuming the interest protected is 'genuine' and not 'disguised protectionism,' the unilateral imposition of human rights, labor, animal welfare, and environmental standards smacks of an enforced moral 'universalism' that is in reality only partial.⁵⁴ A number of commentators have pointed out the relationship between this type of value export and a colonial-era mentality that encourages the export of 'civilization' to the 'barbaric' world in the interest of the colonizing states.⁵⁵ Where these notions are presented as universal it is the result of a long process of naturalizing the culture and society of dominant

⁵³ See, e.g., PHILIPPE SANDS, *LAWLESS WORLD: AMERICA AND THE MAKING AND BREAKING OF GLOBAL RULES* 95–116 (2005) (arguing against trade unilateralism); Ottavio Quirico, *EU Border Tax Adjustments and Climate Change: Reaching Consensus within the International Legal Context*, EUR. ENERGY AND ENVTL. L. REV. 230 (2010) (arguing that unilateral measures to address climate change are illegal without serious negotiations to try to come to bilateral or multilateral solutions).

⁵⁴ Makau Mutua, *Critical Race Theory and International Law: the View of an Insider-Outsider*, 45 VILL. L. REV. 841, 844–51 (2000) ("[I]nternational law is, therefore, Eurocentric in that it issues from European thought, culture and experiences. This specificity denies international law universality. . . . Even the international law of human rights, arguably the most benign of all the areas of international law, seeks the universalization of Eurocentrism. The human rights corpus is driven by. . . the savage-victim-savior metaphor. . . . In this script of human rights, democracy and western liberalism are internationalized to save savage non-Western cultures from themselves and to 'alleviate' the suffering of victims, who are generally non-Western and non-European.").

⁵⁵ See, e.g., B.S. Chimni, *International Institutions Today: An Imperial Global State in the Making*, 15 EUR. J. INT'L L. 1, 31 (2004) ("[WTO's and EU's externally projected interests] manifest the vision of the [transnational capitalist class] and inform the nascent imperial global state.").

groups.⁵⁶ The idea of unilateralism is tied up with “a strong notion of *leadership*, based on material *hegemony* and, most often, on the idea of a global *mission* of the dominant power to keep peace, order, and civilization and to protect ‘democratic values.’”⁵⁷ Where unilateralism pursues a neo-colonialist civilizing mission it cannot help but imply the hierarchical inferiority of differing traditions, and thereby deny the reality of differing desires, cultures, needs, and experiences. In other words, where one culture deems itself superior to all others, then it follows that unilateral export—not multilateral dialogue—is the best means of pursuing global progress.

Unilateralism, however, can also be seen in a positive light. First, unilateralism is sometimes the only available path toward regulation to protect important values. Multilateral negotiations may fail for various reasons, some of them more legitimate than others. Where countries balk at imposing regulations, as Dan Bodansky notes, “the choice is not between unilateralism and multilateralism, but between unilateralism and inaction.”⁵⁸

Second, viewing *only* PPM-based measures as unilateral is one-sided. Actions by a producer or producing state can also constitute a unilateral act. As Howse and Regan astutely point out, “the absence of negotiated rules or norms, leaving the country of production to make these determinations on its own, unconstrained by stipulations imposed by its trading partners who are importing the product, would itself be countenancing ‘unilateralism,’ in this case, the unilateral determination by the country of production of matters that affect the global commons.”⁵⁹

⁵⁶ See, e.g., Mutua, *supra* note 54.

⁵⁷ ÉTIENNE BALIBAR, WE, THE PEOPLE OF EUROPE? REFLECTIONS ON TRANSNATIONAL CITIZENSHIP 207 (James Swenson trans., 2004).

⁵⁸ Daniel Bodansky, *What’s So Bad about Unilateral Action to Protect the Environment?*, 11 EUR. J. INT’L L. 339, 339 (2000).

⁵⁹ Robert Howse & Donald Regan, *The Product/Process Distinction—An Illusory Basis for Disciplining ‘Unilateralism’ in Trade Policy*, 11 EUR. J. INT’L L. 249, 251 (2000).

Third, unilateralism can provide an incentive to tackle concerns collectively. One state's unilateral action can sometimes act as a catalyst for multilateral negotiations, thereby leading to a global or regional solution. This has occurred a number of times in the context of international environmental law,⁶⁰ as well as in the EU.⁶¹

Of all the different ways of looking at PPM regulation, unilateralism may be the perspective that most clearly highlights the power issues involved. A jurisdiction or institution may see unilateralism as a threat, a precious right, or a destabilizing opportunity. This perspective will be influenced by the jurisdiction's or institution's policy goals, relative power, and perceptions of how realistic the multilateral alternative is, as well as the extent to which the jurisdiction or institution is aligned with the likely outcomes of unilateralism.

C. Non-Trade Concerns

PPM measures link trade and non-trade concerns in a way which can be challenging for a jurisdiction with incomplete regulatory powers. There is much dispute over whether institutions and rules designed to protect trade are the appropriate forum for action to protect social or environmental welfare.

Many believe that trade bodies like the WTO should not look beyond the four corners of their own constitutive agreements, and that social problems posed by international trade should be dealt with separately through issue-specific law and policy.⁶² For one, trade bodies may be unsuited to the task of adjudicating social issues. Trade bodies logically privilege trade

⁶⁰ See, e.g., Bodansky, *supra* note 58, at 344 (citing historical examples of unilateral action leading to multilateral standard-setting).

⁶¹ See *infra* Part III.1.B. See generally Davies, *supra* note 19; Sweet & Sandholtz, *supra* note 19 (explaining how European Community rule-making is created and sustained through individual acts of European countries).

⁶² See, e.g., John O. McGinnis & Mark L. Movsesian, *Against Global Governance in the WTO*, 45 HARV. INT'L L.J. 353, 354 (2004) ("Rather than transform itself into a global government . . . the WTO should stick to its limited but important role: reducing barriers to trade among nations.").

interests over all other concerns, an institutional bias that would work to the detriment of important non-trade values.⁶³ Furthermore, trade bodies are not expected to have expertise in areas such as human rights, environmental protection, or animal welfare, making it both unrealistic and unfair to expect trade bodies to make appropriate decisions regarding these issues.⁶⁴

These expectations become even more unrealistic when cultural specificity is considered along with fact-dependency. Interpreting the legality of trade restrictions on the basis of ‘public morals’ is a dangerous and slippery slope for any transnational adjudicator, and particularly for trade regimes. Interfering in culturally sensitive areas such as public morality, labor law, or animal welfare is a delicate business, and runs the risk that decisions may begin to be seen as unacceptably ‘political.’⁶⁵ International economic law has invested heavily in presenting its regulations as ‘neutral,’ ‘scientific’ deductions from economic or objective principles.⁶⁶ Examining social issues in

⁶³ See, e.g., Daniel Bodansky & Jessica C. Lawrence, *Trade and Environment*, in OXFORD HANDBOOK OF INTERNATIONAL TRADE LAW 505, 533 (Daniel Bethlehem et al. eds., 2009) (“[M]any still argue that the WTO dispute settlement system is tilted toward the trade perspective (after all, it can strike down an environmental measure as inconsistent with [trade rules], but not *vice versa*).”).

⁶⁴ See, e.g., Jeffrey L. Dunoff, *Institutional Misfits: The GATT, the ICJ & Trade-Environment Disputes*, 15 MICH. J. INT’L L. 1043, 1128 (1994) (“[Trade institutions] are incapable of providing a balanced response to the competing interests at stake.”).

⁶⁵ See Geert van Calster, *The EU, Trade, Environment, and Unilateralism: Passing the Buck*, 5 EUR. FOREIGN AFF. REV. 9, 14 (2000) (explaining that the definition of “public morals” differs in many countries); Diebold, *supra* note 43, at 43–60.

⁶⁶ See, e.g., Robert Howse, *Democracy, Science, and Free Trade: Risk Regulation on Trial at the World Trade Organization*, 98 MICH. L. REV. 2329, 2333–38 (2000) (describing the technocratic style of the Agreement on Sanitary and Phytosanitary Measures (“SPS Agreement”), and its goal to utilize science in rule-making regarding trade); Robert Howse, *The Boundaries of the WTO: From Politics to Technocracy—and Back Again: The Fate of the Multilateral Trading Regime*, 96 AM. J. INT’L L. 94, 98 (2002) (“A sense of pride developed [with GATT trade policy managers] that an international regime was being evolved that stood above the ‘madhouse’ of politics . . . , a regime grounded in the insights of economic ‘science,’ and not vulnerable to the open-ended normative controversies and conflicts that plagued most international institutions and regimes.”). Cf. Joseph Weiler, *The Rule of Lawyers and the Ethos of Diplomats: Reflections on WTO Dispute Settlement*, in EFFICIENCY, EQUITY, AND LEGITIMACY: THE MULTILATERAL TRADING SYSTEM AT THE MILLENNIUM 334, 336–37 (Roger B. Porter et al. eds., 2001) (explaining how GATT formed a self-referential network that sought to keep economic disputes separate from the rest of international politics).

this context threatens to muddy the waters, bringing unscientific, cultural concerns back into the mix.⁶⁷

In addition, regulating these issues at a transnational level is often seen as interfering unacceptably with domestic politics. Social concerns such as labor and environmental standards—in particular, those that do not affect the global commons—are seen as fundamentally a matter of domestic policy, to be decided as close to the level of the citizen as possible.⁶⁸

On the other hand, many have countered that economic and non-economic interests are often both reflected in a given problem, and are difficult—if not impossible—to disentangle. As a result, they argue that it is necessary to address trade and non-trade concerns together.⁶⁹ Regulations like climate- or human rights-protecting PPM measures therefore challenge the ideational basis of international trade law. They assert that trade cannot be considered aside from other issues, and that every act of production and trade must also be assessed from non-economic perspectives. If this becomes the general rule, then the future of a trade-specific body may be grim.

In addition, institutions designed to promote and manage trade are widely viewed as among the most effective supranational regulatory bodies, which makes them an attractive forum for social activism. Why build an entirely new environmental or human rights machinery when these issues could be inserted into an already well-developed framework?

The scope and extent of production issues attracting regulatory concern is increasing quickly, making the above more than an exercise in legal nicety. A growing number of states would like to tax or regulate in ways that would aid in protect-

⁶⁸ This concept is the basis for the EU idea of subsidiarity, and the US ideal of federalism.

⁶⁹ See, e.g., Andrew T. Guzman, *Global Governance and the WTO*, 45 HARV. INT'L L.J. 303, 307 (2004) (“[R]ather than slowing progress in the trade area, non-trade concerns should be addressed by increasing the level of international cooperation and promoting agreements that take both trade and non-trade issues into account.”).

ing forests and biodiversity; the goal of integrating the climatic effects of goods into tax rules and product law has arrived, and poses a systemic and open-ended threat to deregulated international trade.⁷⁰ For example, the production of almost all goods involves the use of energy. Taxation or regulation based on the emission of carbon dioxide during production would potentially apply to all goods, creating a trade restriction of wide and unique breadth. Additionally, there would be vast bureaucracy involved in establishing and proving the amount of energy involved, whether it is from fossil sources or renewable ones, and whether any compensation has taken place, (and what kinds of compensation are acceptable or effective). Systematic attempts to take account of the climatic effects of production and trade would create a volume of regulation and litigation that would likely be greater than the rest of existing trade law.

III. The WTO and EU Responses

In the context of the WTO, the proper place to address PPM concerns is through the derogation clauses, where PPMs should be strictly policed and subject to critical examination for their proportionality.⁷¹ Each piece of PPM legislation is a restriction on trade, and the unfettered growth of PPM regulations can only be experienced by the WTO system as a threat. As Joost Pauwelyn notes, “the GATT/WTO’s operating system or magic trick is grounded in a deep mistrust of domestic politics,

⁷⁰ See, e.g., Commission Regulation 995/2010 of the European Parliament and of the Council of 20 October 2010 Laying Down the Obligations of Operators Who Place Timber and Timber Products on the Market, 2010 O.J. (L 295) 23. Additionally, there are multiple initiatives by EU Member States with regard to the public procurement of sustainable timber, as demonstrated by the following websites: INKOOP DUURZAAM HOUT [SUSTAINABLY PRODUCED TIMBER], www.inkoopduurzaamhout.nl (last visited Jan. 29, 2012); NATURSTYRELSEN [DANISH NATURE AGENCY], www.skovognatur.dk (last visited Jan. 29, 2012); THE CENTRAL POINT OF EXPERTISE FOR TIMBER PROCUREMENT (www.cpet.org.uk) (last visited Jan. 29, 2012). See also Gavin Goh, *The World Trade Organization, Kyoto and Energy Tax Adjustments at the Border*, 38 J. WORLD TRADE 395 (2004); Jochem Wiers, *French Ideas on Climate and Trade Policies*, 2 CARBON & CLIMATE L. REV. 18 (2008).

⁷¹ See GATT, *supra* note 3, art. XX. Cf. Sanford E. Gaines, *Processes and Production Methods: How to Produce Sound Policy for Environmental PPM-Based Trade Measures?*, 27 COLUM. J. ENVTL. L. 383, 388 (2002) (“[W]e must move away from the clean escape of the revisionist analysis of the GATT and toward the more arduous terrain of policy negotiation and incremental adjustment of Article XX interpretation.”).

the assumption being that if we leave national parliaments alone, protectionism will be rampant.”⁷² Some concessions must be made, because the concerns involved are too politically significant to be brushed aside, but these concessions are likely to be miserly and nervous: if export of environmental and social norms becomes the rule, then the international trading system will at the least require a redesign. For these reasons, several WTO Member States have challenged the ‘extraterritorial’ and ‘unilateral’ aspects of PPMs, and have resisted the integration of non-trade concerns into the realm of international trade law.⁷³

In contrast, it is likely that the EU will see PPM measures as an opportunity. While Member State measures have the same kind of internal trade-restricting effects, the range of possible EU responses is wider than those open to the WTO, and some of these responses fit with the EU’s self-declared identity and mission. For instance, the EU has embraced the integration of trade and non-trade concerns, both in its governing documents and in its internal and external practices.⁷⁴

Moreover, in the few PPM-related cases it has adjudicated thus far, the ECJ has not treated PPM measures by EU Member States substantially different than it treats other trade restrictions.⁷⁵ The Court has held that processing require-

⁷² Joost Pauwelyn, *New Trade Politics for the 21st Century*, 11 J. INT’L ECON. L. 559, 560 (2008).

⁷³ See *supra* note 5.

⁷⁴ See, e.g., TEU, *supra* note 4, art. 21; TFEU, *supra* note 3, arts. 191, 205–07.

