Trade and Environment in the EC and the WTO. A Legal Analysis

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Introduction


1.1 Trade and Environment Dilemmas

According to the rules of the World Trade Organisation and the European Community, is Denmark allowed to prohibit the use of metal beverage cans while allowing the use of other drink containers? Can the Netherlands require all wood products sold on its market to carry a label indicating whether they have been sustainably produced or not? Can the European Community enact a ban on beef containing growth hormones? Can it limit the importation of products containing genetically modified organisms? Can the United States impose gasoline quality standards allowing foreign refiners less possibilities to adapt to these standards than domestic refiners? The above are just some of the questions that have arisen in recent years over the interpretation of trade liberalisation commitments and environmental concerns in the context of the European Community (EC) and the World Trade Organisation (WTO). This study describes and compares the rules of the EC and the WTO on the liberalisation of trade in goods, and how they relate to measures taken by the members of these organisations for the protection of the environment and health.

All of the above examples concern measures that are currently being contemplated by domestic authorities, or have already led to proceedings within the European Community or the World Trade Organisation. The proposed Dutch labelling requirement for wood products aptly illustrates some of the problems involved. In the Netherlands, deforestation caused by unsustainable wood management is widely regarded as a pressing international environmental problem. The Netherlands supports international efforts to address this problem, but these have so far only resulted in non-binding agreements and recommendations on forest management. Some political parties and groups would like to make a more forceful contribution towards addressing the environmental problem. They attempt to do so by enacting policy measures that have an impact on trade. Examples are a ban on unsustainably produced wood products, or a mandatory labelling requirement. Both have been proposed in the Netherlands. The impact of such policies on trade triggers the application of trade agreements to which the state in question is a party, such as the WTO Agreements and the EC Treaty. The national policy measure may be challenged as an unjustifiable violation of the disciplines in these agreements. If this occurs, and the measure is not withdrawn or modified, the issue may be taken to dispute settlement proceedings. It will then be up to those deciding disputes in the WTO and EC (the WTO Dispute Settlement Body, and the European Court of Justice, respectively), to resolve the matter.

1 The term "WTO Agreements" as used here refers to the WTO Agreement and the Annexed Agreements, i.e. the Multilateral Agreements on Trade in Goods, the General Agreement on Trade in Services (GATS), the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), the Understanding on Rules and Procedures Governing the Settlement of Disputes (Dispute Settlement Understanding, DSU), and the Trade Policy Review Mechanism (TPR).
Why are these trade liberalisation disciplines there in the first place, if they seem to obstruct national policies pursuing such laudable goals as environmental protection? The simple answer is that most countries believe that it is to their benefit to conclude international agreements containing such disciplines. The economic theory of "comparative advantages" argues that nations can mutually benefit from opening their markets to trade, even when their levels of productivity differ, and even when they open their markets unilaterally. In spite of various challenges made against it over the past two centuries, this theory still stands strong.² The World Trade Organisation has practically been built upon it.³ Even if in theory, unilateral liberalisation is beneficial, states generally feel more comfortable when other states agree to liberalise too. Thus, in order to reap the benefits from trade on a more permanent basis, states and other independent customs territories have concluded trade agreements throughout modern history.⁴ In these agreements, they committed themselves to reducing government-induced trade barriers. Such trade barriers include, first and foremost, tariffs and quantitative restrictions, which may be dubbed "classical" trade policy instruments. Under the 1947 General Agreement on Tariffs and Trade (GATT), the predecessor to the WTO, the most important trading nations in the world agreed to control such barriers. Tariffs were bound to negotiated maximum rates, while quantitative restrictions were in principle prohibited.⁵ Moreover, rules were agreed upon to discipline such trade policy instruments as anti-dumping and anti-subsidy measures, rules of origin and customs valuation methods. At the regional level, the 1957 European Community Treaty not only prohibited quantitative restrictions, but phased out tariffs entirely over a transitional period.⁶

² For an instructive overview of the origins of this theory, as well as the major subsequent challenges against it, see Irwin (1996). For a recent critique on the model built on comparative advantage, see Dunoff (1998a) and (1999a), arguing that this model is being challenged by the linkages between trade and such non-trade issues as environmental protection.
³ See e.g. the 'About the WTO' introductory section at the WTO webpages, http://www.wto.org.
⁴ Although trade arrangements have been reported as far back as 2500 BC, "modern history" refers to the state system as it developed in Europe from the mid-17th Century onwards. Although historic developments obviously do not usually start in a particular year, the 1648 Peace of Westphalia is often taken as the reference point for the beginning of this development. See Irwin (1996).
⁵ See Articles II and XI of the 1947 General Agreement on Tariffs and Trade, GATT.
⁶ In the EC Treaty as it was before it was amended by the 1997 Amsterdam Treaty, the relevant provisions were Articles 30 and 34 for quantitative restrictions and Articles 12 to 17 for tariffs. The EC Treaty is based on the 1957 Rome Treaty Establishing the European Economic Community. Since the amendments to the EEC Treaty made by the 1992 Maastricht Treaty on European Union, the adjective "Economic" was dropped to reflect the Community's reach beyond the merely economic sphere, and the official name is now the European Community. Hence the use of the abbreviation EC in this work.
Yet barriers to international trade do not only result from such "classical" trade policy instruments as tariffs or quotas. They are also caused by a wide variety of government policies which do not necessarily or specifically target trade, but are nevertheless capable of hindering it. Such policies range from the taxation of products to the allocation of subsidies to domestic industries, and to all sorts of regulations addressing, for example, standards for the safety of products. From the point of view of trade liberalisation efforts, such internal government policies may be typified as "internal barriers". The effects of such internal barriers on international trade often equal or even surpass those of "classical" trade instruments. For instance, if producers have to meet technical regulations that differ from country to country, they will need to adapt their production processes for each country they wish to export their products to. The trade-impeding effects of "internal barriers" became a point of attention in both the GATT and EC in the late 1960s and early 1970s. States and other customs territories committing themselves to reducing trade barriers were in agreement that many "internal barriers" at the same time pursue legitimate domestic policy objectives, such as national security, public morality, and human, animal or plant life and health. Considering the obvious need for domestic policy action in such areas, it was not a viable option to subject internal regulations and taxes to outright prohibitions or negotiated maximum levels, as had been deemed suitable for disciplining border measures such as quantitative restrictions and tariffs. Therefore, trade agreements rather subjected "internal barriers" to agreed principles such as non-discrimination and non-protectionism. This had the effect of leaving members the liberty to pursue their societal goals through regulatory and taxation policies, as long as they did not unduly discriminate against imports or protect domestic industries.