⁷⁵ ECJ’s case law on the free movement of goods—protected by TFEU arts. 34–36—is very broad in scope and covers all quantitative restrictions and measures of equivalent effect, which extend to “all trading rules enacted by member States which are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade.” Case 8/74, *Procureur du Roi v. Dassonville*, 1974 E.C.R. 837. A wide range of regulatory measures are encompassed in this case law, including those that apply indiscriminately to foreign and domestic goods alike. One of the major characteristics of the Court’s approach to the free movement of goods is the principle of mutual recognition or functional equivalence established in *Cassis de Dijon*. Case 120/78, *Rewe-Zentral AG v. Bundesmonopolverwaltung für Branntwein (Cassis de Dijon)*, 1979 E.C.R. 649. Under this principle, a good lawfully manufactured in one Member State should be allowed access to the markets of other Member States. The ECJ has limited the deregulatory potential of this principle by adopting a rule of reason whereby a Member State can justify a restriction by reference to the so-called “mandatory requirements.” The Court’s case law on the free movement of goods has therefore put a lot of emphasis on the Member State’s defense of a regulatory measure. With a *prima facie* violation easily found, it is the justification of the measure and its

ments—including those based on non-trade concerns—are a restriction of intra-EU trade and therefore must be justified in order to be compatible with the Treaty.⁷⁶ The ECJ has accepted a range of justifications, as long as these justifications reflect concerns acknowledged as European goals, and there has not been any harmonization to preempt the Member State's action.⁷⁷ In regard to tax measures, the Court has not recognized PPM measures as an analytically distinct group and has allowed Member States to make distinctions between products on the basis of production processes employed for tax purposes.⁷⁸

The following sections examine the EU and WTO responses to PPM measures in more detail, from the various perspectives discussed in the preceding sections.

1. Extraterritoriality

A. The WTO

The WTO has been relatively hostile to extraterritorial regulation. Indeed, the intrusion by one state into the sovereign affairs of another goes against what John Jackson called one of

proportionality that is the crux of the argument. The Court has interpreted these derogations strictly, so as not to reserve certain matters to the exclusive jurisdiction of Member States. See J.H.H. Weiler, *The Constitution of the Common Market Place: Text and Context in the Evolution of the Free Movement of Goods*, in *THE EVOLUTION OF EU LAW* 349 (Paul Craig & Gráinne de Búrca eds., 1999); Jukka Snell, *The Notion of Market Access: A Concept or a Slo-gan?*, 47 *COMMON MKT. L. REV.* 437 (2010).

⁷⁶ See, e.g., Joined Cases C-158/04 & C-159/04, *Alfa Vita Vassilopoulos AE v. Elliniko Dimosio, Nomarchiaki Aftodiikisi Ioanninon*, 2006 E.C.R. I-8135; Case 6/81 *BV Industrie Diensten Groep v. J.A. Beele Handelsmaatschappij BV*, 1982 E.C.R. 707; Case 153/78, *Comm'n of the European Communities v. Fed. Rep. of Ger.*, 1979 E.C.R. 2555; Case C-147/04 *De Groot en Slot Allium BV and Bejo Zaden BV v. Ministre de l'Économie, des Finances et de l'Industrie*, 2006 E.C.R. I-245; Case C-277/02, *EU-Wood-Trading GmbH v. Sonderabfall-Management-Gesellschaft Rheinland-Pfalz mbH*, 2004 E.C.R. I-11987; Case C-379/98, *Preussen Elektra AG v. Schleswag AG*, 2001 E.C.R. I-2099; Case C-1/96, *The Queen v. Minister of Agric., Fisheries and Food ex parte Compassion in World Farming Ltd.*, 1998 E.C.R. I-1281; Case C-5/94, *The Queen v. Minister of Agric., Fisheries and Food ex parte Hedley Lomas (Ireland) Ltd.*, 1996 E.C.R. I-2553.

⁷⁷ See, e.g., *EU-Wood-Trading GmbH*, 2004 E.C.R. at I-11987 (finding that the goals pursued through these regulations were legitimate). *But see, e.g., Comm'n of the European Communities*, 1979 E.C.R. at 2565–67 (rejecting Germany's proffered reasons for controlling the trade of meat products with Member States); *Preussen Elektra AG*, 2001 E.C.R. at I-2156–57.

⁷⁸ See *infra* Part III.4.

the seven “mantras” of the WTO: preservation of “national or non-state sovereignty.”⁷⁹

The idea of extraterritoriality is in conflict with the institutional identity of the WTO in a significant way. The WTO considers itself to be a member-driven organization⁸⁰ that exists in large part to maintain the negotiated equilibrium among its Member States. The primary concern of the WTO is stabilizing the trade system and preventing the nullification or impairment of trade concessions, while simultaneously working to ratchet down the level of remaining barriers.⁸¹ Thus, the WTO is not concerned with extraterritoriality in a formal sense, but rather with extraterritoriality insofar as it upsets intra-state trade relations and the compromise positions of the Member States.

Because its concern is relational, the case-specific approach to extraterritoriality adopted by the Appellate Body in *US—Shrimp* makes a great deal of sense. In that case, the Appellate Body refused to find PPM-based regulations impermissible as a class due to their extraterritorial effects:

It is not necessary to assume that requiring from exporting countries compliance with, or adoption of, certain policies (although covered in principle by one or another of the exceptions) prescribed by the importing country, renders a measure *a priori* incapable of justification under Article XX. Such an interpretation renders most, if not all, of the specific exceptions of Article XX inu-

⁷⁹ John H. Jackson, *The WTO ‘Constitution’ and Proposed Reforms: Seven ‘Mantras’ Revisited*, 4 J. INT’L ECON. L. 67, 72 (2001) (emphasis omitted).

⁸⁰ *Id.* at 72 (“[A] mantra often used is that the [WTO] is ‘member driven.’”) (emphasis omitted).

⁸¹ See Kalypso Nicoaidis & Robert Howse, *This is my EUtopia . . . : Narrative as Power*, 40 J. COMMON MKT. STUD. 767, 776 (2002) (“[T]he management of the multilateral trading system involved not only the negotiation of new concessions, but also the task of interpreting or evolving rules that distinguished between policy interventions . . . thus threatening the co-operative equilibrium.”).

tile, a result abhorrent to the principles of interpretation we are bound to apply.⁸²

The Appellate Body further refused to decide whether there were firm territorial limits to Article XX:

We do not pass upon the question of whether there is an implied jurisdictional limitation in Article XX(g), and if so, the nature or extent of that limitation. We note only that in the specific circumstances of the case before us, there is a sufficient nexus between the migratory and endangered marine populations involved in the United States for the purposes of Article XX(g).⁸³

The Appellate body, however, expressed concern with the possibility that extraterritorial actions would infringe on the rights of other Member States:

The task of interpreting and applying the chapeau is, hence, essentially the delicate one of locating and marking out a line of equilibrium between the right of a Member to invoke an exception under Article XX and the rights of other Members under varying substantive provisions (e.g., Article XI) of the GATT 1994, so that neither of the competing rights will cancel out the other and thereby distort and nullify or impair the balance of rights and obligations constructed by the Members themselves in that Agreement. The location of the line of equilibrium, as expressed in the chapeau, is not fixed and unchanging; the line moves as the kind and the

⁸² *US—Shrimp*, *supra* note 5, ¶ 121.

⁸³ *Id.* ¶ 133.

shape of the measures at stake vary and as the facts making up specific cases differ.⁸⁴

PPMs present a logical concern for the WTO where they upset this relational balance of power, infringing on the rights claimed by other Member States. Indeed, many of the arguments against PPMs focus on the fact that they are a tool that can be used by powerful trading blocs to impose their values on other states and impair the benefits of trade liberalization. This worry is exacerbated by the fact that “[t]he user of the PPM is almost always a rich country, and the target country is often a developing country.”⁸⁵ As the WTO Ministerial Conference noted in 2005, many developing countries equate the use of PPMs “with richer countries attempting to impose their environmental and social standards on the rest of the world.”⁸⁶ Such situations have led to charges of ‘neo-’ or ‘eco-imperialism,’⁸⁷ in which rich countries attempt to coerce poor countries into adopting regulatory regimes that may be ill-adapted or infeasible for their context.

As a result of their extraterritoriality, therefore, PPMs represent a challenge to the WTO’s ideal of relational equilibrium. Where a conflict over regulatory jurisdiction occurs, the organization’s first loyalty is to protecting the sovereignty of all members and restoring the balance of negotiated concessions.

B. The EU

The EU has a stronger institutional identity and more autonomy from its Member States, which, as the ECJ famously held in *Van Gend & Loos*, “have limited their sovereign rights, albeit within limited fields” and thereby created a new legal or-

⁸⁴ *Id.* ¶ 159.

⁸⁵ Steve Charnovitz, *The Law of Environmental “PPMs” in the WTO: Debunking the Myth of Illegality*, 27 YALE J. INT’L L. 59, 62 (2002).

⁸⁶ World Trade Organization, Sixth Ministerial Conference, Hong Kong Briefing Notes, WT/MIN(05), 35 (Dec. 5, 2005), available at http://www.wto.org/english/thewto_e/minist_e/min05_e/brief_e/brief00_e.htm.

⁸⁷ See, e.g., Chamovitz, *supra* note 85, at 62.

der.⁸⁸ Notwithstanding the debates surrounding the extent of these limitations, fifty years of European integration and the transfer of competences to the EU have made the initial idea of limiting sovereignty somewhat less of an issue. Therefore, one would expect less resistance towards extraterritorial protection of non-trade concerns by Member States, if such protection reflects the position of the community and the values the Member States share with each other. Lifting sovereignty would also make such extraterritorial protection less necessary, and more short-term in instances where it was found to be necessary, because Member States can solve such issues through harmonization. The consequences of these contextual factors are summarized by Debra Steger: “[R]ather than worrying incessantly about sovereignty, [Europeans] speak about the benefits that come from ‘pooling’ sovereignty.”⁸⁹

The Court’s case law on extraterritorial protection of non-trade concerns by Member States within the free movement of goods seems to reflect this. The Court seems to favor the extraterritorial protection of non-trade concerns if (1) these concerns are part of EU policy or an EU objective and (2) there has been no harmonization on the subject. Where there is harmonization, or where the regulation does not serve an EU policy or EU objective, the Court is less inclined to accept extraterritorial protection. In the last two decades the ECJ seems generally to have adopted a pragmatic approach that is much more focused on the proportionality of a measure and its effects on harmonization than on any jurisdictional concern.⁹⁰

Early cases in the 1970s gave some signs that extraterritorial protection of non-trade issues would not be permitted. In its seminal ruling in *Cassis de Dijon*, the Court stated that “[i]n the absence of common rules . . . it is for the Member States to

⁸⁸ Case 26/62, *N.V. Algemene Transport—en Expeditie Onderneming van Gend & Loos v. Nederlandse administratie der belastingen*, 1963 E.C.R. 1, 2.

⁸⁹ Debra P. Steger, *The Culture of the WTO: Why It Needs to Change*, 10 J. INT’L ECON. L. 483, 488 (2007).

⁹⁰ See *supra* note 75 and accompanying text.

regulate all matters relating to the production and marketing of alcohol and alcoholic beverages *on their own territory*.⁹¹ This statement could be read as indicating a presumption against regulating to address external harms.

The Advocate General's opinions in *Dassonville* and *Kramer* seem to support this stance. In *Dassonville*, the Court had to assess whether a Belgian law requiring imports of whiskey to be accompanied with a certificate of origin was compatible with the free movement of goods.⁹² While the Court did not address the issue of whether the protection of industrial and commercial property of another state was a legitimate concern, Advocate General Trabucchi considered the protection of extra-territorial interests impermissible.⁹³ In his opinion:

The protection of designations of origin of products is covered by the principle of protection of industrial and commercial property for which Article 36 allows necessary derogations to the prohibition on quantitative restrictions and measures having equivalent effect. *However, on the basis of this rule, States can derogate in the said manner only for the purpose of the protection of their own interests and not for the protection of the interests of other States.* Thus, for example, restrictions on freedom of movement, which a State can introduce on the basis of this rule for the protection of public health, cannot in any case justify restrictions on exports of products considered harmful for the purpose of protecting the public health of the populations of other Member States. *Article 36 allows every State the right to protect exclusively its own national in-*

⁹¹ Case 120/78, *Rewe-Zentral AG v. Bundesmonopolverwaltung für Branntwein* (Cassis de Dijon), 1979 E.C.R. 649, 662 (emphasis added).

⁹² Case 8/74, *Procureur du Roi v. Dassonville*, 1974 E.C.R. 837.

⁹³ *Id.* at 855 (Opinion of Advocate-General Trabucchi); *see also* Joined Cases 3, 4 and 6/76, *Cornelis Kramer and others*, 1974 E.C.R. 1279.

terests. Consequently, for the purpose of protecting industrial and commercial property, each State can restrict the freedom of movement of goods only with reference to the protection of individual rights and economic interests falling under its own sphere of interest.⁹⁴

In the 1990s, however, the Court's opinion of extraterritorial action began to seem more ambiguous. In four cases regarding the extraterritorial protection of animal welfare, the ECJ made several contradictory indications regarding the permissibility of protecting animals outside the territory of the regulating Member State.⁹⁵ Two cases regarding import prohibitions to protect bird species seemed relatively permissive regarding extraterritoriality, while two cases concerning export prohibitions to protect sheep and cows were fairly restrictive.⁹⁶ In all four cases, however, the measures' effect on harmonization was a primary concern.⁹⁷

The protection of wild birds is partly harmonized in the EU,⁹⁸ but some Member States maintain regulations that go beyond the protection afforded by the directive—including regulations protecting species that occur only outside the territory of the regulating Member State. In *Gourmetterie van den Burg*, for example, a trader challenged a Dutch law prohibiting the buying and selling of red grouse, a species native only to the British Isles and freely marketed there.⁹⁹ The Dutch law sought to justi-

⁹⁴ *Procureur du Roi*, 1974 E.C.R. at 860 (Opinion of Advocate-General Trabucchi) (emphasis added).

⁹⁵ *Compare* Case C-169/89, Criminal Proceedings against *Gourmetterie Van den Burg*, 1990 E.C.R. I-2143, with Case C-202/94, Criminal Proceedings against *Godefridus Van der Feesten*, 1996 E.C.R. I-355, with Case C-5/94, *The Queen v. Ministry of Agric., Fisheries and Food, ex parte Hedley Lomas (Ireland) Ltd.*, 1996 E.C.R. I-2553, with Case 153/78, *Comm'n of the European Communities v. Fed. Rep. of Ger.*, 1979 E.C.R. 2555.

⁹⁶ *Compare Van den Burg*, 1990 E.C.R. at I-2143, and *Van der Feesten*, 1996 E.C.R. at I-355, with *Hedley Lomas (Ireland) Ltd.*, 1996 E.C.R. at I-2553, and *Fed. Rep. of Ger.*, 1979 E.C.R. at 2555.

⁹⁷ See *Van den Burg*, 1990 E.C.R. at I-2143; see also *Van der Feesten*, 1996 E.C.R. at I-355; *Hedley Lomas (Ireland) Ltd.*, 1996 E.C.R. at I-2553; *Fed. Rep. of Ger.*, 1979 E.C.R. at 2555.

⁹⁸ Council Directive 2009/147, 2010 O.J. (L 20) (EC).

⁹⁹ *Van den Burg*, 1990 E.C.R. at I-2146–47.

fy the measure on the grounds of protecting the life and health of animals.¹⁰⁰ Notably, the Commission supported the permissibility of the Dutch extraterritorial protective measures.¹⁰¹ The ECJ ultimately found against the law, not because it sought to protect a species that occurred outside of its jurisdiction, but because the directive provided for complete harmonization with regards to non-migratory species.¹⁰² The ECJ, however, implied that had the protected species been migratory or endangered, the regulation would have been permissible.¹⁰³

Similarly, *Van der Feesten* involved a Dutch law prohibiting the keeping, purchase, sale, import, and export of wild birds.¹⁰⁴ The law was challenged on the grounds that it extended to birds occurring naturally in the wild only outside of the Netherlands.¹⁰⁵ In this case, the ECJ went further than in *Van den Burg*, upholding the law on the grounds that the protection of foreign birds was logically necessary to protect domestic wild birds that might interbreed with them.¹⁰⁶ The Court found that: “[T]he Directive applies to bird subspecies which occur naturally in the wild only outside the European territory of the Member States if the species to which they belong or other subspecies of that species occur naturally in the wild within the territory in question.”¹⁰⁷ The Court thus accepted that the protection pro-

¹⁰⁰ *See id.* at I-2148.

¹⁰¹ *See id.* at I-2155 (Opinion of Advocate General Van Gerven) (“In the Commission’s view, it is immediately apparent from Article 36 that the aim of protecting animal life can apply equally well to animals which do not occur in the country adopting the protective measures as to animal species actually found there.”).

¹⁰² *See id.* at I-2164.

¹⁰³ *See id.* at I-2163 (“[The Directive] grants special protection to migratory species which constitute, according to the third recital in the preamble to the directive, a common heritage of the Community. [And] in the case of the most endangered birds, the directive provides that the species listed in Annex I must be the subject of special conservation measures in order to ensure their survival and protection. It follows from those general objectives laid down by [the Directive] for the protection of birds that the Member States are authorized, pursuant to Article 14 of the directive, to introduce stricter measures to ensure that the aforesaid species are protected even more effectively.”).

¹⁰⁴ Case C-202/94, *Criminal Proceedings against Godefridus Van der Feesten*, 1996 E.C.R. I-355, 382.

¹⁰⁵ *Id.* at I-357 (Opinion of Advocate General Fennelly).

¹⁰⁶ *Id.* at I-386–87.

¹⁰⁷ *Id.* at I-387.

vided for by EU legislation had no firm territorial limits, but required a link with the territory of the regulating Member State. It has been argued that the discrepancy between this case and *Van den Burg* indicates that the Court is willing to accept more far-reaching protection if the protected species forms a part of common EU heritage.¹⁰⁸

At the same time, two decisions regarding the permissibility of export restrictions on animal welfare grounds seem to point to a more cautious approach where harmonized legislation is present.

In *Hedley Lomas* and *Compassion in World Farming*, the ECJ had to deal with somewhat exotic PPM measures applied by the United Kingdom.¹⁰⁹ *Hedley Lomas* concerned the United Kingdom's refusal of a license to export live sheep to Spain because the authorities in the United Kingdom were not confident that Spanish slaughterhouses were up to EU standards for slaughtering.¹¹⁰ The Court's rejection of the United Kingdom's justification for the measure was largely based on the unilateral conduct by the United Kingdom authorities, an issue which will be returned to below.¹¹¹ With regard to extraterritoriality, the Court's message was somewhat difficult to read. The ECJ declined to make any specific statement with regard to the applicability of Article 36 to justify regulations aimed at preventing harm outside of national borders. It did censure the United Kingdom for its attempt to enforce harmonized regulations outside of its borders "solely on the conviction that a certain number of Spanish slaughterhouses were not complying with the requirements of the Directive itself and that there was at least a significant risk that animals exported to Spain would

¹⁰⁸ See JOCHEM WIERS, *TRADE AND ENVIRONMENT IN THE EC AND THE WTO* 134 (1st ed. 2002).

¹⁰⁹ See Case C-5/94, *The Queen v. Ministry of Agric., Fisheries and Food, ex parte Hedley Lomas (Ireland) Ltd.*, 1996 E.C.R. I-2553; see also Case C-1/96, *The Queen v. Minister of Agric., Fisheries and Food, ex parte Compassion in World Farming Ltd.*, 1998 E.C.R. I-1281.

¹¹⁰ *Hedley Lomas (Ireland) Ltd.*, 1996 E.C.R. at I-2606.

¹¹¹ See *infra* Part III.2.B.

undergo, upon slaughter, treatment contrary to the Directive.”¹¹² In his Opinion, Advocate General Léger argued that the United Kingdom was not in the best position to assert the conditions in slaughterhouses in Spain, an essentially evidential point.¹¹³ The ECJ, however, has used a similar argument to allow export restrictions based on protecting the quality and reputation of the exported product.¹¹⁴

Compassion in World Farming, similarly, dealt with whether the United Kingdom could restrict the export of live veal calves to other Member States where they may be subject to poor living conditions.¹¹⁵ In this case, however, it was not as clear whether EU law completely harmonized the field. In his opinion, Advocate General Léger concluded that there was no harmonization, and that therefore export restrictions might be permitted.¹¹⁶ He also argued that Article 36 of the Treaty on the Functioning of the European Union (TFEU) could only justify a restriction on the free movement of goods on the basis of interests located inside the territory of the Member State imposing restrictions.¹¹⁷ Thus, the United Kingdom’s export restrictions could be permitted on the ground of protecting public morality, but not on the grounds of public policy or protecting animal welfare.¹¹⁸ Interestingly, this amounts to an argument merely to redraft the interest as internally, rather than externally, di-

¹¹² *Hedley Lomas (Ireland) Ltd.*, 1996 E.C.R. at I-2610.

¹¹³ *See, e.g., id.* at I-2566 (Opinion of Advocate General Léger) (“I wish finally to point out, as the applicant company in the national proceedings has aptly noted, that if the United Kingdom had had proof that the directive was being infringed in some slaughterhouses . . .”).

¹¹⁴ Case C-384/93, *Alpine Invs. BV v. Minister van Financiën*, 1995 E.C.R. I-1167, 1178–79; Case 89/76, *Comm’n of the European Communities v. Kingdom of the Neth.*, 1977 E.C.R. 1355, 1360.

¹¹⁵ *See* Case C-1/96, *The Queen v. Minister of Agric., Fisheries and Food, ex parte Compassion in World Farming Ltd.*, 1998 E.C.R. I-1281, 1292. The case was a reference from proceedings brought by the Royal Society for the Prevention of Cruelty to Animals and *Compassion in World Farming* against the United Kingdom’s Minister of Agriculture, Fisheries and Food, challenging the Minister’s refusal to restrict the export of veal calves to France on animal welfare grounds. *Id.* at I-1283.

¹¹⁶ *See id.* at I-1268 (Opinion of Advocate General Léger).

¹¹⁷ *See id.* at I-1269 (Opinion of Advocate General Léger).

¹¹⁸ *See id.* at 1262–74 (Opinion of Advocate General Léger).

rected—a position that would broadly legitimize properly-worded extraterritorial measures.

The Court disagreed with the Advocate General, finding that there was indeed harmonization of animal welfare standards sufficient to preclude the United Kingdom from taking action in this field.¹¹⁹ Furthermore, the Court held that the United Kingdom's actions justified on the grounds of public policy or public morality was also impermissible because it would undermine EU harmonization in the area of animal welfare.¹²⁰ The ECJ also made a stronger statement regarding extraterritorial action to protect the animal welfare:

It is true that the Court ruled [previously] . . . that Community law, as it then stood, did not prevent a Member State from maintaining or introducing unilateral rules concerning the standards which had to be observed in the installation of enclosures for fattening calves with a view to protecting the animals and which applied without distinction to calves intended for the national market and to calves intended for export.

However, that judgment related to measures which a Member State applied only within its own territory. Furthermore, it was delivered before the Community legislature had adopted the Directive and was expressly founded on the absence, in the provisions governing the common organisation of the market, of any provision for

¹¹⁹ *Compassion in World Farming Ltd.*, 1998 E.C.R. at I-1300. The United Kingdom, however, could take action as permitted by the harmonizing document. *See id.* (“[T]he fact that the Member States are authorized to adopt within their own territory protective measures stricter than those laid down in a directive does not mean that the Directive has not exhaustively regulated the powers of the Member States in the area of the protection of veal calves . . .”).

¹²⁰ *Id.* at I-1301 (“[A] Member State cannot rely on the views or the behavior of a section of national public opinion . . . in order unilaterally to challenge a harmonizing measure adopted by the Community institutions.”).

the protection of animals kept for farming purposes. . . .¹²¹

These animal welfare cases are ambiguous regarding extraterritoriality. The Court does not seem to regard extraterritorial protection as inevitably fatal to a measure, but rather as a factor arousing suspicion. That suspicion, however, does not center on the motives behind the measure and its legitimacy in principle, as the Advocates General discussed, but rather on its proportionality and effects on harmonization. The Court, one could suggest, is far more concerned about the practical jurisdictional and evidential problems that extraterritorial protection might raise than about any principled or constitutional issue.

This fundamentally pragmatic and flexible approach is also reflected the Court's position in *Alpine Investments*, where the ECJ dealt with the question of whether a Dutch prohibition on cold calling services made from the Netherlands to other Member States could be justified on public interest grounds.¹²² Specifically, the Netherlands argued that the prohibition served two public interest purposes: 1) safeguarding the reputation of Dutch financial markets; and 2) protecting the investing public, particularly in foreign states.¹²³ The Court ruled that:

Although the protection of consumers in the other Member States is not, as such, a matter for the Netherlands authorities, the nature and extent of that protection does none the less have a direct effect on the good reputation of Netherlands financial services.

Maintaining the good reputation of the national financial sector may therefore constitute an imperative reason of public interest capable of justi-

¹²¹ *Id.* at I-1296.

¹²² Case C-384/93, *Alpine Invs. BV v. Minister van Financiën*, 1995 E.C.R. I-1167, 1172.

¹²³ *Id.* at I-1178.

fyng restrictions on the freedom to provide financial services.¹²⁴

This holding is interesting because like the Advocate General in *Compassion in World Farming*, the ECJ accepted the inwardly-directed reason (protecting the reputation of Dutch financial markets) and rejected the externally-directed reason (protecting the investing public) for the regulation.¹²⁵ This implies that regulations directed solely at harms in other Member States would not be justifiable. At the same time, though, the Court did not reject the regulation merely because of its externally-directed component.¹²⁶

This would seem to indicate that so long as a regulation *also* protects an internal public interest, it can be justified as a derogation from Articles 34 and 35. And because, as discussed above, a PPM measure can almost always be re-characterized as either an internally or externally directed measure, this would leave open the door for the justification of any number of PPM measures, so long as proportionate to the internally-directed interest at stake. The acceptance in *Alpine Investments* of “[m]aintaining the good reputation of the national financial sector . . . ,” for example, as a legitimate national concern justifying trade restrictions, is a generous gesture. It goes a respectable distance towards merging the internal and the external.¹²⁷

This line of argument also underlies the ECJ’s recent judgment in *Josemans*.¹²⁸ This case concerned the compatibility of local Dutch law prohibiting Dutch cannabis-selling ‘coffee-shop’ owners from allowing customers not residing in the Netherlands on their premises with EU law.¹²⁹ A number of justifica-

¹²⁴ *Id.* at I-1179.

¹²⁵ *Id.* at I-1179–80.

¹²⁶ *See id.* at I-1180.

¹²⁷ *Id.* at I-1179.

¹²⁸ Case C-137/09, *Josemans v. van Maastricht*, 2010 EUR-Lex CELEX LEXIS (Dec. 16, 2010).

¹²⁹ *Id.* ¶ 15. Coffee-shops in the Netherlands are establishments where cannabis is sold and consumed, although the marketing of non-alcoholic beverages and food is also a not inconsiderable activity.

tions were put forward to justify this restriction on the freedom to provide services within the EU, notably, not only by the Dutch government, but also by other Member States and the Commission.¹³⁰ Although the Dutch authorities primarily based their defense on public interest grounds, namely the objective of combating drug tourism causing public nuisance, all the other governments that submitted observations to the ECJ argued that the interest of restricting access of non-residents in the Netherlands to coffee-shops was not solely confined to a particular 'Dutch' interest, but also related to interests of other Member States and of the EU at large.¹³¹ The other Member States referred to "the public order problems to which that phenomenon, including the illegal export of cannabis, gives rise in Member States other than the Kingdom of the Netherlands, in particular in neighbouring States."¹³² In addition, the German government took the view that the restriction could be justified on grounds of public health.¹³³ The ECJ agreed and held that:

It must be pointed out that combating drug tourism and the accompanying public nuisance is part of combating drugs. *It concerns both the maintenance of public order and the protection of the health of citizens, at the level of the Member States and also of the European Union.*

Given the commitments entered into by the European Union and its Member States, there is no doubt that the abovementioned objectives constitute a legitimate interest which, in principle, justifies a restriction of the obligations imposed by European Union law, even under a fundamental freedom such as the freedom to provide services.

¹³⁰ *Id.* ¶¶ 60–66 (stating that the German Government and other European Union Member States believe that the Commissions restrictions are justifiable on public policy grounds).

¹³¹ *See Id.* ¶ 64.

¹³² *Id.*

¹³³ Case C-137/09, *Josemans v. van Maastricht*, 2010 EUR-Lex CELEX LEXIS (Dec. 16, 2010), ¶ 61.

In that connection, it is important to bear in mind, as is apparent from paragraphs 11, 37 and 38 of this judgment, that the need to combat drugs has been recognised by various international conventions which the Member States, and even the European Union, have cooperated on or acceded to. The preambles to those instruments mention the danger to the health and well-being of individuals constituted, in particular, by demand for and the illicit traffic in narcotic drugs and psychotropic substances, as well as their harmful effects on the economic, cultural and political bases of society.