Thus, trade agreements usually contain strict disciplines as regards the use of "classical" trade instruments, as well as less strict disciplines addressing trade barriers resulting from other, "internal" government policies, such as taxation or regulation. Still, countries felt that they sometimes needed to enact measures pursuing legitimate objectives that could not avoid contravening these disciplines. For example, it is sometimes necessary to ban imports of a dangerous product, or to tax or regulate in ways that may turn out to be discriminatory. Therefore, legitimate objectives such as the protection of life and health were expressly acknowledged in the trade liberalisation agreements. This was done by

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7 The more common term "non-tariff barriers" is avoided here, because some of the "classical" trade policy instruments such as quantitative restrictions are, technically speaking, also non-tariffs, yet are included in the "classical" trade instruments in this work.

8 See the questions in the European Parliament during 1966-67 discussed in Chapter 2, and accounts of trade barriers in "GATT Activities" publications from the early 1970s onwards (see also Chapter 4 on the Tokyo Round Standards Code, the precursor of the TBT Agreement).
inserting clauses providing exceptions to both the commitments on “classical” trade instruments and the agreed principles regarding “internal barriers”. In order for the trade liberalisation objectives not to be too easily undermined by extensive invocations of these exceptions, they were accompanied by conditions to be met in order for such legitimate objectives to trump trade liberalisation interests. An example of such a condition is the requirement that a measure for which an exception is invoked should not result in “arbitrary discrimination” or a “disguised restriction on trade”.

From the start, both the EC Treaty and the GATT contained an exception clause referring to the protection of human, animal and plant life and health. In addition, the GATT provided an exception to its disciplines for the conservation of exhaustible natural resources. Initially, “environmental protection” as such was not among the agreed legitimate objectives in the founding treaties. However, in the EC, through the case-law of the European Court of Justice, “environmental protection” as such became accepted as a legitimate objective capable of hindering the free movement of goods. Similarly, while “environmental protection” as such is not mentioned in the text of the GATT, it now figures in a number of other WTO agreements, notably the Agreement on Technical Barriers to Trade (TBT).9

The trade liberalisation commitments and exceptions clauses that are the focus of this study were to a large extent agreed upon in the late 1940s and 1950s. Since then, important developments have occurred. The successful reduction of “classical” trade barriers diminished their relative importance. Accordingly, trade liberalisation efforts increasingly focused on “internal” barriers. In the EC, the relevant rule even developed into a general prohibition on trade obstacles, unless justified. At the same time, large-scale human-induced environmental problems, some of which had transboundary implications, received widespread attention. Moreover, internal government regulation multiplied in many states as it addressed increasingly complex and technical subject matters, correspondingly adding to the risk of interfering with trade commitments. Thus, since the mid-twentieth century, there has been increased attention to environmental problems, an increased scope and intensity of governmental action, and an increasing reach of trade disciplines into governments’ regulatory authority. As a corollary to these developments, tensions between trade liberalisation and national environmental policies have come to the fore. Since the 1980s, various national policy measures pursuing environmental goals have been challenged as being violations of the trade liberalisation commitments in both the EC Treaty and the GATT/WTO Agreements. Likewise, the environmental exceptions and justification grounds in these treaties were invoked to justify them.

9 The TBT Agreement in its current form was negotiated during the Uruguay Round from 1986 to 1993, while its predecessor dates from the Tokyo Round, which lasted from 1973 to 1979.
1.2 Similar Conflicts, Different Structures

The EC Treaty and the WTO contain trade liberalisation commitments and environmental justifications that operate according to a roughly similar pattern. Tariffs and quantitative restrictions are restrained or abolished, principles are laid down regarding internal regulations and taxes causing trade barriers, as well as exceptions for measures pursuing legitimate objectives. In the context of the EC, this pattern is often referred to as "negative integration", as it focuses on limiting trade barriers caused by national regulatory activity, rather than replacing such activity by international or supranational regulatory activity ("positive integration"). Although the term "integration" derives from the study of regional agreements such as the EC, it is also increasingly applied to trade liberalisation on a global scale taking place under the auspices of the WTO. Not only the relevant rules in the EC and the WTO, but also the conflicts between members' environmental policies and trade liberalisation commitments are to a considerable extent similar. However, there are also obvious and important differences between the EC and the WTO. These differences relate not only to their membership, but also to the goals, institutional set-up, functions and powers of these organisations.

1.2.1 EC Background

The trade liberalisation commitments in the 1957 Rome Treaty Establishing the European Economic Community and their objectives were far-reaching. The Treaty of Rome sought to establish a common market and a customs union. These concepts both refer to the "free movement of goods", which has been interpreted by the ECJ as a "general principle of Community law" and as a "fundamental Community provision." The common market is

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10 As will be extensively discussed below, the EC goes even further by inserting into the EC Treaty a prohibition on 'measures having equivalent effect to quantitative restrictions', as well as accepting justifications not explicitly acknowledged in the Treaty.

11 See Tinbergen (1954); Balassa (1961); Pelkmans (1997)

12 Article 8 of the original Rome Treaty Establishing the European Economic Community. The 1986 Single European Act replaced the reference to the "common market" with the notion of "internal market", currently found in Article 14 EC. See on both concepts, Schrauwen (1997). The reference to "common market" can still be found in Article 2 EC as it stands. On the customs union, see Article 9 of the original Rome Treaty, presently Article 23 EC.

13 See e.g. the ECJ in Case 240/83 ADBHU, para. 9: "[... ] the principles of free movement of goods and freedom of competition, together with freedom of trade as a fundamental right, are general principles of Community law of which the court ensures observance." And in Case C-49/89 Corsica Ferries, para. 8: "the articles of the EEC Treaty concerning the free movement of goods, persons, services and capital are fundamental Community provisions and any restriction, even minor, of that freedom is prohibited."
supposed to resemble as closely as possible a domestic internal market. The European Union, of which the EC forms an integral part, is built upon a foundation of common values. These are expressed in the Preambles to the EC and EU Treaties as well as in Article 6 EU, which speaks of ‘the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law’. The EU has recently adopted a Charter of Fundamental Rights, although its exact legal status is as yet unclear. In addition to pursuing “negative integration” through trade liberalisation commitments, the European enterprise from the very start encompassed an even more ambitious project. In the aftermath of the devastating consequences of the Second World War, economic prosperity was expected to go hand in hand with peace and stability for the continent. The interests of individual Member States were to be tied together through the pooling of their resources and the setting up of common institutions. The origin of the idea of a forging of interests can be found in the 1950 Schuman Plan, which led to the European Community for Coal and Steel (ECSC): ‘World peace cannot be safeguarded without the making of creative efforts proportionate to the dangers which threaten it’ [...] ‘the contribution to civilisation made by an organised and living Europe is indispensable to the maintenance of peaceful relations’. Moreover, the Community institutions were given the power to enact legislation binding the Member States.

The same ideas underlay the 1957 EEC Treaty. For example, the pooling of resources in the literal sense was to be realised by a common agricultural policy. More generally, common action through common institutions was apparent from the tasks and activities given to the Community in Articles 2 and 3 of the Treaty. Among the tasks in Article 2 EC the following are mentioned:

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14 See e.g. the ECJ in Case 157/81 Gaston Schulp, para. 33: ‘The concept of a common market as defined by the Court in a consistent line of decisions involves the elimination of all obstacles to intra-community trade in order to merge the national markets into a single market bringing about conditions as close as possible to those of a genuine internal market.’

15 1992 Maastricht Treaty on European Union. That Treaty established a so-called “pillar structure”, with the first pillar consisting of the three European Communities (EC, ECSC, and Euratom), a second pillar consisting of a ‘common foreign and security policy’, and a third pillar regarding ‘cooperation in the fields of justice and home affairs’, which was subsequently redubbed ‘police and judicial cooperation in criminal matters’ by the 1997 Amsterdam Treaty. This work addresses certain aspects of the EC Treaty, i.e., a part of the first pillar. Only very occasionally is the term European Union (EU) used to denote the larger entity.

16 See http://www.europarl.eu.int/charter.


18 See the Preamble to the EC Treaty: ‘common action to eliminate the barriers which divide Europe’, ‘the removal of existing obstacles calls for concerted action’, ‘by thus pooling their resources’.
a 'harmonious, balanced and sustainable development of economic activities', a 'high level of protection and improvement of the quality of the environment', and the 'raising of the standard of living and quality of life'. The activities in Article 3 include inter alia a 'common commercial policy', a 'common policy in the sphere of agriculture and fisheries', a 'policy in the sphere of the environment', and a 'contribution to the attainment of a high level of health protection'. These tasks and activities implied the attribution of powers to the Community and its institutions. This attribution of powers was made more explicit by the 1992 Maastricht Treaty's addition to the EC Treaty of the current Article 5 EC (then Article 3b). Article 5 EC requires that the Community acts within the limits of the powers conferred upon it by the Treaty and of the objectives assigned to it therein. Article 7 EC (Article 4 of the original Rome Treaty) lists the individual institutions and reiterates the attribution principle as far as they are concerned.

Perhaps the most salient feature of the powers attributed to the European institutions is their ability to bind the Community's Member States and their inhabitants by enacting legislation, often by a qualified majority of the Member States' representatives in the Council and in a co-decision procedure with the directly elected European Parliament. Such legislation, in the form of regulations, directives and decisions, has its legal basis in a number of provisions throughout the Treaty. It is usually referred to as "secondary" EC law, as opposed to the "primary" rules in the EC Treaty itself. Importantly, secondary legislation is not confined to those areas where the Community pursues "common policies" or has an "exclusive competence", meaning that powers have been entirely transferred from the Member States to the Community, such as in external trade.\textsuperscript{19} The Community also enacts legislation in all those policy areas where it shares competencies with its Member States. There is a general mandate in the EC Treaty to legislate in order to contribute to the establishment of an internal market.\textsuperscript{20} Moreover, the Treaty includes mandates to enact environmental legislation,\textsuperscript{21} and to pursue action in the field of public health to complement the Member States' own public health policies.\textsuperscript{22} Further references to environmental protection and health are found in Article 2 EC, which lists the Community's tasks and objectives,\textsuperscript{23} in Article 3, listing the Community's poli-

\textsuperscript{19} See Articles 26 and 133 (formerly 28 and 113) EC.
\textsuperscript{20} See Article 95 EC.
\textsuperscript{21} See Articles 174-176 EC (ex Articles 130-1, as inserted in the EC Treaty by the 1986 Single European Act and amended by the 1992 Maastricht and 1997 Amsterdam Treaties).
\textsuperscript{22} See Article 152 EC (ex Article 129, as inserted in the EC Treaty by the 1992 Maastricht Treaty and amended by the 1997 Amsterdam Treaty).
\textsuperscript{23} "The Community shall have as its task, [...] to promote throughout the Community [...] a high level of protection and improvement of the quality of the environment [...]"
cies, and in Article 6, prescribing the integration of environmental protection requirements into the definition and implementation of all Community policies, with a view to promoting sustainable development. The Treaty on European Union, of which the EC forms an integral part, refers in its Preamble to ‘the principle of sustainable development’ and to environmental protection.

Another important characteristic of European integration is the participation of Europe’s citizens in the process. Citizens participate formally through direct representation in the European Parliament. National parliaments control national governments’ input in the Council of Ministers. In addition, their participation in the European integration process was greatly enhanced by the possibility to invoke European law before national courts in the Member States, and to have national law set aside by it. The case-law on the “direct effect” and “supremacy” of Community law that brought about these opportunities for citizens has been described and commented on extensively elsewhere.

Through its case-law, the ECJ has effectively lifted the question of the effects of an international agreement between states in the internal legal orders of those states to the level of the institutions set up by that agreement, especially the ECJ itself, irrespective of what national constitutions had to say about the effects of international law in their national legal orders. Such effects had not been explicitly agreed upon by the Member States when they negotiated the EC Treaty.

Arguably, however, the drafters of the EC Treaty had already laid the foundation for the participation of citizens in the enforcement (and formation through case-law) of European law, by designing the preliminary ruling procedure in the Treaty. This procedure not only connects citizens to European law, it also ensures direct participation of national courts in its development. In addition, it ensures the uniform interpretation and application of European law by those courts. Arguably, the entire construction of “direct effect” and “supremacy” of EC law erected by the ECJ would not have worked without the preliminary ruling procedure.

Finally, citizens also have direct access to the European Court of Justice, albeit under certain conditions. The EC Treaty allows individuals direct access to the ECJ in certain circumstances, such as when they seek to challenge the legality of an act of one of the EC’s institutions that directly and individually concerns them. In addition to providing preliminary rulings and hearing

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24 'For the purposes set out in Article 2, the activities of the Community shall include [...] a policy in the sphere of the environment; [...] a contribution to the attainment of a high level of health protection [...]’

25 Article 6 EC, inserted as part of the title on environment by the Single European Act, and transferred to the general first part on Principles of the EC Treaty by the 1997 Treaty of Amsterdam.

26 See, in addition to the numerous textbooks on European Law covering these subjects, e.g. Weiler (1981) and (1991); Spiermann (1999).