Furthermore, the need to fight drugs, in particular by preventing drug addiction and punishing the illicit trafficking in such products or substances, has been set out in Article 152(1) EC and in Articles 29 EU and 31 EU. As regards provisions of secondary law, the first recital in the preamble to Framework Decision 2004/757 states that illicit drug trafficking poses a threat to health, safety and the quality of life of citizens of the European Union, and to the legal economy, stability and security of the Member States. Furthermore, as is apparent from paragraph 10 of this judgment, certain instruments of the European Union relate expressly to the prevention of drug tourism.¹³⁴

The ECJ also accepted restrictions on exports on the basis of events occurring outside of the regulating Member State's territory in three cases dealing with export restrictions of certain goods for reasons relating to public security. These are not PPM cases as such, but they address the extent to which events and behavior in another territory are the legitimate concern of a reg-

¹³⁴ *Id.* ¶¶ 65–68 (emphasis added).

ulating state. As in *Alpine Investments*, the Court's approach in these cases was that the permissibility of the regulation depended on the degree to which there was a connection with a domestic interest. In *Richardt*, the Court found that the seizure by Luxembourg authorities of strategic material in transit through the country was permitted on grounds of public security. According to the Court:

[T]he concept of public security within the meaning of Article 36 of the Treaty covers both a Member State's internal security and its external security. It is common ground that the importation, exportation and transit of goods capable of being used for strategic purposes may affect the public security of a Member State, which it is therefore entitled to protect pursuant to Article 36 of the Treaty.¹³⁵

In the *Werner* and *Leifer* cases, the Court reviewed the export restrictions of two so-called "dual-use goods" (a vacuum induction oven and chemicals) from Germany to Libya and Iraq, respectively.¹³⁶ The Court held that these export restrictions were permitted for reasons of public security because "the risk of a serious disturbance to foreign relations or to peaceful coexistence of nations may affect the security of a Member State."¹³⁷ Advocate General Jacobs argued in his Opinion in *Leifer* that such an export restriction was also permitted for the reason of protecting health and lives of people outside Germany. He argued that:

[I]t cannot have been [the Council's] intention only to allow the Member States to protect the health and lives of their own nationals. As a rule,

¹³⁵ Case C-367/89, Criminal proceedings against Richardt & Les Accessoires Scientifiques SNC, 1991 E.C.R. I-04621, ¶ 22 (referring to the Treaty establishing the European Economic Community).

¹³⁶ Case C-70/94, Fritz Werner Industrie- Ausrüstungen GmbH v. Germany, 1995 E.C.R. I-03218; Case C-83/94 Peter Leifer, Reinhold Otto Krauskopf, Otto Holzer, 1995 E.C.R. I-03235.

¹³⁷ See *Werner*, 1995 E.C.R. I-3218, ¶ 27; *Leifer*, 1995 E.C.R. I-3235, ¶ 28.

of course, a Member State will in the first place act so as to protect its own citizens. Where however a war is waged between certain third countries, entailing a great deal of bloodshed, it would be indefensible to interpret Article 11 of the Export Regulation¹³⁸ as not allowing certain export restrictions aimed at not aggravating the loss of life.¹³⁹

The Court did not approve this reasoning, preferring to justify the measures by reference to domestic interests.¹⁴⁰ Yet in several waste export cases the Court has considered restrictions on waste export without referring to any domestic interest, apparently accepting in principle the desire to protect the environment of another Member State.¹⁴¹ Some of these restrictions have been overruled on proportionality or evidential issues, but not because the threatened environmental harm was in another state.¹⁴²

These cases on the export of waste show that Member States may take extraterritorial protection of non-trade concerns into account, but only in so far as the Member State of dispatch can prove, on the basis of relevant scientific research, that the

¹³⁸ Advocate General Jacobs argued that Article 11 of the Export Regulation in the Treaty should be interpreted similarly to Article 36 of the Treaty of the Functioning of the European Union (“TFEU”). He states, ‘similar principles should, as I shall suggest, govern the interpretation of both [Article 36 and Article 11 of the export regulation], and guidance can therefore be provided by the judgment of the Court in Richardt...’. *Werner*, 1995 E.C.R. I-3218 ¶ 35 (Opinion of Advocate General Jacobs).

¹³⁹ *Id.* ¶¶ 58–59.

¹⁴⁰ See *Werner*, 1995 E.C.R. I-03218, Court decision; *Leifer*, 1995 E.C.R. I-03235, Court decision ¶¶ 2–3.

¹⁴¹ See, e.g., Case C-277/02, *EU-Wood-Trading GmbH v. Sonderabfall-Management-Gesellschaft Rheinland-Pfalz mbH*, 2004 E.C.R. I-11987.; Case 118/86, *Openbaar Ministerie v. Nertsvoederfabriek Nederland B.V.*, 1987 E.C.R. 3883 [hereinafter *Nertsvoederfabriek*]; Case 172/82, *Syndicat national des fabricants raffineurs d’huile de graissage v. Groupement d’intérêt économique “Inter-Huiles”*, 1983 E.C.R. 555 [hereinafter *Inter-Huiles*]; Case C-203/96 *Chemische Afvalstoffen Dusseldorp BV v. Minister Van Volkshuisvesting, Ruimtelijke Ordening en Milieubeheer*, 1998 E.C.R. I-04075; Case 153/78, *Comm’n of the European Communities v. Fed. Rep. of Ger.*, 1979 E.C.R. 2555, ¶ 41.

¹⁴² See *Chemische Afvalstoffen Dusseldorp*, 1998 E.C.R. I-04075; *Nertsvoederfabriek*, 1987 E.C.R. 3883; *Inter-Huiles*, 1983 E.C.R. 555.

export of waste may cause harm, and that it does not require the importing Member State to have higher standards than the state of export.¹⁴³

Externally, EU law is less ambiguous. The Treaties provide explicit support for an evangelical EU, seeking to spread its values and world view beyond its own borders. PPM measures are in this context logical and fitting. Article 3(5) of the Treaty on European Union (TEU) sets out the goals of the EU in its relations with the wider world:

In its relations with the wider world, the Union shall uphold and promote its values and interests and contribute to the protection of its citizens. It shall contribute to peace, security, the sustainable development of the Earth, solidarity and mutual respect among peoples, free and fair trade, eradication of poverty and the protection of human rights, in particular the rights of the child, as well as to the strict observance and the development of international law, including respect for the principles of the United Nations Charter.¹⁴⁴

Moreover, the EU has also consciously chosen to throw its ideological weight behind the idea of soft power or normative power in international relations, and the use of economic influence rather than military influence as a tool of development and social change. As early as the 1970s, scholars like François Duchêne argued that the European Community represented a “new stage of political civilisation” that would influence international affairs not through military might, but rather through “essentially civilian forms of power” such as economic and foreign policy instruments.¹⁴⁵ And more recently, Ian Manners’s

¹⁴³ See *EU-Wood-Trading*, 2004 E.C.R. I-111987.

¹⁴⁴ TEU, *supra* note 4, art. 3.5.

¹⁴⁵ François Duchêne, *The European Community and the Uncertainties of Interdependence*, in *A NATION WRIT LARGE? FOREIGN POLICY PROBLEMS BEFORE THE EUROPEAN COMMUNITY* 1, 19 (Max Kohnstamm & Wolfgang Hager eds., 1973).

concept of “Normative Power Europe” has gained ground as an explanation of the EU’s ability to influence international affairs by “redefin[ing] international norms in its own image.”¹⁴⁶

EU officials point to the relatively smooth transition from communist dictatorship to liberal democracy of the Central and Eastern European Member States as an example of the positive effects of economic engagement and the coupling of the economic and non-economic.¹⁴⁷ This approach is also applied in relations with Turkey and North Africa,¹⁴⁸ and more widely, as the EU seeks to attach human rights and other conditions to its trade and economic relations with third states.¹⁴⁹ The EU’s Generalised System of Preferences (GSP) gives developing countries preferential access to the EU market in the form of reduced tariffs on goods, and although there is no expectation that this preferential treatment is reciprocated, the GSP+ regime, which is more beneficial, only applies when a developing country has ratified and effectively implemented 27 international agreements on labor standards, sustainable development, good governance and human rights.¹⁵⁰

It is evident, then, that the idea of making trade conditional on compliance with social and environmental norms is not new to European foreign policy thinking. As Kalypso Nico-

¹⁴⁶ Manners, *supra* note 22, at 252. There is some debate about the conceptual relationship between civilian, soft, and normative power that will not be entered into here.

¹⁴⁷ See Jacques Delors, President of the European Comm’n, Address at the College of Europe in Bruges (Oct. 17, 1989), available at http://www.cvce.eu/obj/Address_given_by_Jacques_Delors_Bruges_17_October_1989-en-5bbb1452-92c7-474ba7cf-a2d281898295.html (arguing that the existence of the EC as an example of a Community based on the rule of law, a democratic entity and a buoyant economy was the model and the catalyst for the changes in the eastern European states).

¹⁴⁸ See, e.g., Thomas Diez, *Constructing the Self and Changing Others: Reconsidering ‘Normative Power Europe’*, 33 MILLENNIUM: J. INT’L STUD. 613, 630–33 (2005) (describing the export of European values to North Africa through the Euro-Mediterranean Partnership and to Turkey via its candidacy for EU-membership).

¹⁴⁹ See generally Karen E. Smith, *The EU, Human Rights and Relations with Third Countries: ‘Foreign Policy’ with an Ethical Dimension?*, in ETHICS AND FOREIGN POLICY 185 (Karen E. Smith & Margot Light eds., 2001) (describing the linkage of trade and human rights in EU foreign policy since the 1980s).

¹⁵⁰ See generally Council Regulation 732/2008, Applying a Scheme of Generalised Tariff Preferences, 2008 O.J. (L 211) 1 (EC).

laïdis and Robert Howse note, “[t]he projection of Europe’s Utopia on to the rest of the world has a long history and many labels, from enlightenment to colonialism, civic imperialism, or ‘civilian power’.”¹⁵¹ From this perspective, PPMs fit entirely within the EU’s external economic mind-set. They are, in a sense, merely one more mechanism in the soft power toolkit.

And indeed, the EU has been willing to use PPMs to spread its values. Recently, the EU has adopted a regulation laying down the obligations of operators who place timber and timber products on the market.¹⁵² The regulation tries to check harm that takes place outside EU territory, although there is also a nexus with EU concerns such as climate change and biodiversity. The regulation recognizes that:

Illegal logging is a pervasive problem of major international concern. It poses a significant threat to forests as it contributes to the process of deforestation and forest degradation, which is responsible for about 20 % of global CO₂ emissions, threatens biodiversity, and undermines sustainable forest management and development including the commercial viability of operators acting in accordance with applicable legislation. It also contributes to desertification and soil erosion and can exacerbate extreme weather events and flooding. In addition, it has social, political and economic implications, often undermining progress towards good governance and threatening the livelihood of local forest-dependent communities, and it can be linked to armed conflicts. Combating the problem of illegal logging in the context of this Regulation is expected to contribute to the Union’s climate change mitigation efforts in a cost-effective manner and should

¹⁵¹ Nicoaidis & Howse, *supra* note 81, at 767.

¹⁵² Council Regulation 995/2010, Timber Regulation 2010 O.J. (L 295) 23 (EU).

be seen as complementary to Union action and commitments in the context of the United Nations Framework Convention on Climate Change.¹⁵³

The regulation explicitly addresses concerns located outside EU territory, by prohibiting the marketing of timber harvested illegally in third countries.¹⁵⁴ The regulation also requires traders to identify from whom they have obtained the timber, and to whom they have supplied timber.¹⁵⁵ In addition, the regulation obliges operators to use a ‘due diligence system’,¹⁵⁶ which:

[S]hould provide access to information about the sources and suppliers of the timber and timber products being placed on the internal market for the first time, including relevant information such as compliance with the applicable legislation, the country of harvest, species, quantity, and where applicable sub-national region and concession of harvest.¹⁵⁷

2. Unilateralism

A. The WTO

Even more so than with regard to extraterritoriality, the WTO has been quite hostile to the notion of unilateral action to prevent extrajurisdictional harm. The concept of multilateralism is of fundamental importance to the WTO. It forms one of the bedrock principles of the organization, and frames the institutional pursuit of negotiated concessions. Indeed, as John Ruggie famously described it, the philosophy of embedded liberalism

¹⁵³ *Id.* at pmb. ¶ 3.

¹⁵⁴ *Id.* art. 4.

¹⁵⁵ *Id.* art. 5.

¹⁵⁶ *Id.* art. 6 and 4 ¶ 2.

¹⁵⁷ *Id.* at pmb. ¶ 17.

that characterized the GATT was founded on the twin principles of “multilateralism and safeguarding domestic stability.”¹⁵⁸ Unilateral Member State PPMs undermine this philosophy and create potential openings for protectionism and the nullification of bargained trade concessions, threatening the all-important equilibrium among Member States.

It is unsurprising, then, that the WTO cases most explicitly dealing with the PPM issue have focused on unilateralism as a primary concern. Philippe Sands has argued that one of the reasons why the GATT panel in *US—Tuna* rejected the unilateral imposition by the US of the manner in which tuna might be caught was because “it was concerned with the imposition by one state (community) of its values (dolphin conservation) on another state (community) without that other state having had an opportunity to contribute to the elaboration of those values or their elevation to international acceptability.”¹⁵⁹ And the decision in *US—Shrimp* stressed the failure of the US to engage in multilateral negotiations as the primary reason for rejecting the turtle protection measure:

The unjustifiable nature of this discrimination emerges clearly when we consider the cumulative effects of the failure of the United States to pursue negotiations for establishing consensual means of protection and conservation of the living marine resources here involved. . . . The principal consequence of this failure may be seen in the resulting unilateralism evident in the application of [the measure]. As we have emphasized earlier, the policies relating to the necessity for use of particular kinds of [Turtle Excluder Devices] in various maritime areas, and the operating details of these policies, are all shaped by

¹⁵⁸ John Gerard Ruggie, *International Regimes, Transactions, and Change: Embedded Liberalism in the Postwar Economic Order*, 36 INT'L ORG. 379, 396 (1982).

¹⁵⁹ Sands, *supra* note 47, at 295.

the Department of State, without the participation of the exporting Members. The system and processes of certification are established and administered by the United States agencies alone. The decision-making involved in the grant, denial or withdrawal of certification to the exporting Members, is, accordingly, also unilateral. The unilateral character of the application of [the measure] heightens the disruptive and discriminatory influence of the import prohibition and underscores its unjustifiability.¹⁶⁰

Even more clearly, the SPS and TBT agreements both create a presumption in favor of multilaterally agreed product standards, and require states that wish to regulate more strictly to provide scientific evidence for their regulatory choices.¹⁶¹

Today, according to Sands, unilateralism seems to be acceptable within the GATT only if three criteria have been met. First, a state taking a unilateral measure should have a legitimate interest in the concern it is seeking to protect. Second, that concern must be the subject of international action. Third, the state taking the unilateral measure must have exhausted efforts to find a solution through diplomacy either bilaterally or multilaterally.¹⁶²

B. The EU

One would expect that the EU, which is fundamentally built upon cooperation between Member States, would be reluc-

¹⁶⁰ *US—Shrimp*, *supra* note 5, ¶ 172.

¹⁶¹ Agreement on the Application of Sanitary and Phytosanitary Measures, Apr. 15, 1994, art. 3.2, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, World Trade Organization, The Legal Texts: The Results of the Uruguay Round of Multilateral Trade Negotiations (1999) [hereinafter SPS Agreement]; Agreement on Technical Barriers to Trade, Apr. 15, 1994, art. 2.4, WTO Agreement, Annex 1A [hereinafter TBT Agreement]. *But cf.* Appellate Body Report, *European Communities—Trade Description of Sardines*, ¶ 227, WT/DS231/AB/R (Sept. 26, 2002) (noting that a standard does not need to be adopted by consensus to qualify as “international”).