27 Article 234 (formerly 177) EC.

28 See Article 230 EC.
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challenges to Community acts, the Court also deals with procedures against Member States for failure to correctly implement and apply Community law. These infringement procedures may be initiated by other Member States or by the European Commission.\textsuperscript{29} Infringement procedures between Member States are very rare.\textsuperscript{30} Action against Member States for failure to correctly apply Community law is normally left to the Commission in its function as the 'guardian of the Treaty'.\textsuperscript{31} Rulings by the Court of Justice are considered to be authoritative, and both the compliance rate with its judgments and the level of acceptance of its preliminary rulings by the national courts are high. Regarding infringement procedures against Member States, the Treaty even provides for a fine to be imposed by the Court in the case of a continued failure to comply with the judgment in which the infringement was found. Although this stage has seldom been reached, it illustrates the vigour of the Court's judgments.\textsuperscript{14}

Thus, as supranational institutions supervising the implementation and application of European law, the Court and the Commission play a vital role in the European structure. Another highly idiosyncratic feature of this structure is the institutional interplay in the creation of secondary Community legislation. Even if the Council of Ministers, which consists of representatives of the Member States, adopts Community legislation, this is done in most cases by qualified majority, and according to a procedure of co-decision with the European Parliament.\textsuperscript{33} The Commission is the sole initiator of Community legislation. Its proposals can only be amended by the Council with unanimity, and the Commission may alter its proposal as long as the Council has not acted.\textsuperscript{34} This allows the Commission to play an active part in the legislative process. Thus, Member States are not the only ones to affect the outcome of the legislative process in the Community through their representatives in the Council; the Commission and Parliament as reflecting Community or "supranational" interests have an important influence in the process too. Moreover, in many cases Member States can be bound by legislation they do not favour, when it has been adopted by qualified majority. In the making of primary Community law, i.e. the devising of new treaties and the amendment of existing ones, the Member States play a more autonomous role. An intergovernmental confer-

\textsuperscript{29} See Articles 227 and 226 EC, respectively.
\textsuperscript{30} For a recent example, see e.g. Case C-388/95 Belgium v. Spain (Rioja wine).
\textsuperscript{31} See Article 211 EC.
\textsuperscript{32} The Court recently imposed a fine for the first time in Case C-387/97 Commission v. Greece. The fine amounted to EUR 20,000 for each day of delay in implementing the measures necessary to comply with the judgment in Case C-45/91, in which the Court had found that Greece had failed to put into effect an obligation to implement waste disposal plans.
\textsuperscript{33} Article 251 EC, which is increasingly becoming the standard procedure for Community legislation.
\textsuperscript{34} Article 250 EC.
ence is convened where representatives of the Member States must agree by common accord to any Treaty changes, which must moreover be ratified by all Member States in accordance with their domestic constitutional requirements. Nevertheless, the European Parliament and the Commission play an important part in the run-up to the actual intergovernmental conference, so even that process is not purely intergovernmental.

In almost every aspect of the European structure, the institutional interplay is evident in continuing power struggles between the various Community institutions. Examples are disputes concerning the legal basis of Community legislation and the ensuing roles of various institutions in the process. Such struggles may be dubbed manifestations of “horizontal federalism”. Interestingly, these horizontal institutional struggles often also have a “vertical” pendant, in that Member States are involved in them not just through their representation in the Council of Ministers, but also directly. Examples are “comitology”, i.e. the way Member States control the exercise of powers delegated by the Council to the Commission through expert committees, and disputes concerning the Community’s competence to legislate internally and externally.

1.2.2 GATT/WTO Background

The 1947 GATT Agreement in its Preamble mentions as its objectives the raising of standards of living, employment, real income and effective demand growth, full use of resources and expanding production and exchange. Such objectives were to be contributed to by ‘reciprocal and mutually advantageous arrangements directed to the substantial reduction of tariffs and other barriers to trade and to the elimination of discriminatory treatment in international commerce’. The GATT was provisionally applied for almost 50 years. Although it had an administrative secretariat, there was no further institutional structure. The GATT was legally speaking not an international organisation, although regarded as one de facto. The 1994 WTO, which incorporates the GATT, is a fully-fledged international organisation, and has a somewhat
more elaborated institutional structure. The Preamble to the WTO Agreement essentially builds upon the GATT Preamble. It reiterates the objectives described above. In addition, it refers to the objectives of sustainable development, environmental protection and the needs of developing countries. However, all of these additional objectives should be contributed to by 'reciprocal and mutually advantageous arrangements'.

Thus, while new objectives like environmental protection and sustainable development have been identified by the WTO in comparison with its precursor, no new strategies to achieve them are envisaged. Apparently, these new objectives, just like the "traditional" GATT objectives, are supposed to be attained by the reduction of trade barriers and the elimination of discrimination in trade. Thus, the Preamble to the WTO Agreement suggests that there is no tension between objectives like the full use of resources and expanding production on the one hand, and sustainable development on the other. The Preamble also refers to the aim of developing 'an integrated, more viable and durable multilateral trading system, preserving its basic principles and furthering the objectives underlying this multilateral trading system'.

However, despite the references to an "integrated system" based on "principles", the WTO has no legislative powers of its own, and does not pursue common actions or policies as regards subject areas such as the environment, culture or social issues. Moreover, common values that explicitly underlie the EU, such as liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, are not expressly mentioned in the WTO Agreements.

The WTO Agreements do explicitly recognise the values of environmental and health protection, however. Exceptions in the GATT refer to human, animal or plant life or health and to the conservation of exhaustible natural resources, and environmental protection is mentioned in a number of the WTO's annexed Agreements. Moreover, as said, the Preamble to the Agreement Establishing the WTO refers to 'the objective of sustainable development' and uses the words 'seeking both to protect and preserve the environment and to enhance the means for doing so [...]'. Trade and environment issues are discussed in the Committee on Trade and Environment. The Committee has a fairly extensive work programme, and by the year 2000 had issued over a hundred reports. However, no environmental or health policies as such are pursued by the WTO itself. Therefore, there is no question of competencies shared by the organisation and its members, as there is in the EC.

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41 Preamble to the WTO Agreement.
42 See e.g. Articles 2.2, 2.10, 5.4, 5.7 TBT Agreement; Article 5.2 SPS Agreement; Article 20 Agreement on Agriculture; Article 8 Subsidies Agreement; Article XIV GATS; Article 27.2 TRIPS.
43 WTO Trade and Environment Decision, MTN/TNC/45(MIN).
44 See WTO documents WT/CTE/W1-100 and WT/CTE/1-3.
It is clear that the WTO does not aim to establish a common or internal market, and no such thing as a "principle" of the free movement of goods can be read into its provisions. The WTO Preamble merely speaks of 'expanding [...] trade', 'the substantial reduction of tariffs and other barriers to trade', and 'the elimination of discriminatory treatment in international trade relations'. Is there a general 'principle of trade liberalisation' in the WTO? This question could be of great importance. If such a principle were to exist, and were to be placed 'at the top of the list' and thus be overriding, as is sometimes asserted, it could be instrumental in tilting interpretations of WTO law towards liberalisation in cases of doubt. This would imply that members of the WTO have adhered to an inherent commitment to trade liberalisation. It should be stressed, however, that a "substantial reduction" of trade barriers and the elimination of trade discrimination do not presuppose a final objective of free trade.