¹⁶² Sands, *supra* note 47, at 300.

tant to allow unilateral trade measures by its Member States. In particular, Article 4, paragraph 3 of TEU requires the EU and its Member States, “pursuant to the principle of sincere cooperation . . . in full mutual respect, [to] assist each other in carrying out tasks which flow from the Treaties.”¹⁶³ The principle of sincere cooperation also requires Member States to “take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union” and to “facilitate the achievement of the Union’s tasks and refrain from any measure which could jeopardise the attainment of the Union’s objectives.”¹⁶⁴

As was the case with extraterritoriality, however, the ECJ has seemed much more concerned with the effects of unilateralism on harmonization than with unilateralism in a formal or fundamental sense.

For example, in *Hedley Lomas*, the case in which the United Kingdom refused to grant a license for the export of live sheep to Spanish slaughterhouses, the ECJ held that: “A Member State may not unilaterally adopt, on its own authority, corrective or protective measures designed to obviate any breach by another Member State of rules of [EU] law.”¹⁶⁵ Initially, it may seem that this case points toward a refusal by the Court to accept unilateralism as a legitimate course of action by Member States. However, the ECJ found the UK action impermissible because slaughterhouse standards had been harmonized by EU legislation.¹⁶⁶ The ECJ’s key concern was not with unilateral action to protect animal welfare, but with unilateral action in a sphere harmonized by EU law. As the Court wrote: “[r]ecourse to Article 36 is no longer possible where Community directives provide for harmonization of the measures necessary to achieve

¹⁶³ TEU, *supra* note 4, art. 4.

¹⁶⁴ *Id.*

¹⁶⁵ Case C-5/94, *The Queen v. Minister of Agric., Fisheries and Food ex parte Hedley Lomas*, 1996 E.C.R. I-2553, ¶ 20.

¹⁶⁶ *Id.*

the specific objective which would be furthered by reliance upon this provision.”¹⁶⁷

Advocate General Léger, agreed, noting that “nothing was more alien to [EU] law than the idea of a measure of retaliation *or reciprocity* proper to classical public international law,” and that EU law prohibits Member States from taking the law into their own hands.¹⁶⁸ However, the Advocate General’s opinion, too, was much more concerned with the regulation’s impact on the harmonization process than it was with unilateral conduct in the absence of harmonization.¹⁶⁹

By contrast, the Court in *Compassion in World Farming*, involving the UK’s refusal to export veal calves to states with poorer living conditions, emphasized that unilateralism may be permissible in cases where the EU had not moved to harmonize internal market law or where the harmonizing legislation specifically permitted unilateral action.¹⁷⁰

In *Gourmetterie Van den Burg*, a case involving the Dutch ban on sales of red grouse, Advocate General van Gerven objected to the Dutch regulation because of its effects on Member States’ mutual confidence in each other’s legislation and willingness to cooperate. He states, “a measure unilaterally adopted by one Member State in connection with the hunting of animals in another Member State would seem at first sight to be difficult to reconcile with the principle of mutual confidence between Member States when they give effect to a Community directive in their legislation.”¹⁷¹ However, the main thrust of his argument focused on the lack of proportionality of the unilateral *de facto* import ban in light of the fact that protecting the red grouse was not a Community objective:

¹⁶⁷ *Id.* ¶ 18.

¹⁶⁸ *Hedley Lomas*, 1996 E.C.R. I-2553 (Opinion of Advocate General Léger).

¹⁶⁹ *Id.* ¶¶ 39–40.

¹⁷⁰ *See Compassion in World Farming Limited*, 1998 E.C.R. I-1251.

¹⁷¹ Case C-169/89, *Criminal proceedings against Gourmetterie Van den Burg*, 1990 E.C.R. I-2143, ¶ 7 (Opinion of Advocate General van Gerven).

The restriction of intra-Community trade resulting from an absolute prohibition of imports in the Netherlands is out of proportion, in my view, to the small contribution which such a prohibition is capable of making in concreto—by discouraging the killing of the bird species in question in the United Kingdom—to the achievement of the objective pursued, namely the improvement of stocks of bird species which is not endangered and *whose protection is not a priority under Community law*. That is so particularly since the measure under consideration and the obstacle to trade resulting therefrom are intended to protect a bird and thus, contrary to the principle of mutual confidence between States, to take effect on the territory of another Member State; moreover, the measure was adopted on the basis of a unilateral appraisal of the interests involved, that is to say without taking account of interests which may warrant or justify the hunting of that species.¹⁷²

An issue central to these cases is whether the challenged measures pursue objectives that are also EU objectives. Where a unilateral Member State action has the effect of interfering with EU action, as in the cases above, it is not permitted. However, where unilateral action helps to promote an EU objective, the Court has indicated that unilateral action may be acceptable. Indeed, in several cases the Court seemed to welcome such unilateral national initiatives.

Preussen Elektra is a particularly good example of this behavior. The ECJ upheld a German law requiring electricity suppliers to purchase a certain percentage of energy from renewable sources at a minimum price higher than that of electric-

¹⁷² *Id.* ¶ 10 (emphasis added).

ity on the German market.¹⁷³ The Court ruled that although the German law unilaterally restricted intra-EU trade, it was justified because the measure was “useful for protecting the environment” and the use of renewable energy sources which it was intended to promote “contributes to the reduction in emissions of greenhouse gases which are amongst the main causes of climate change which the European Community and its Member States have pledged to combat.”¹⁷⁴ The Court referred to the Treaty articles regarding environmental policy,¹⁷⁵ and went on at considerable length discussing EU and international measures addressing climate change¹⁷⁶ and EU measures regulating the electricity market while taking the environment into account.¹⁷⁷ The fact that the German measure pushed forward a community goal in the absence of harmonization was enough to ensure that its unilateral nature would be accepted.

This welcoming approach may be the result of the EU’s distinctive institutional context. Unlike the WTO, the EU has the capacity to harmonize—to legislate for the entire EU area on a wide range of subjects—wherever necessary for the functioning of the internal market. A unilateral Member State PPM initiative creates free movement problems within that market, as products from laxer states find access to markets in stricter states restricted. However, precisely this fact triggers EU competence to take the necessary harmonizing measures. The EU legislature is empowered to regulate when differences exist between national rules that could obstruct fundamental freedoms and thus have a direct effect on the functioning of the internal

¹⁷³ Case C-376/98, *Preussen Elektra AG v. Schleswag AG*, 2001 E.C.R. I-2099. See generally Ann Goossens & Sam Emmerechts, *Case C-379/98, PreussenElektra AG v. Schleswag AG*, *Judgment of the Full Court of 13 March 2001*, 38 COMMON MKT L. REV. 991 (2001) (discussing *Preussen Elektra*).

¹⁷⁴ *Preussen Elektra*, 2001 E.C.R. I-2099, ¶ 73.

¹⁷⁵ *Id.* ¶ 76.

¹⁷⁶ *Id.* ¶ 74.

¹⁷⁷ *Id.* ¶¶ 77–80.

market or could cause significant distortions of competition.¹⁷⁸ Usually if a significant number of states have adopted or are considering adopting a measure of a given sort this is an indication that substantial political will is present, and there is a good chance of bringing less active states on board. This often results in a new, broader EU norm. This process is aided by the realization of most states that if they begin to take unilateral action they will harm the free movement from which they all generally benefit. Thus, if the EU wishes to pursue a given policy, unilateral Member State action in that area can be an opportunity rather than a threat, as it creates the awareness of the issue, justifies EU intervention, and identifies Member States who are prepared to provide active support for regulation of the issue in question.

A perfect example of unilateral Member State action that led to EU-wide legislation is the evolution of the EU regulation on trade in seal products.¹⁷⁹ Several years ago, Belgium and the Netherlands enacted legislation prohibiting trade in seals and seal products on animal welfare grounds.¹⁸⁰ These national laws created barriers to the free movement of goods within the EU. However, rather than challenging the measures before the ECJ, the EU legislature took the opportunity to implement harmonizing legislation. This chain of reasoning is described in Regulation 1007/2009:

In response to concerns of citizens and consumers about the animal welfare aspects of the killing and skinning of seals and the possible presence on the market of products obtained from animals killed and skinned in a way that causes

¹⁷⁸ Case C-58/08, *The Queen on the application of Vodafone Ltd v. Secretary of State*, 2010 E.C.R. I-04999, ¶¶ 32–33; Case C-376/98, *Federal Republic of Germany v. European Parliament & Council of the European Union*, 2000 E.C.R. I-8419, ¶¶ 49–51.

¹⁷⁹ Parliament & Council Regulation 1007/2009, 2009 O.J. (L 286) 36 (EU).

¹⁸⁰ See Robert Howse & Joanna Langille, *Permitting Pluralism: The Seal Products Dispute and why the WTO Should Permit Trade Restrictions Justified by Non-Instrumental Moral Values* (N.Y. Univ. Pub. Law and Legal Theory Working Papers, Paper no. 316, 2011), available at lsr.nellco.org/cgi/viewcontent.cgi?article=1317&context=nyu_plltwp.

pain, distress, fear and other forms of suffering, several Member States have adopted or intend to adopt legislation regulating trade in seal products by prohibiting import and production of such products, while no restrictions are place on trade in these products in other Member States.

There are therefore differences between national provisions governing the trade, import, production and marketing of seal products. Those differences adversely affect the operation of the internal market in products which contain or may contain seal products, and constitute barriers to trade in such products. . . .

The measures provided for in this Regulation should therefore harmonise the rules across the Community as regards commercial activities concerning seal products, and thereby prevent the disturbance of the internal market in the products concerned, including products equivalent to, or substitutable, for seal products.¹⁸¹

Thus, internally, unilateral measures that further a Community goal are sometimes welcomed as opportunities for the EU to adopt harmonizing legislation. In the institutional environment of the EU, unilateral action can become a pathway toward, rather than an obstacle to, multilateral action.

Externally, the EU has asserted a strong commitment to multilateralism in a number of contexts.¹⁸² However, it has also been willing to take unilateral measures when important issues

¹⁸¹ Parliament & Council Regulation 1007/2009, 2009 O.J. (L 286) 36 (EU), ¶¶ 5–8.

¹⁸² See, e.g., Sibylle Scheipers & Daniela Sicurelli, *Normative Power Europe: A Credible Utopia?*, 45 J. COMMON MKT STUD. 435, 441–48 (2007) (describing the EU's commitment to multilateralism in the context of the ICC negotiations and the development of the Kyoto Protocol).

are at stake.¹⁸³ Bernhard Jansen, a Legal Advisor to the European Commission, summarized the European position:

[S]tates are allowed in some limited circumstances under existing public international law to prosecute and punish criminal offences committed outside their own jurisdiction. Examples include piracy, slave trade, hijacking of aircraft, genocide, war crimes and certain acts of terrorism. With regard to conservation measures, the relevant questions would be whether there is an internationally agreed conservation method, whether there is an imminent threat of extinction or severe and irreversible damage to a rare or endangered species, and the importance of that species for the universal 'genetic pool'. If it can be shown by applying these criteria, or other criteria which environmental experts may be able to develop, that the damage to, or the extinction of, a rare or endangered species has effects beyond the territory of the state in which that species lives, we are prepared in Europe as well to consider this as a matter of international concern which might justify action beyond the boundaries of a classic approach to the limits imposed on states by the territoriality principle. However, as this example shows, we are only prepared to consider a more flexible interpretation of the territoriality principle in situations where international cooperation and widely accepted international agreements cannot be reached sufficiently in time in order to achieve an internationally recognized purpose.¹⁸⁴

¹⁸³ See van Calster, *supra* note 65, at 14.

¹⁸⁴ Bernhard Jansen, *The Limits of Unilateralism from a European Perspective*, 11EUR. J. INT'L L. 309, 313 (2000).

The rhetoric of multilateral preference is less significant than two other aspects of this passage: the perceived autonomy to interpret internationally recognized goals, such as species conservation, and the reservation of the right to act unilaterally in pursuance of such an interpretation. Formulating unilateral action as a necessary evil indicates that it is seen as a continuing right. Indeed, if a sufficient condition for unilateralism is that “widely accepted international agreements cannot be reached sufficiently in time in order to achieve an internationally recognized purpose,”¹⁸⁵ then the EU is reserving very nearly a *carte blanche*.

Several EU regulations and communications support the idea that Europe is not averse to acting unilaterally to protect what it deems to be universal values. For example, the Commission noted in an early communication on the process/product distinction that:

The need to ensure that environmental protection can be enforced when there is the risk of irreparable harm to the environment of another state or the global commons, while at the same time dispelling the risk of giving leeway to possible protectionist abuses, is the most challenging task of the international community in the debate on trade and the environment. The Commission considers that there may be specific exceptional circumstances in which the rules of the multilateral trading system should not preclude the adoption of relevant trade measures against a country which is violating some fundamental legal duties under international environmental law, such as the obligation to ensure that activities within its jurisdiction do not cause damage to the environment of other States and the obligation to cooperate to conserve, protect and restore the health

¹⁸⁵ *Id.* at 311.

and integrity of the Earth's ecosystem (Principles 2 and 7 of the Rio Declaration). But trade measures must be based on rigorous scientific evidence, be proportional to the objectives sought and implemented in a transparent manner: they should be considered as last resort measures, once attempts to find other bilateral and multilateral solutions have been exhausted.¹⁸⁶

The newly drafted EU-wide regulation prohibiting the marketing of illegally harvested timber justifies unilateral action to protect global timber supplies by noting its consistency with international norms:

Illegal logging is a pervasive problem of major international concern. It poses a significant threat to forests as it contributes to the process of deforestation and forest degradation, which is responsible for about 20 % of global CO₂ emissions, threatens biodiversity, and undermines sustainable forest management and development including the commercial viability of operators acting in accordance with applicable legislation. It also contributes to desertification and soil erosion and can exacerbate extreme weather events and flooding. In addition, it has social, political and economic implications, often undermining progress towards good governance and threatening the livelihood of local forest-dependent communities, and it can be linked to armed conflicts. Combating the problem of illegal logging in the context of this Regulation is expected to contribute to the Union's climate change mitigation efforts in a cost-effective manner and should

¹⁸⁶ *Commission Communication to the Council and to the Parliament on Trade and Environment*, at 14, COM (1996) 54 final (Feb. 28, 1996).

be seen as complementary to Union action and commitments in the context of the United Nations Framework Convention on Climate Change.¹⁸⁷

The regulation goes on to mention the EU's support of international efforts to eliminate illegal logging and associated trade through Voluntary Partnership Agreements and the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES).¹⁸⁸ The regulation thus falls within the context of international cooperation to combat forest degradation. Note that under TFEU Member States are allowed to adopt more stringent measures.¹⁸⁹

Regulation 1007/2009 relating to trade in seal products, similarly, does not shy away from unilateral international action for the protection of animal welfare. Though it makes no reference to internationally agreed standards of animal welfare, it does reference the UN Declaration on the Rights of Indigenous Peoples to justify its exception for indigenous hunts¹⁹⁰ and seems heavily influenced by the perception of the European public.¹⁹¹ Morality and animal welfare are two of the primary reasons for the regulation.¹⁹²

Whether it sees itself as protecting important universal values or as the flag-bearer of the normative vanguard, the EU has been willing to set aside its rhetorical commitment to multilateralism on several occasions.