At most, the WTO could be said to contain a dynamic principle of progressive trade liberalisation. Moreover, trade liberalisation as a goal has always, from the early days of the ITO and GATT onwards, been intrinsically linked with safeguards guaranteeing members sufficient leeway to pursue their policies, be they of a monetary, labour, employment, or social character. Thus, trade liberalisation has never been the sole goal of the GATT or the WTO; it has been and is "embedded" in other goals, pursued primarily by its Members. This important qualification of the trade liberalisation objective of the GATT and WTO has been stressed by a number of authors. Overlooking it easily leads to a presentation of 'trade and...' conflicts as contradictory, presenting the goal of "free" or "unfettered" trade as absolute and as opposed to the societal goals pursued by national legislation. Accordingly, some authors conclude that the WTO regime gives primacy to trade interests over other interests. It is submitted that rather than doing that, the WTO, as a result of its functions and rules, is bound to regard non-trade interests from a trade angle. It is therefore of the utmost importance to decide what national policies are affected by its trade

45 Hilf (1999) at 10 and (2001) at 117 appears to read a general trade liberalisation principle into the WTO. He refers to the textual references in the WTO Preamble and in the Preamble to GATT 1994, and to Articles II and XXVIII bis GATT, and the TBT Agreement. In addition, he mentions the Appellate Body reports in Australia-Salmon and Korea-Alcohol. However, it is unclear to the current author how the paragraphs in these reports cited can be read as manifestations of an (overarching) principle of trade liberalisation.

46 Contra, see Bronckers (2001).

47 Cf. the following statement by a former US State Department trade policy analyst with regard to the GATT, as quoted by Dunoff (1999a) at 371: 'No one was committed to "free trade": no one expected anything like it; the term does not appear in the GATT, which simply calls for a process of liberalisation with no stated objective.'

48 Roessler (1998); Dunoff (1999a) at 370, referring to Ruggie (1982).

49 See e.g. Nichols (1996a) at 700; Atik (1998) at 248.
liberalisation disciplines in the first place, and then whether trade liberalisation is indeed an overriding requirement in the interpretation of these disciplines. In the WTO, there is no direct citizens' representation in the form of a directly elected supranational parliamentary body. National parliaments, to the extent that these exist in WTO Members, are supposed to control what their governments' delegates say and do in the WTO. As to the role of WTO law before national courts, whether citizens can invoke GATT/WTO law before their national courts and whether national laws can be set aside in such procedures is entirely up to individual Members to decide. It is clear from Article XVI.4 of the WTO Agreement that Members are obliged, as a matter of international law, to ensure the conformity of their internal laws with their WTO obligations. However, it remains up to national legal systems and their constitutions how these international obligations are incorporated into the national legal orders. Thus, WTO law does not prescribe that domestic courts should set aside domestic laws found to be incompatible with WTO rules. Although national legislatures or courts could in principle decide to allow individuals to invoke WTO law to challenge domestic laws, this appears unlikely to happen. Important WTO Members such as the US and the EC have explicitly stated that they do not intend WTO law to have such effects in their domestic courts.50 The case-law of the ECJ confirms the indirect nature of the effects of WTO law in the European legal order.51

Significantly, there is no such thing as a preliminary ruling procedure in the WTO. No direct actions are possible before the DSB either; only states can bring disputes before the Dispute Settlement Body. Therefore, individuals depend upon their own national legal and political system to enforce the benefits of trade liberalisation commitments. In some WTO Members, they can ask their government to take action against another WTO Member when their trading rights are impaired.52 But that possibility does not allow individuals to challenge

50 See Council Decision 94/800/EC concerning the conclusion on behalf of the Community of the WTO Agreements, OJ (1994) L 336/1, and Introductory Note to the Schedules of Commitments under GATS of both the EC and the MS (Legal Instruments Embodying the Uruguay Round Results, Vol. 28 at p. 23557). For the US positions, see Sections 102(3)1 and 2 of the Uruguay Round Agreements Act and the Statement of Administrative Action, at p. 14.

51 On the status of GATT/WTO law in the EC legal order, see Eeckhout (1997), with further references. On the status of GATT 1947 in the EC, see e.g. Cases 21-24/72 International Fruit Company, 70/87 Fediol, C-69/89 Nakajima, C-280/93 Germany-Council. On the status of the WTO Agreements in the EC, see e.g. Cases C-53/96 Hermès and C-300/98 Dior, both preliminary rulings on national courts' questions, and C-149/96 Portugal-Council regarding a direct challenge to Community legislation before the ECJ.

52 Such possibilities for individuals to trigger action under WTO dispute settlement procedures have been laid down in legislation in some WTO Members, such as the EC (Trade Barriers Regulation, Reg. 3286/94) and the US (Sections 301-310 of the 1974 Trade Act).
the laws of their own country because of inconsistencies with WTO commitments.\textsuperscript{53} The WTO Secretariat cannot commence procedures before the Dispute Settlement Body against Members for infringements of the Agreements.\textsuperscript{54} There is also no equivalent to secondary Community law in the WTO. Logically, then, there is no possibility of judicial action against acts of the WTO institutions. Institutionally, there is no equivalent to supranational bodies like the European Commission or the European Parliament in the WTO. The WTO Secretariat does not function as the guardian of the Agreements in the way the Commission does in the EC. Thus, the kind of intensive institutional interplay witnessed in the EC does not occur in the WTO.

1.3 Context of Trade and Environment Conflicts

Worries concerning the WTO and other international institutions in that they may be obstacles to pursuing environmental policies have been among the major causes of criticism aimed at and protests against these organisations. Within Europe, although somewhat milder, similar antagonisms between trade liberalisation and environmental goals are present. It therefore seems appropriate, before examining the relevant rules and their interpretations, to have a look at the contexts in which these rules operate, and at the underlying interests and values of trade and environment conflicts in the EC and the WTO.

1.3.1 Environmental Protection, Sustainable Development, and Globalisation

The dilemmas faced when interpreting the relevant provisions in conflicts concerning trade and environment go beyond those which are purely legal. They are embedded in a political, economic and cultural context. Discussions on trade-environment issues on a global scale take place against the background of the discourse on "sustainable development" and "globalisation". Behind both terms lies a wealth of academic and policy discourse, which to a considerable degree concerns their meaning and scope. The 1987 report of the World Commission on Environment and Development (Brundtland Report) described the term "sustainable development" as 'development that meets the needs of the present without compromising the chances of future generations to meet their needs'.\textsuperscript{55} "Sustainable development" seeks to address concerns

\footnotesize{\textsuperscript{53} Which, according to authors such as Petersmann, is a most important function of trade liberalisation rules.}

\footnotesize{\textsuperscript{54} Cf. Lasok (2000).}

about development inequalities, both intragenerational and intergenerational. It seeks to do so not just in an economic sense, but also with regard to the social and environmental components of development. Hence trade and environment problems are clearly within its ambit.\textsuperscript{16} Although there is no one agreed definition, "globalisation" is widely understood to encompass the increasing international flows of goods, services and finance.\textsuperscript{17} Increasing transboundary and global environmental problems may equally be regarded as aspects of "globalisation".