3. Non-Trade Issues

¹⁸⁷ Parliament & Council Regulation 995/2010, pmb. recital 4, 2010 O.J. (L 295) 23, 23.

¹⁸⁸ *Id.* at recitals 5–10.

¹⁸⁹ Article 193 of TFEU reads: “The protective measures adopted pursuant to Article 192 shall not prevent any Member State from maintaining or introducing more stringent protective measures. Such measures must be compatible with the Treaties. They shall be notified to the Commission.” TFEU, *supra* note 3, art. 193.

¹⁹⁰ Parliament & Council Regulation 1007/2009, 2009 O.J. (L 286) 36 (EU), ¶ 14.

¹⁹¹ *See, e.g., id.* at pmb. recital 4.

¹⁹² *Id.* at pmb. recitals 1, 4.

A. The WTO

Many WTO Member States are resistant to the idea of integrating non-trade concerns into the trade system. As the WTO Secretariat once stated: “The WTO is not an environmental protection agency and . . . does not aspire to become one.”¹⁹³ For the WTO, international trade regulation is an inappropriate forum for tackling PPM issues. Ecuador, for example, has charged that: “The issue of PPMs was often used by developed countries to restrict market access for some products based on environmental, labour, sanitary or phytosanitary criteria, among others.”¹⁹⁴ Australia has noted its belief that “PPMs reflected the specific economic, social and environmental conditions of individual countries, and, as such, were best dealt with at the national level rather than in the WTO.”¹⁹⁵ According to this view, integrating non-trade concerns into the WTO system muddies the clarity of international economic law and undermines the reciprocal system of trade concessions, permitting countries to argue their way out of commitments on social grounds that were not agreed to by all Member States.

Nicolaïdis and Howse convincingly argued that this resistance was present in the political philosophy of the GATT (characterized by John Ruggie as “embedded liberalism”),¹⁹⁶ as they described “a conception of the complementarity between bargained trade liberalization, on the one hand, and the evolution of the domestic welfare and regulatory state, on the other.”¹⁹⁷ Australia has noted its belief that “PPMs reflected the specific economic, social and environmental conditions of individual countries, and, as such, were best dealt with at the na-

¹⁹³ WTO Secretariat, *Trade and Environment at the WTO*, at 6 (Apr. 2004), available at http://www.wto.org/english/res_e/booksp_e/trade_env_e.pdf.

¹⁹⁴ Special Session of the Committee on Trade and Environment, *Summary Report on the Twenty-First Meeting of the Committee on Trade and Environment in Special Session*, ¶ 48, TN/TE/R/21 (Apr. 29, 2008).

¹⁹⁵ *Id.* ¶ 59.

¹⁹⁶ Ruggie, *supra* note 158, at 399.

¹⁹⁷ Nicolaïdis & Howse, *supra* note 81 776–77.

tional level rather than in the WTO.”¹⁹⁸ According to this view, integrating non-trade concerns into the WTO system muddies the clarity of international economic law and undermines the reciprocal system of trade concessions, permitting countries to argue their way out of commitments on social grounds that were not agreed to by all Member States.

Nicolaïdis and Howse have convincingly argued that this resistance was bound up with the political philosophy of the GATT, characterized by John Ruggie as “embedded liberalism,” “a conception of the complementarity between bargained trade liberalization, on the one hand, and the evolution of the domestic welfare and regulatory state, on the other.”¹⁹⁹ In this vision, social politics are a matter of domestic concern, and integrating such concerns into the international trade regime would be counter to the strategy of promoting multilateralism and tolerating domestic difference. Robert Howse argues elsewhere that this was the basis behind some criticism of the *US—Tuna I* and *US—Shrimp* decisions: “To many people around the world, the panels had blown up exactly what they had been trying to preserve—the notion of trade liberalization as consistent with deep regulatory diversity, accommodating a full range of noneconomic public values.”²⁰⁰

Though contested, this value system is still clearly in evidence at the WTO. Indeed, as Director-General of the WTO Pascal Lamy wrote in 2005:

Pursuant to the WTO, each Member is free to determine the values to which it gives priority and the level of protection it deems adequate for such values. This would include any societal value elected by a WTO Member... [T]he only control

¹⁹⁸ Committee on Trade and Environment, *supra* note 194, ¶ 59.

¹⁹⁹ Nicolaïdis & Howse, *supra* note 81, 776. See also Ruggie, *supra* note 158, at 399 (describing the “essence of embedded liberalism” as the attempt “to devise a form of multilateralism that is compatible with the requirements of domestic stability.”).

²⁰⁰ Howse & Regan, *supra* note 59, at 103.

exercised by the WTO is whether the member is in good faith when invoking such non-trade values or whether it is hiding a protectionist device. This control is exercised by the WTO dispute settlement mechanism. This WTO dispute settlement mechanism has not up to now given trade policy rules precedence over other multilateral rules.²⁰¹

The 1996 Singapore declaration is an interesting example of how the WTO deals with non-trade concerns that concern social and labor rights. The Ministerial Conference stated in this declaration:

We renew our commitment to the observance of internationally recognized core labor standards. The International Labor Organization (ILO) is the competent body to set and deal with these standards, and we affirm our support for its work in promoting them. We believe that economic growth and development fostered by increased trade and further trade liberalization contribute to the promotion of these standards. We reject the use of labor standards for protectionist purposes, and agree that the comparative advantage of countries, particularly low-wage developing countries, must in no way be put into question. In this regard, we note that the WTO and ILO Secretariats will continue their existing collaboration.²⁰²

In this spirit, the WTO has been reluctant to admit any 'political' value judgment to enter into its decision-making pro-

²⁰¹ Pascal Lamy, Director-General of the World Trade Organization, *Towards Global Governance?*, Speech Before at the Master of Public Affairs Inaugural Lecture at the Institut d'Etudes Politiques de Paris (Oct, 21, 2005) quoted in Jenny Schultz & Rachel Ball, *Trade as a Weapon? The WTO and Human Rights-Based Trade Measures*, 12 DEAKIN L. REV. 41, 41 (2007).

²⁰² World Trade Organization, Ministerial Conference Singapore of 9-13 December 1996, WT/MIN(96) ¶4 (1996).

cesses. Instead, it has historically conceived of itself as engaged in the management of a single-value regime, charged only with promoting the goal of multilaterally negotiated deregulated international trade. The dispute settlement body has tried, to the extent possible, to examine only the processes that led to a domestic political decision and its effects on trade, and to ignore questions of the legitimacy of the values themselves. In the *China—Audiovisuals* case, for example, the panel did not examine the legitimacy of the values protected by China's censorship policy, but merely the means through which it was enforced.²⁰³ As the Panel noted in *US—Gambling*, “the content of these concepts for Members can vary in time and space, depending upon a range of factors, including prevailing social, cultural, ethical and religious values.”²⁰⁴

As non-trade values continue to intrude on international trade regime, however, it has become increasingly untenable for the WTO to present itself as standing in isolation from difficult political choices. Since the birth of the Appellate Body, with its more generalist judges, these issues have begun to be confronted more directly. In *US—Gasoline*, for example, the Appellate Body noted that “the *General Agreement* is not to be read in clinical isolation from public international law.”²⁰⁵ And the Appellate Body has on multiple occasions made reference to other international agreements in its decisions. The Doha round has made some additional steps in this direction. The declaration on TRIPs and access to medicines, for example, was a major con-

²⁰³ Appellate Body Report, *China — Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, WTO Doc WT/DS363/AB/R, AB-2009-3 (21 December 2009); See also Joost Pauwelyn, Note, *Squaring Free Trade in Culture with Chinese Censorship: the WTO Appellate Body Report on China—Audiovisuals*, 11 MELB. J. INT'L L. 1, 14–15 (2009).

²⁰⁴ Panel Report, *United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WTO Doc. WT/DS285/R (Nov. 10, 2004), ¶ 6.461 quoted in M.J. TREBILCOCK & ROBERT HOWSE, *THE REGULATION OF INTERNATIONAL TRADE* 628 (2002).

²⁰⁵ Appellate Body Report, *United States—Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R (29 April 1996), III, Article 81 ¶ 2. See also Rep. of the Int'l Law Comm'n, 58th sess, *Report of the ILC Study Group, Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, 1 May-9 June and 3 July-11 August 2006, U. N. Doc. A/CN.4/L.682 (13 Apr. 2006).

cession to the notion that ‘neutral’ trade rules can have serious impacts on ‘non-trade’ concerns. And the assessment of environmental issues has also been an official—and difficult—part of the Doha negotiations. Nevertheless, the WTO continues to be shy of integrating non-trade concerns into the international trading framework, and it is structurally difficult for it to achieve such integration other than by extending derogations.

B. The EU

With respect to the integration of trade and non-trade concerns, the EU has taken a fundamentally different approach. The integration of different policy fields is expressly supported, even required, by a number of different Treaty articles.²⁰⁶ From environment to sex equality, the EU has made a conscious choice to conceive of non-trade issues as (also) part of market policy—that is to say the internal market is a market of values, and a market of other policies. Europe is built around its market, and the integration of the markets of its Member States has been the earliest and primary goal of the EU. With the market as its main instrument, but with wider aspirations, it is not surprising that the integration of trade and non-trade concerns naturally flows from the way the EU is structured.

Both the European Treaties and the case law of the ECJ show that in addition to liberalizing trade and removing obstacles to trade, the European legislator is permitted to and should take into account non-trade concerns. Article 114 TFEU permits legislators to adopt measures with the aim of establishing or ensuring the functioning of the European market.²⁰⁷ Article 114 does not give the EU a general competence to legislate. Instead, the ECJ has determined that it can only be relied on if the measures adopted genuinely improve the conditions for the establishment and functioning of the internal market. But the

²⁰⁶ TFEU, *supra* note 3, art. 7–13.

²⁰⁷ *Id.* art. 114.

meaning of ‘genuine improvement’ is broad, and includes both trade and non-trade measures.

Indeed, EU legislators can and do take into account a number of non-trade concerns. The TFEU explicitly requires the EU to protect a number of non-trade interests, including environmental protection,²⁰⁸ social protection,²⁰⁹ consumer protection,²¹⁰ animal welfare,²¹¹ and human health.²¹² Moreover, Article 114 permits European regulation even where non-trade concerns are the *decisive factor* in the EU’s decision to regulate.²¹³ And once an act based on Article 114 TFEU has already removed any obstacle to trade in the area that it harmonizes, the Community legislature may also adapt that act to any change in circumstances or development of knowledge respecting its task of safeguarding the general interests recognized by the Treaty.²¹⁴

Unlike the WTO, therefore, the EU has never been focused solely on the single goal of promoting free trade. The Court has emphasized the integration of different policy objec-

²⁰⁸ *Id.* art. 11 (“Environmental protection requirements must be integrated into the definition and implementation of the Union’s policies and activities, in particular, with a view to promoting sustainable development.”).

²⁰⁹ *Id.* art. 9 (“In defining and implementing its policies and activities, the Union shall take into account requirements linked to the promotion of a high level of employment, the guarantee of adequate social protection, the fight against social exclusion, and a high level of education [and] training...”).

²¹⁰ *Id.* art. 12 (“Consumer protection requirements shall be taken into account in defining and implementing other Union policies and activities.”).

²¹¹ *Id.* art. 13 (“In formulating and implementing the Union’s agriculture, fisheries, transport, internal market, research and technological development and space policies, the Union and the Member States shall, since animals are sentient beings, pay full regard to the welfare requirements of animals, while respecting the legislative or administrative provisions and customs of the Member States relating in particular to religious rites, cultural traditions and regional heritage.”).

²¹² TFEU, *supra* note 3, art. 9 (“In defining and implementing its policies and activities, the Union shall take into account requirements linked to the... protection of human health.”).

²¹³ Case C-58/08, *The Queen on the application of Vodafone Ltd v. Secretary of State*, 2010 E.C.R. I-04999, ¶ 36 (“provided that the conditions for recourse to Article 95 EC [TFEU Art. 114] as a legal basis are fulfilled, the Community legislature cannot be prevented from relying on a legal basis on the ground that consumer protection is a decisive factor in the choices to be made.”).

²¹⁴ *Id.* ¶ 34.

tives in the EU policy. In *Outokumpu Oy* for example, the Court noted that “compatibility with the environment, particularly of methods of producing electrical energy, is an important objective of the [EU]’s energy policy.”²¹⁵ And in *EU-Wood-Trading* the ECJ interpreted the Regulation as falling “within the framework of the environmental policy pursued by the Community,” rather than “as seeking to implement the free movement of waste within the Community.”²¹⁶

In *Preussen Elektra*, the case requiring German electricity suppliers to purchase energy from renewable sources, the Court also emphasized the integration of environmental policy into other EU policies.²¹⁷ As noted above, the Court ruled that although the German law restricted intra-EU trade, it was justified because the measure was “useful” for protecting the environment “in so far as it contributes to the reduction in emissions of greenhouse gases which are amongst the main causes of climate change which the European Community and its Member States have pledged to combat.”²¹⁸ The Court referred to a number of EU measures and international treaties such as the UNNCCC and the Kyoto protocol to support this argument.²¹⁹ It also noted that European climate change policy is “designed to protect the health and life of humans, animals and plants,”²²⁰ and specifically referred to TFEU Article 11, which requires European policies to take environmental protection into account.²²¹ The Court emphasized that in the absence of harmonization, Member States are permitted to restrict trade on the basis of non-trade concerns, especially where those non-trade concerns are part of EU policy.

²¹⁵ *Id.* ¶ 33.

²¹⁶ Case C-277/02, *EU-Wood-Trading GmbH v. Sonderabfall-Management-Gesellschaft Rheinland-Pfalz mbH*, 2004 E.C.R. I-11987, ¶. 34.

²¹⁷ *Id.* ¶ 76.

²¹⁸ C-376/98, *Preussen Elektra AG v. Schleswag AG*, 2001 E.C.R. I-2099, ¶ 73; *See also* Goossens & Emmerechts, *supra* note 173.

²¹⁹ Goossens & Emmerechts, *supra* note 173.

²²⁰ *Preussen Elektra*, 2001 E.C.R. I-2099, ¶ 75.

²²¹ *Id.* ¶ 76.