Starting with bilateral fisheries treaties, environmental concerns have been addressed in international law from the 19th century onwards.\textsuperscript{58} However, it was not until the late 1960s that the need for more comprehensive policies to manage the environment was internationally recognised.\textsuperscript{59} At the 1972 Stockholm United Nations Conference on the Human Environment, an action plan, recommendations and a set of principles were adopted. In the same year, the United Nations Environment Programme (UNEP) was established. After the Brundtland Report on sustainable development had been issued in 1987, preparations began for the 1992 United Nations Conference on Environment and Development (UNCED). At that conference, three non-binding instruments were adopted: the Rio Declaration on Environment and Development, the UNCED forest principles, and Agenda 21.\textsuperscript{60} These instruments explicitly addressed the relationship between trade and environmental protection. Although non-binding, some principles in the Rio Declaration may reflect rules of customary international law. Moreover, it provides guidance as to future legal developments.\textsuperscript{61} Principle 12 of the Rio Declaration stipulates that:

\begin{quote}
States should cooperate to promote a supportive and open international economic system that would lead to economic growth and sustainable development in all countries, to better address the problems of environmental degradation. Trade policy measures for environmental purposes should not constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on international trade.[...]
\end{quote}

\begin{footnotes}
\item[56] On trade and sustainable development, see e.g. Weiss, Denters, and De Waart (eds.) (1996); Repetto (1994); IISD (1994).
\item[57] A web search for a definition of "globalisation" in November 2001 produced around 50,000 hits. Recent works on trade and globalisation include Richardson (2000); WTO (1998). Critical approaches are found in e.g. Wallach (1999); Klein (1999); Hertz (2000).
\item[58] For an overview of the history of international environmental law, see Sands (1996).
\item[59] See the final report of the 1968 Biosphere Conference, cited in Sands (1996) at 34.
\item[60] In addition, two international environmental agreements were opened for signature: the Convention on Biological Diversity and the UN Framework Convention on Climate Change.
\item[61] Sands (1996) at 30.
\item[62] See also Section 5.4.3 on Principle 12 of the Rio Declaration and paragraphs 2.22 and 3.39(d) of Agenda 21, regarding the need for multilateral solutions over and above unilateral solutions to environmental problems.
\end{footnotes}
Agenda 21 does not provide principles, but rather a more elaborate action plan to tackle the challenges of sustainable development in the 21st century. It also addresses trade and environment:

*Environment and trade policies should be mutually supportive. An open, multilateral trading system [...] contributes to an increase in production and incomes and to lessening demands on the environment. [...] A sound environment, on the other hand, provides the ecological and other resources needed to sustain growth and underpin a continuing expansion of trade. An open, multilateral trading system, supported by the adoption of sound environmental policies, would have a positive impact on the environment and contribute to sustainable development.*

In the GATT, attention was paid to trade and environment for the first time in a 1971 report by the Secretariat, compiled in the context of the preparations for the 1972 Stockholm Conference. In the same year, a GATT expert group on environmental measures and international trade (EMIT) was set up, which however convened for the first time only in 1991, just before UNCED. The final phase of the Uruguay Round negotiations that led to the establishment of the WTO coincided with UNCED. It is no surprise that the WTO Decision on Trade and Environment refers to the Rio Declaration and Agenda 21, and contains similar language. The Preamble to the WTO Agreement refers to sustainable development.

According to the international instruments referred to above, trade, environmental protection and sustainable development are not regarded as being incompatible. On the contrary, they are seen as complementary and mutually reinforcing. This depiction of their relationship may appear somewhat simplistic and idealistic. The relationship between trade, environment and development is highly complex and differs from case to case. In some cases, trade can have

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61 Paragraphs 2.19 of Agenda 21. Cf. Paragraphs 2.3 and 2.5 of Agenda 21:

'The international economy should provide a supportive international climate for achieving environment and development goals by: (a) Promoting sustainable development through trade liberalization; (b) Making trade and environment mutually supportive; [...] An open, equitable, secure, non-discriminatory and predictable multilateral trading system that is consistent with the goals of sustainable development and leads to the optimal distribution of global production in accordance with comparative advantage is of benefit to all trading partners. Moreover, improved market access for developing countries' exports in conjunction with sound macroeconomic and environmental policies would have a positive environmental impact and therefore make an important contribution towards sustainable development.'

64 GATT (1971).

65 As the Appellate Body noted in US-Shrimp-Turtle, para. 153: 'As this preambular language reflects the intentions of negotiators of the WTO Agreement, we believe it must add colour, texture and shading to our interpretation of the agreements annexed to the WTO Agreement, in this Case, the GATT 1994.'
concrete detrimental effects on the environment; one can here think of pollution caused by transport. In other cases, trade disciplines can have direct positive environmental effects, e.g. when resulting in subsidies for unsustainable fisheries being abolished. The above principles and understandings therefore certainly should not be understood to mean that there can or will be no concrete conflicts between trade and environmental policies. How such conflicts are dealt with in interpreting trade liberalisation rules is precisely the subject of this study.

In the EC, the year 1972 also marked an important step in the development of an environmental policy. Before then, occasional Community measures were taken that pursued environmental objectives, but without an underlying environmental policy. In 1972, the European Council stated that economic expansion should lead to raising quality and standards of living, and stressed the importance of a Community environmental policy. After 1972, the Community started to draw up environmental action plans. In 1987, with the Single European Act, environmental protection received treaty status. The Title on Environment in the EC Treaty provided inter alia that "environmental protection requirements must be integrated into the definition and implementation of other Community policies". With the 1992 Maastricht Treaty on European Union, "respect for the environment" and a "policy in the sphere of the environment" were added to the Community's tasks and activities in Articles 2 and 3 of the EC Treaty. Finally, the modifications to the EC Treaty made by the 1997 Amsterdam Treaty have resulted in a reference to a 'harmonious, balanced and sustainable development of economic activities' and to a 'high level of protection and improvement of the quality of the environment' among the Community's tasks. Moreover, the integration principle has moved forward and is now placed among the Community's general principles. The Preamble and Article 2 of the Treaty on European Union now also refer to sustainable development.

1.3.2 "Trade and...": Trade Liberalisation and Non-Trade Interests

Trade liberalisation commitments may come into conflict not only with the protection of life and health and of the environment, but with other societal goals as well. Often, the expression "trade and..." is used when referring to conflicts between trade liberalisation and other societal interests. Generally speaking, the basic mechanisms examined in this study, i.e. trade liberalisation commitments, and justifications for 'non-trade interests' with accompanying

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66 As recognised in WTO (1999), commented upon by Charnovitz (2000).
68 In what then were Articles 130r-t and 100a EC, now 174-176 and 95 EC.
69 The preamble to the Treaty on European Union also refers to "environmental protection".
conditions, are to a large extent relevant to policies pursuing other non-trade interests. The societal goals that make up the other end of 'trade and...' conflicts are referred to as "non-trade interests". Examples are labour rights, collective social benefit systems, cultural diversity, or the protection of intellectual property rights. Conflicts are also possible between trade liberalisation and such interests as national security, public morality, and public policy, or "ordre public". The latter interests are generally perceived as part of the domaine réservé, expressions of state sovereignty par excellence. Accordingly, it has been argued that they are less likely to become the subject of multilateral agreement than the other interests mentioned.\textsuperscript{70} Admittedly, multilateral agreement will be more difficult to reach with regard to some interests than to others. However, even with respect to the interests part of the domaine réserve, it is possible that international legislative or adjudicatory institutions determine the margins of interpretation, as the European Community demonstrates.\textsuperscript{71}

There are similarities as well as differences in the range of "non-trade interests" recognised in the EC and the WTO. In their provisions providing general exceptions to liberalisation commitments for trade in goods, both the EC and the WTO refer to the protection of life and health.\textsuperscript{72} Environmental protection as a legitimate cause potentially overriding trade liberalisation commitments has been recognised in the ECJ's case-law, as well as in a number of the WTO Uruguay Round Agreements, such as the TBT Agreement. On the other hand, the exception in the GATT separately provides for the protection of exhaustible natural resources, which are not mentioned in the EC Treaty. Outside the environmental realm, similarities between the EC and the WTO include exceptions for public morality, national treasures of artistic, historic or archaeological value, and national or public security. In addition, the EC Treaty refers to public policy and the protection of industrial and commercial property, while the WTO includes a number of general exceptions not found in the EC, among which are the import and export of gold and silver, the products of prison labour, and products in short supply.

In the WTO context, "trade and..." conflicts are normally presented as pitching international trade liberalisation commitments versus national non-trade interests. While this is true in many cases, this picture needs to be refined. First of all, the non-trade interest may also be transnational. This is illustrated both by the unilateral efforts by WTO members to address international environmental problems, and by multilateral environmental agreements (MEAs)

\textsuperscript{70} See e.g. Weiss (1999), and further discussion in Section 3.2.5.

\textsuperscript{71} See with regard to public policy and the free movement of persons e.g. Case 41/74 Van Duyn; Joined Cases 115-116/81 Adoui and Cornuaille. With regard to public morality and the free movement of goods, see Cases 121/85 Conegate and 34/79 Henn and Darby.

\textsuperscript{72} Article 30 EC and Article XX GATT, respectively.
that may conflict with trade liberalisation commitments. Secondly, while trade liberalisation commitments are made internationally, the interests behind them are national, i.e. the interests of producers, consumers, importers and exporters. At the same time, the interests of an open, rules-based and non-discriminatory trading system are ideally shared by actors in all members of the trade liberalisation agreement, and in that sense are transnational. Thus, a “trade and...” conflict in reality often pitches transnational interests against each other. However, these interests are supposed to be represented in the national political process preceding the implementation of a national policy that may lead to a “trade and...” conflict. The transnational trade interests are supposedly represented in trade agreements. The transnational non-trade interests will be represented in relevant international environmental agreements or standards, and if there are none, they will only be represented to the extent that they are taken into account in the national political process.

The EC does not pursue its own policies with regard to, for example, public morality or “ordre public”. Thus, with regard to such interests, the picture is largely similar to the WTO situation; national non-trade interests are pitched against international trade liberalisation commitments. The Court of Justice determines the margins within which the Member States may invoke these interests to interfere with free movement rights derived from Community law. The same refinement made above applies here too; trade liberalisation is at the same time a national and a transnational interest. As regards those non-trade interests that are the subject of this work, the EC has legislative competencies of its own, so the transnational nature of these interests has treaty status.

The EC Treaty differentiates between “public health” and “environment”. The Community pursues an environmental policy of its own, and shares competencies with its Member States in this field. Therefore, a trade and environment conflict in the EC involves an international trade liberalisation commitment and a non-trade interest that may be both national and Community-wide. The degree to which the non-trade interest is perceived as a national or also as a Community interest depends on the environmental problem at issue. Accordingly, “trade and...” conflicts in the EC may be considered to lie somewhere in the middle of a scale with completely or mostly national non-trade interests like public order at one end, and completely Community (or “communitarised”) non-trade interests at the other end. The Community’s public health policy is only supplementary to the Member States’ policies. Nonetheless, life and health protection is also an internal market issue, and through that avenue increasingly comes to the forefront in Community legislation. Thus, trade and health conflicts lie somewhere between trade and public policy conflicts and trade and environment conflicts on the scale proposed above.
Some authors present ‘trade and...’ problems as value conflicts. Of course, whether one agrees with such a view depends on how one defines "values". Non-trade interests such as environmental protection may well be values or express values. It seems less clear that trade liberalisation itself is a value. It has also been suggested that trade linkage problems involve conflicting claims of justice in the context of international economic law. Accordingly, a concept of justice is central to international economic law. In this view, each ‘trade and...’ debate has, at its root, a series of questions concerning justice. Identifying trade linkage questions as justice questions suggests an ‘integrated view’, which recognises that conflicts between traditional trade policy and other areas of social policy involve branches of the same tree, the tree being the construction of a “just society”. The resolution of ‘trade and...’ disputes cannot be sought exclusively at the doctrinal level. It has to be articulated normatively, as an attempt to resolve dilemmas and tensions within the liberal vision and between liberalism and other candidates for ‘right order’.

1.3.3 “Trade And...”, International Law and Other Disciplines

Much of the literature concerning the WTO forms part of what is called ‘international trade law’ or ‘international economic law’. The latter term is usually also taken to include regional economic agreements, among which is the European Community. The debate on “trade and...” conflicts in international law is often linked to much more than trade and certain societal interests. Discussions involve notions such as democracy, human rights, liberalism, sovereignty, legitimacy and equality.

Proponents usually point out that trade liberalisation increases economic opportunities, thus giving countries and their populations the chance to reap the economic gains from trade. World Bank studies suggest that developing countries that have liberalised their trade regimes have shown much better growth rates than developing countries that have remained relatively closed to trade. In addition, liberalised trade is said by its proponents to stimulate peace

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73 See e.g. Nichols (1996a) and Atik (1998).
74 Garcia (1998a).
75 Ibid.
76 For discussions on the meaning of these terms, see (1996) 17 U. Pa. J. Int'l. Econ. L., special issue dedicated to international economic law.
78 World Bank (2001) shows that 24 developing countries that increased their integration into the world economy over two decades ending in the late 1990s achieved higher growth in incomes, longer life expectancy and better schooling. These countries, home to some 3 billion people, enjoyed an average 5 percent growth rate in income per capita in the 1990s compared to 2 percent in rich countries. On
between trading nations and peoples. Trade interests increase knowledge and understanding of each other, and even in the event of conflicts, established trade contacts make war too costly an option to consider. The main source of inspiration for this view are the writings of Kant.\textsuperscript{79} The idea that trade stimulates or even guarantees peaceful coexistence underlies the European integration project.\textsuperscript{80} Although less explicitly, it may be said to underlie global trade liberalisation too.\textsuperscript{81} As early as 1947, when the Havana Conference that sought to establish an International Trade Organisation was held, it was stated that ‘[t]rade had been man’s main peacetime activity almost since the time he had begun to live in society, which led people to believe that the success to be attained by the work of the Conference would become an invaluable pillar of that lasting peace that all the peoples were so anxiously seeking.’\textsuperscript{82} On the basis of Kantian ideas, it has been argued that “liberal democracies” do not wage war on each other.\textsuperscript{83} They will form a ‘league of democratic nations’ in international organisations, and to some extent already do so in organisations such as the OECD, the EC and the GATT.\textsuperscript{84} This view has been criticised as ignoring the tensions between democracy and liberalism, and implicitly favouring the latter over the former.