Focusing on EU PPM policy and legislation, there are several examples of integration of trade and other policies.²²² The *Integrated Product Policy* of the EU seeks to minimize environmental harm by targeting environmental harm at all phases of a product's life cycle where it is most effective. The phases of a product's life cycle "cover... all the areas from the extraction of natural resources, through their design, manufacture, assembly, marketing, distribution, sale and use to their eventual disposal as waste."²²³ At the same time it also involves many different actors such as designers, industry, marketing people, retailers and consumers. IPP attempts to stimulate each part of these individual phases to improve their environmental performance.²²⁴ The Commission has emphasized in its Communication on the Integrated Product Policy that "full account will be taken of the [EU]'s obligations under international law, in particular as regards trade, as well as the principles governing other [EU] policies."²²⁵ In an earlier Communication on Trade and Environment the Commission noted that the product/process distinction is becoming increasingly diffuse, because, among other reasons, new instruments of environmental policy are based on the so-called "life-cycle approach."²²⁶

In legislation there have been several EU PPM measures which address non-trade concerns such as animal welfare and climate change. The oldest one is Council Regulation 3254/91 of 4 November 1991 prohibiting the use of leghold traps in the EU and the introduction into the EU of pelts and manufactured goods of certain wild animal species originating in countries

²²² See, e.g., European Commission, Communication from the Commission to the European Parliament and the Social Committee and the Committee of the Regions, *Towards a Single Market Act: For a highly competitive social market economy*, COM (2010) 608 final/2 (2010).

²²³ EUROPEAN COMMISSION: ENVIRONMENT, WHAT IS INTEGRATED PRODUCT POLICY, available at <http://ec.europa.eu/environment/ipp/integratedpp.htm>.

²²⁴ *Id.* See also Case C-277/02, *EU-Wood-Trading GmbH v. Sonderabfall-Management-Gesellschaft Rheinland-Pfalz mbH*, 2004 E.C.R. I-11987 ¶ 35 (noting the necessity of life cycle management of environmental harms such as the disposal of waste).

²²⁵ *Communication from the Commission to the Council and the European Parliament* at p. 6, COM (2003) 302 final (June 6, 2003).

²²⁶ *Communication from the Commission to the Council and the European Parliament: On Trade and Environment* at p. 13, COM (1996) 302 final (Feb. 28, 1996).

which catch them by means of leghold traps or trapping methods which do not meet international humane trapping standards.²²⁷ The legal basis for this regulation was TFEU article 207 (Common Commercial Policy) and TFEU article 192 (Environmental Policy). This measure almost led some other WTO Members to challenge it, but eventually an understanding was reached.²²⁸

Another animal welfare EU PPM measure is the more recent regulation on the marketing of seal products discussed above.²²⁹ The preamble of the Regulation declares that: “In accordance with the Protocol on protection and welfare of animals annexed to the Treaty, the [EU] is to pay full regard to the welfare requirements of animals when formulating and implementing, inter alia, its internal market policy. The harmonised (sic) rules provided for in this Regulation should accordingly take fully into account considerations of the welfare of animals.”²³⁰ Similarly, Directive 2003/15/EC on the approximation of the laws of Member States relating to cosmetic products prohibits the marketing of cosmetic products that have been subject to certain methods of animal testing.²³¹

With respect to combating climate change, Directive 2009/29/EC, which aims to improve and extend the greenhouse gas emission allowance trading scheme of the EU, notes the

²²⁷ Council Regulation 3254/91, 1991 O.J. (L 308) 1.

²²⁸ Van Calster, *supra* note 65, at 14.

²²⁹ Regulation 1007/2009 of the European Parliament and of the Council, 2009 O.J. (L 286) 36.

²³⁰ *Id.* at 9. It is worth noting that several Inuit groups have challenged the regulation before the General Court on the basis of lack of competence, *see e.g.*, Action brought on 11 January 2010 – Inuit Tapiriit Kanatami e.a. v Parliament and Council, 2010 O.J. (C 100/41, Case T-18/10) (arguing “the contested regulation does not result in such improvement as required by the European Courts’ case law but, on the contrary, it will effectively eliminate any possibility of an internal market in seal products covered by the regulation’s scope,” and that “the defendants erred in law by infringing the principles of subsidiarity and proportionality... [and] do not demonstrate why intervention at the European Union level is required. The applicants point out that only two Member States had already introduced a ban on seal products. Furthermore, they argue that, even if action at European Union level was to meet the subsidiarity requirement, less intrusive measures would have sufficed to meet the stated goals of the regulation. The applicants contest the fact that the defendants opted for a near total ban on seal products, rather than adopting less restrictive alternatives, such as labeling requirements.”)

²³¹ Directive 2003/15/EC, 2003 O.J. (L 66) 26.

problem of carbon leakage and mandates action if producers are exposed to carbon leakage or loss of market share due to imposed emission burdens.²³² Also, the EU has recently adopted a regulation laying down the obligations of operators who place timber and timber products on the EU market.²³³ This regulation only permits trade in timber products if these products have been harvested legally, according to national, that is to say the standards in the harvesting country, and international standards accepted by the harvesting country. In addition, Member States are permitted, for environmental purposes, to impose more stringent requirements on operators on their markets.²³⁴ Also, as mentioned above, the EU has long attached human rights and other conditions to trade agreements.²³⁵

At the WTO, too, the EU has favored the incorporation of non-trade concerns. In *EC—Asbestos*, for example, the EC argued that determining likeness “solely on the basis of commercial factors” would be “a serious curtailment of regulatory autonomy” because “[i]f non-commercial considerations [were] only considered at the Article XX stage of the analysis, then the list of policy purposes for which regulators may distinguish between products [would be] unduly limited to the categories listed in Article XX.”²³⁶ This broader approach on the determination of likeness is similar to the ECJ case law on product taxation, an issue we will explore below.

It could be argued that the integration of trade and non-trade policies is also an identity issue, both internally and externally. Internally, the EU has often struggled against European

²³² Directive 2009/29/EC, 2009 O.J. (L 140) 63.

²³³ Regulation 995/2009 of the European Parliament and of the Council, 2010 O.J. (L 295) 23, art. 4.

²³⁴ The TFEU reads “[t]he protective measures adopted pursuant to Article 192 shall not prevent any Member State from maintaining or introducing more stringent protective measures. Such measures must be compatible with the Treaties. They shall be notified to the Commission.” TFEU, *supra* note 3, art. 193.

²³⁵ See *supra* Section III(1)(B).

²³⁶ Appellate Body Report, *European Communities — Measures Affecting Asbestos and Asbestos-Containing Products*, ¶ 34, WT/DS135/AB/R (Mar. 12, 2001) [hereinafter *EC—Asbestos*].

opposition to the dominance of the market and free trade in EU policies, and has been anxious to emphasize that the European model is a model of a 'social market' or a 'market with values.' Often in implicit opposition to popular stereotypes of the US, or of the one-sidedness of international trade, the EU, following the policy lead of its dominant Member States, sets out to integrate and balance economic and non-economic policy in one coherent whole, and rejects the idea of trade as an independent policy area. In that sense it does not adhere to the classical comparative advantage-based logic of trade, at least internally, but rather sees the merits of trade in the social and economic integration which it brings, which in turn are seen as improvers of welfare. Integration is a powerful imperative of its own, even if the belief that it improves economic wellbeing is now an important part of the integrationist drive.

4. Product taxation and regulatory purpose

With regard to the internal market tax provisions, the ECJ has interpreted the legality of product taxation by EU Member States very differently than the Appellate Body of the WTO. The Court has allowed Member States to differentiate between products on the basis of 'objective factors' not only related to their position on the market place but also from other regulatory perspectives, such as the impact on the environment of the production process employed.²³⁷

EU law is similar to international trade law in requiring like taxation of like products. One obvious locus for a PPM debate is in the question whether, for example, sustainable wood is 'like' or 'similar to' non-sustainably harvested wood and whether they must therefore be similarly taxed. This raises a number of issues that are not always answered the same way in

²³⁷ See Reinhard Quick & Christian Lau, *Environmentally Motivated Tax Distinctions and WTO Law — The European Commission's Green Paper on Integrated Product Policy in Light of 'Like Product-' and 'PPM-' Debates*, 6 J. INT'L ECON. L. 419, 450–51 (2003) (citation omitted) ("When comparing EU and WTO jurisprudence on non-discrimination, one is faced with the astonishing result that the ECJ seems to more easily accept legitimate policy objectives as justifying trade restrictions.").

EU and WTO law. One of these issues is the extent to which policy goals can be taken into account in making tax distinctions. If physically identical products compete in a market, can they be distinguished for tax purposes on the grounds of undesirable social or environmental consequences attaching to their differing production methods? Is the purpose of regulation relevant to the legitimacy of its classifications?

It is well known that the Appellate Body in *Japan – Alcoholic Beverages II* rejected the ‘aims and effects’ test for determining the GATT-compliance of tax measures.²³⁸ Japan argued that the complainants had to establish protectionist intent in order for the measure to violate Article III:2 first sentence.²³⁹ It is widely believed that as a result of this decision regulatory purpose is irrelevant for the finding of unlawful discrimination between domestic and imported ‘like’ products.²⁴⁰ Despite some arguments to the contrary—notably by Howse and Regan²⁴¹—most commentators believe that taking regulatory purpose into account in the determination of likeness would render Article XX redundant.²⁴²

The ECJ has been much less reluctant to take into account the regulatory purpose of a tax regulation when examin-

²³⁸ Howse & Regan, *supra* note 59, at 264. See Appellate Body Report, *Japan – Taxes on Alcoholic Beverages*, § B(3), at 6, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R (Oct. 4, 1996) [hereinafter *Japan—Alcohol*], for a discussion of the rejection of the ‘aims and effects’ test.

²³⁹ *Japan—Alcohol*, *supra* note 238, § B(1), at 3–4.

²⁴⁰ Howse & Regan, *supra* note 59. Indeed, in *Japan—Alcohol* the Appellate Body explained: “It is not necessary for a panel to sort through the many reasons legislators and regulators often have for what they do and weigh the relative significance of those reasons to establish legislative or regulatory intent. If the measure is applied to imported or domestic products so as to afford protection to domestic production, then it does not matter that there may not have been any desire to engage in protectionism in the minds of the legislators or the regulators who imposed the measure.” *Japan—Alcohol*, *supra* note 238, § H(2)(c), at 27–28.

²⁴¹ Howse and Regan have argued that notwithstanding the Appellate Body’s finding, protectionist intent or subjective protectionist purpose might still be used as supporting evidence to make two products unlike for the purposes of Article II:2 first sentence and Article III:4 of the GATT. Their analysis would focus on the relationship between two products from the perspective of the consumer. Howse & Regan, *supra* note 59, at 264–268.

²⁴² Quick & Lau, *supra* note 237, at 454–456. Howse and Regan argue by contrast that Article XX would still have a role to play in justifying other breaches of the GATT, as well as after a finding of direct discrimination under Article III. Howse & Regan, *supra* note 59.

ing potential violations of the treaty provision on discriminatory product taxation. The ECJ employs a two-stage approach to Article 110 TFEU: First, it looks at whether there are objective criteria for distinguishing between two products that are unrelated to origin. These objective criteria are set by the regulating Member State and may include among others the production processes employed in the manufacture of the product.²⁴³ If the Court accepts these criteria, Article 110 TFEU does not apply. If not, the Court goes into an analysis of Article 110 TFEU.²⁴⁴ In order to comply with this article, tax distinctions must be based on legitimate goals and objective considerations, and be proportionate.²⁴⁵

Article 110 TFEU is very similar to GATT Article III:2. It reads:

No Member State shall impose, directly or indirectly, on the products of other Member States any internal taxation of any kind in excess of that imposed directly or indirectly on similar domestic products.

Furthermore, no Member State shall impose on the products of other Member States any internal taxation of such a nature as to afford indirect protection to other products.²⁴⁶

²⁴³ See, e.g., Case 127/75, *Bodie Getränkevertrieb GmbH v Hauptzollamt Aachen-Nord*, 1976 E.C.R. 1079.; Case 140/79, *Chemial Farmaceutici SpA v. DAF SpA*, 1981 E.C.R. I; Case 243/84, *John Walker & Sons Ltd. v. Ministeriet for Skatter og Afgif*, 1986 E.C.R. 00875; Case 196/85, *Commission of the European Communities v. French Republic*, 1987 E.C.R. 01597; Case C-90/94, *Haahr Petroleum Ltd v. Åbenrå Havn, Ålborg Havn, Horsens Havn, Kastrup Havn NKE A/S, Næstved Havn, Odense Havn, Struer Havn and Vejle Havn, and Trafikministeriet*, 1997 E.C.R. I-04085; Case C-213/96, *Outokumpu Oy*, 1998 E.C.R. I-01777; Joined Cases C-290/05 & C-333/05, *Ákos Nádasdi v. Vám- és Pénzügyőrség Észak-Alföldi Regionális Parancsnoksága, and Ilona Németh v. Vám- és Pénzügyőrség Dél-Alföldi Regionális Parancsnoksága*, 2006 E.C.R. I-10115.

²⁴⁴ See CATHARINE BARNARD, *THE SUBSTANTIVE LAW OF THE EU: THE FOUR FREEDOMS* 53–56 (2010).

²⁴⁵ *Outokumpu Oy* 1998 E.C.R. I-01777, ¶ 40.

²⁴⁶ Consolidated Version of the Treaty on the Functioning of the European Union art. 110, Sep. 5, 2008, 2008 O.J. (C 115) 47.

Once a tax measure is found to be in violation of Article 110 TFEU it is not possible to justify the measure, as the derogation article applies only to regulatory measures, and it is therefore incompatible with the treaty.²⁴⁷ It is thus not surprising that the Court takes the regulatory purpose of a tax measure into account in establishing whether such measure violates Article 110 TFEU. Moreover, because the field of taxation is seen as a sensitive area, the Court has taken a permissive approach towards tax measures. This in contrast to the Court's interpretation of quantitative restrictions and measures of equivalent effect—regarding which it has taken a much more restrictive approach.²⁴⁸

Regulatory purpose is important for PPM measures because it is what often makes two physically identical products with similar end-uses different. It has been established case law of the Court that Member States are permitted to distinguish even similar products for regulatory purposes.

The most striking example of a PPM measure reviewed by the Court under Article 110 TFEU was in *Outokumpu Oy*, where the ECJ reviewed a Finnish tax provision that differentiated the rate of tax on electricity on the basis of the production method of electricity.²⁴⁹ Finland argued that its rule was imposed on environmental grounds, and that the taxes were designed to encourage more ecologically sound methods of energy production. The Court stated:

As regards the compatibility of such a duty with Article [110] of the Treaty, it is settled case-law, first, that in its present state of development Community law does not restrict the freedom of each Member State to establish a tax system

²⁴⁷ Case C-302/00, *Commission of the European Communities v. French Republic*, ¶ 33, 2002 E.C.R. I-02055. This difference with the GATT, where Article XX applies as a general derogation clause, might explain the inclusion of the regulatory purpose in the assessment whether a measure violates Article 110 TFEU.

²⁴⁸ See BARNARD, *supra* note 244, at 53–56.

²⁴⁹ Case C-213/96, *Outokumpu Oy*, 1998 E.C.R. I-01777, ¶ 17.

which differentiates between certain products, even products which are similar within the meaning of the first paragraph of Article [110] of the Treaty, on the basis of objective criteria, such as the nature of the raw materials used or the production processes employed. Such differentiation is compatible with Community law, however, only if it pursues objectives which are themselves compatible with the requirements of the Treaty and its secondary legislation, and if the detailed rules are such as to avoid any form of discrimination, direct or indirect, against imports from other Member States or any form of protection of competing domestic products.

Article [110] of the Treaty therefore does not preclude the rate of an internal tax on electricity from varying according to the manner in which the electricity is produced and the raw materials used for its production, in so far as that differentiation is based... on environmental considerations.²⁵⁰

This was so because “protection of the environment constitutes one of the essential objectives of the Community.”²⁵¹ “Moreover, since the entry into force of the Treaty on European Union, the Community's task includes the promotion of sustainable and non-inflationary growth respecting the environment (Article [3 TEU]) and its activities include a policy in the sphere of the environment (Article [4 paragraph 2 under e TFEU]).”²⁵² Also, “compatibility with the environment, particularly of methods of producing electrical energy, is an important objective of the Community's energy policy.”²⁵³

²⁵⁰ *Id.* ¶¶ 30–31.

²⁵¹ *Id.* ¶ 32.

²⁵² *Id.*

²⁵³ *Id.* ¶ 33.

The Court nevertheless concluded that the tax provision was incompatible with the treaty, because it calculated taxes on imported electricity at a different rate than those on domestic electricity.²⁵⁴ Had the environmental differentiations applied across the board, they would have been compatible with Article 110.²⁵⁵ Interestingly, the Court rejected the Finnish government's argument that it would be very difficult to establish the nature of the imported electricity since, once it entered the grid, it was indistinguishable from other electricity.²⁵⁶ The Court held that practical difficulties cannot justify such discriminatory taxation:

While the characteristics of electricity may indeed make it extremely difficult to determine precisely the method of production of imported electricity and hence the primary energy sources used for that purpose, the Finnish legislation at issue does not even give the importer the opportunity of demonstrating that the electricity imported by him has been produced by a particular method in order to qualify for the rate applicable to electricity of domestic origin produced by the same method.²⁵⁷

The divergence of approaches between the WTO and EU can be further illustrated by comparing the Court's ruling in *Bobie* with the GATT panel report in *US—Malt Beverages*.²⁵⁸

²⁵⁴ Case C-213/96, *Outokumpu Oy*, 1998 E.C.R. I-01777, ¶ 41.

²⁵⁵ *See id.* ¶ 31.

²⁵⁶ *Id.* ¶¶ 37–38.

²⁵⁷ *Id.* ¶ 39. This is in stark contrast with the Court's judgment in *Preussen Elektra*, where the Court found that "the nature of electricity is such that, once it has been allowed into the transmission or distribution system, it is difficult to determine its origin and in particular the source of energy from which it was produced," and therefore accepted the necessity of an obligation to buy *domestically* produced green electricity. *See* Case C-379/98, *PreussenElektra AG v. Schleswag AG*, 2001 E.C.R. I-2099, ¶ 79.

²⁵⁸ Compare Case 127/75, *Bobie Getränkevertrieb GmbH v Hauptzollamt Aachen-Nord*, 1976 E.C.R. 1079, with Report of the Panel, *United States — Measures Affecting Alcoholic and Malt Beverages*, DS23/R (Mar. 16, 1992), GATT B.I.S.D. (39th Supp.) at 206 (1993) [hereinafter *US—Malt*].

Both cases dealt with preferential tax arrangements for micro-breweries.²⁵⁹ In *Bobie*, the Court had to rule on the question whether a German tax provision that applied a graduated rate at home-produced beer and a flat rate on ordinary imported beer was compatible with Article 110 TFEU.²⁶⁰ The ECJ ruled that Member States may apply different systems of taxation to domestic and imported products so long as “the charge to the tax on the imported products remains at all times the same as or lower than the charge applicable to the similar domestic product.”²⁶¹ In principle, therefore, a Member State is free to choose the tax system that it considers most suitable for each product, even if the system distinguishes among products based on PPM criteria:

[T]he application to home-produced beer of a graduated tax calculated on the basis of the yearly production of each brewery is a matter which falls within the discretion of each State. . . . If . . . a Member State has elected to apply to home-produced beer a graduated tax calculated on the basis of the quantity which each brewery produces in one year, the first paragraph of Article [110] is only fully complied with if the foreign beer is also taxed at a rate, the same or lower, applied to the quantities of beer produced by each brewery during the period of one year.²⁶²

The GATT Panel in *US—Malt Beverages*, on the other hand, found a similar distinction in principle incompatible with the GATT. In that case, the Panel had to decide, among other things, whether State excise tax credits based on the annual pro-

²⁵⁹ *Bobie*, 1976 E.C.R. 1079; *US—Malt*, *supra* note 258.

²⁶⁰ *See Bobie*, 1976 E.C.R. 1079, ¶ 6.

²⁶¹ *Id.* ¶ 3.

²⁶² *Id.* ¶¶ 8–10.

duction of beer in the State of Minnesota were a violation of GATT Article III:2 first sentence.²⁶³ The Panel held that:

[T]he parties disagreed as to whether or not the tax credits in Minnesota were available in the case of imported beer from small foreign breweries. The Panel considered that beer produced by large breweries is not unlike beer produced by small breweries. Indeed, the United States did not assert that the size of the breweries affected the nature of the beer produced or otherwise affected beer as a product. Therefore, in the view of the Panel, even if Minnesota were to grant the tax credits on a non-discriminatory basis to small breweries inside and outside the United States, imported beer from large breweries would be “subject . . . to internal taxes . . . in excess of those applied . . . to like domestic products” from small breweries and there would still be an inconsistency with Article III:2, first sentence. Accordingly, the Panel found that the state excise tax credits provided by Kentucky, Minnesota, Ohio and Wisconsin to domestic breweries based on annual beer production, but not to imported beer, are inconsistent with Article III:2, first sentence.²⁶⁴

Of course, the United States could potentially have had recourse to Article XX of GATT to justify its measures, but the list contained in Article XX is limited, and strictly interpreted.²⁶⁵ Because there is no derogation clause for indirect tax measures, it is not surprising that the ECJ will take regulatory purpose into account when assessing such measures. But the fact that such assessment is not confined to a limited list means

²⁶³ *US—Malt*, *supra* note 258, ¶ 3.8(c).

²⁶⁴ *US—Malt*, *supra* note 258, ¶ 5.19.

²⁶⁵ See Report of the Panel, *United States — Section 337 of the Tariff Act of 1930*, ¶ 5.9, (Jan. 16, 1989), GATT B.I.S.D. (36th Supp.) at 345 (1990).

that there is more room for legislators to tax products in different ways for different purposes. In this sense, too, EU law seems to be more willing to take non-trade concerns into account, as long as the measures in question are applied equally to foreign products that meet the same objective criteria.

IV. Conclusion

Given the above analysis, the potential for conflicts or divergence between WTO and EU law is easy to imagine. The WTO is a trade regime that is institutionally disinclined to permit extraterritorial and unilateral PPMs where they upset the balance of trade equilibrium among Member States. And the EU is a multi-issue regional body that sees PPMs as an opportunity to strengthen EU authority internally and promote European values abroad. Indeed, the differing philosophies of the WTO and EU with respect to the proper forum and content of PPM rules are evidenced by the fact that the EU has been a participant in nearly every one of the WTO disputes touching on the PPMs issue so far.²⁶⁶

Perhaps the potential conflicts between the EU and WTO approaches are best illustrated by an example. All of these tendencies can be seen in the recent seals dispute brought against the EU by Norway, Canada and Iceland.²⁶⁷ As discussed above, this

²⁶⁶ In *Tuna/Dolphin I*, the EEC intervened as a third party, arguing that the US dolphin-protection measure's intermediary nations embargo was incompatible with the GATT. *US—Tuna I*, *supra* note 5, ¶ 4.10. In *Tuna/Dolphin II* the EEC appeared as the primary complainant, arguing once more that US dolphin-protection law was contrary to the GATT. *US—Tuna II*, *supra* note 5, ¶ 1.1. The EC appeared again as a third party in *US—Shrimp*. *US—Shrimp*, *supra* note 5, ¶ 65. It was the defendant in *EC—Asbestos* and *EC—Biotech*. *EC—Asbestos*, *supra* note 236, ¶ 30; Panel Report, *European Communities—Measures Affecting the Approval and Marketing of Biotech Products*, ¶ 1.1, WT/DS291/R, WT/DS292/R, WT/DS293/R (Sept. 29, 2006). And is currently the subject of complaints regarding poultry and seals. Request for the Establishment of a Panel by the United States, *European Communities — Certain Measures Affecting Poultry Meat and Poultry Meat Products from the United States*, WT/DS389/4 (Oct. 12, 2009), available at http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds389_e.htm; Request for the Establishment of a Panel by Norway, *European Communities — Measures Prohibiting the Importation and Marketing of Seal Products*, WT/DS401/5 (Mar. 15, 2011), available at http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds401_e.htm [hereinafter *EC—Seal Products I*].

²⁶⁷ *EC—Seal Products I*, *supra* note 266.

situation began with the imposition of measures by Belgium and the Netherlands prohibiting the import of seals and seal products out of concern for animal welfare abroad. Rather than pursuing the annulment of these measures as unilateral and extra-territorial, and restrictive of intra-EU trade, the EU instead chose to use the opportunity to assess the possibilities for community action. After commissioning scientific assessments of the harm posed to seals and conducting public opinion surveys to gauge the opinions of European citizens, the Parliament and Council adopted an EU-wide ban in September 2009.²⁶⁸

Because the measure was harmonized and based on “concerns about the killing of seals and their commercialization . . . widely held in the EU,” the EU was willing to act unilaterally to protect animal welfare.²⁶⁹ As the European Commission’s spokesperson for Rade, Lutz Guellner, stated:

We believe that the claim that EU is not respecting its WTO obligations is unfounded. The measures adopted are not protectionist, are not discriminatory, and respond to concerns about the killing of seals and their commercialization which are widely held in the EU, as confirmed by the overwhelming support for the legislation in the EU Member States and the European Parliament.²⁷⁰

Other WTO Members, however, disagreed. In 2009 the representative of Norway raised objections in the Committee on Technical Barriers to Trade regarding the EU ban on trade in certain seal products.²⁷¹ Because the rule permits exemptions for hunts traditionally conducted by indigenous communities,

²⁶⁸ Regulation 1007/2009, of the European Parliament and of the Council of 16 September 2009 on Trade in Seal Products, 2009 O.J. (L 286) 36.

²⁶⁹ Press Release, Commission reaction to the request for consultations from Canada and Norway on the EU’s legislation on seals (Nov. 3, 2009), available at <http://trade.ec.europa.eu/doclib/press/index.cfm?id=479&serie=293&langId=en>.

²⁷⁰ *Id.*

²⁷¹ *EC—Seal Products I*, *supra* note 266.

Norway, with the support of Canada and Iceland, “questioned whether governmental regulations that distinguish two otherwise like products, based on ethical concerns relating to the way they were produced, could fulfill the requirements of Article 2.2 of the TBT Agreement.”²⁷² Canada added its disapproval of the fact that the ban “would be unilaterally establishing criteria for animal welfare.”²⁷³

A WTO Panel will now assess the validity of the claims on both sides and it will be interesting to see how the Panel will deal with these issues as the case illustrates well the potential conflicts between the EU and WTO over PPMs. With respect to unilateralism and extraterritoriality, internally, the EU saw not a conflict, but an opportunity to harmonize. Externally, the EU was willing to act to protect what it saw as important values. Other WTO Member States, however, saw an inappropriate action to unilaterally impose animal welfare standards, particularly because there was little ‘nexus’ between the seals and the EU.

In general, the ECJ has taken a case-by-case approach to PPM measures, which at first glance looks very similar to that in the WTO case law. Issues of evidence and proportionality have been central, and the concern to balance trade against legitimate non-trade concerns, while being alert for protectionism and regulatory overkill is inevitable and familiar.

Yet a shared language and expression of many of the same concerns hide certain differences. The kinds of extraterritorial concern which have arisen in the EU cases are diverse—industrial reputation, local and non-local environmental harm, animal welfare, biodiversity, the protection of artisanal industry—and the Court has been surprisingly relaxed about accepting these as legitimate. It has intermittently—though not consistently—required that there be some link between the harm abroad and a domestic interest, but has been relatively open to

²⁷² Committee on Technical Barriers to Trade, *Note by the Secretariat: Minutes of the Meeting of Mar. 18–19, 2009*, ¶ 21, G/TBT/M/47 (Jun. 5, 2009).

²⁷³ *Id.* ¶ 24.

how this link may be found. Where the concern in question falls within the range of matters on the EU policy list—notably the environment, but human rights and even social justice would arguably also be there—this link does not even seem necessary. One may question whether the Appellate Body would be prepared to go so far.

Where taxation is concerned the difference is somewhat sharper. Tax distinctions based on PPMs, and on policy goals independent of the product itself, are apparently an accepted part of EU law—even between similar products. By contrast, the GATT requires such distinctions to be treated as derogations, and on the evidence so far they will be subjected to strict scrutiny, with considerable concern for their effects on competitive position.

The EU acceptance of PPM regulation acquires significance because it is playing out on many levels at once. As well as the Court judgments, there are legislative initiatives from Brussels, Member States are increasingly looking at ways to integrate extraterritorial production concerns into their domestic government purchasing and taxation, and private organizations such as FSC and MSC are exerting an ever greater influence on domestic goods markets, and may become *de facto* regulators of certain product markets via their labels and certification schemes. At the same time, NGOs, Member State governments, and the EU often work together and coordinate, so that tensions between goals will be slowly replaced by an integrated network of regulatory actors: a private certification scheme becomes the basis of a national purchasing and taxation system, which in turn takes place within the framework of an EU directive coordinating such national plans.

Such integration creates considerable resistance to change. Yet as a matter of fact, access to European markets will become more tightly regulated as PPM regulation emerges, and as a matter of law, some of this regulation will be subject to WTO challenge. There is the making of a many-sided political and legal conflict. As well as the simple issues of compliance,

PPMs focus attention on the sustainability of single-issue international governance mechanisms, but also on the political dangers of multi-issue export of norms. Differing visions of sovereignty, universality and of international society underlie attitudes to PPMs, and determine whether they are seen as a pathway to inter-state meddling, or the safeguarding of values in trade. The EU's purposive, explicitly evangelical, and law-based identity is distinctive in this context, and gives it an institutional bias towards substantive policy goals, and away from respect for constitutional boundaries, which more traditionally constituted states, and their representatives in the WTO adjudicatory bodies, may not welcome or entirely comprehend. PPM regulation will be a fruitful venue for the exposure of these differences.