\textsuperscript{79} 'Nature also unites nations which the concept of cosmopolitan right would not have protected from violence and war, and does so by means of their mutual self-interest. For the spirit of commerce sooner or later takes hold of every people, and it cannot exist side by side with war.' Kant (1991) at 114.

\textsuperscript{80} See the Preamble to the EC Treaty: ‘Resolved by thus pooling their resources to preserve and strengthen peace and liberty …[,]’ and the excerpt from the Schuman Declaration, supra note 17.

\textsuperscript{81} See the ‘About the WTO’ introductory section at the WTO webpages, http://www.wto.org.

\textsuperscript{82} Speech at the first plenary meeting by the President of Cuba, host of the 1947-48 Havana Conference on Trade and Employment that was to prepare the International Trade Organisation. E/CONF.2/SR.1 at 1.

\textsuperscript{83} When Francis Fukuyama (1992) proclaimed the “end of history”, he argued that the victory of “liberal democracy” marked the end of ideological clashes. Simplifying his thesis, he argued that this victory is driven by two main factors: the ‘logic of modern natural science’ that leads to the triumph of capitalism, and man’s desire for recognition, manifested in such feelings as self-respect and dignity. A “liberal democracy” in Fukuyama’s view is a societal order built on the logic of modern science and capitalism, and able to satisfy the desire for recognition of all citizens. The international dimension of Fukuyama’s thesis is much less elaborated.

\textsuperscript{84} Fukuyama (1992) at 276-284. Interestingly, in this view, even if the GATT does not require its members to be democratic, it does require them to have “liberal economies”. Fukuyama, at 283, note 9. This point is debatable, however, as the GATT accommodated a number of non-market economies as contracting parties.
Moreover, it has been added, liberal democracy has never been under so much strain as it is today.\textsuperscript{85}

The word “liberal” takes on different meanings in discussions on “trade and...” problems. First, the liberal view in international relations theory challenges the realist and positivist assumptions that states are the sole or predominant actors on the international scene, focusing instead on individuals, interest groups and companies. Secondly, when international trade lawyers speak of a “liberal trade order”, they refer to open markets enabling international trade flows without undue discrimination on the grounds of the national origin of goods and unnecessary trade obstacles. Thirdly, “liberal” may also denote the kind of \textit{domestic} system that states should be based on in order to successfully take part in the international trade system. The latter meaning of “liberal” has an economic as well as a political pendant. It is not only associated with a capitalist, property-based economy, but frequently also with respect for human rights and fundamental freedoms, democracy and the rule of law. Proponents of a “liberal” international trade system do not necessarily argue that all participating states should be democratic, or even capitalist. The history of the GATT shows in fact that its rules were quite apt to take in state-driven economies. And although the WTO’s expanded scope \textit{vis-à-vis} the GATT makes it more difficult for non-capitalist states to participate, this does not seem to be an impossibility.\textsuperscript{86} Moreover, the WTO does not lay down any demands for membership in terms of human rights, democracy or the rule of law. It is debatable to what extent such values are enshrined in the WTO agreements.\textsuperscript{87}

It may be argued that through trade contacts, open economies gradually absorb and adopt certain values relating to democracy and human rights. However, in some countries that have shown impressive economic performance, little or no improvement in terms of democracy and human rights has taken place.\textsuperscript{88} The view that trade spreads such essential assets of (Western) neoliberal societies as democracy, the rule of law, individualism and human rights may

\textsuperscript{85} Marks (1997).

\textsuperscript{86} For instance the TRIPS Agreement requires a domestic system of intellectual property rights, which may be difficult to introduce in a non-market economy. Nevertheless, Myanmar and Cuba are just two obvious examples of WTO Members that are largely based on non-market economies.

\textsuperscript{87} It has accordingly been argued that the WTO should not attempt to ‘micromanage world social policy’ for three reasons. First, it would not work between polities ranging from democracies to totalitarian dictatorships. Second, many conflicts between trade and societal values are local in nature. Third, social policy co-ordination and imposition does not create universal values. Nichols (1996a). For an opinion that the WTO does enshrine basic liberties and human rights, see various writings by Petersmann.

\textsuperscript{88} See UN doc A/55/342, “Globalization and its impact on the full enjoyment of all human rights”, preliminary report of the UN Secretary-General.
be criticised from a cultural relativist perspective. Trade itself is sometimes presented as a human right, often linked to the right to property. The main source of inspiration appears to be the German constitution. However, most of the world's constitutions do not recognise a constitutional right to trade.

Considering the fact that trade and environment conflicts go beyond those which are merely legal, it comes as no surprise that they are also studied by other than legal disciplines. Particularly influential in the study of international trade law are international relations theory, and economics. In international relations, institutionalism has proved a viable alternative to the dichotomy between realism (focusing on states as the primary and unitary actors in world affairs) and liberalism (viewing other actors, such as individuals, business, and interest groups as essential). Regime theory is increasingly applied to issues of public international law, including WTO law. Such applications are usually categorised as institutionalist.

The application of economic insights to legal issues is captured by the law and economics movement. Public choice theory applies insights from the study of private economic behaviour to collective action problems, including government action. Institutional economics focuses on the transaction costs involved in obtaining information needed to take rational decisions. The relationship between transaction costs and institutions is regarded as being critical to understanding economic exchange and the existence of institutions. Transactions are sometimes left to the market, where they take place on the spot and spontaneously, and sometimes institutionalised in a firm or in government regulation.

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89 See e.g. Huntington (1996) at 183-195: 'The central problem in the relations between the West and the rest is [...] the discordance between the West's - particularly America's - efforts to promote a universal Western culture and its declining ability to do so. [...] Double standards in practice are the unavoidable price of universal standards of principle. [...] If democracy comes to additional Asian countries it will come because the increasingly strong Asian bourgeoisies and middle classes want it to come'.

90 See various writings of Petersmann.

91 As noted by Kuiper (1997).

92 See e.g. Slaughter (1995) and Abbott (1989).

93 See e.g. Bhagwati and Hudec (eds.) (1996) and Bhandari and Sykes (eds.) (1997).

94 See Nichols (1996b) and (1998), arguing that the notion of institutionalism encompasses more than just regime theory, providing an overview of institutionalist approaches, and proposing historical and sociological institutionalism as alternative ways of looking at the WTO.

95 For an overview of this discipline, see Bouckaert and De Geest (ed.) (2000).

96 See e.g. Stephan (1995).

97 The leading work on the theory of the firm is Coase (1988), incorporating Coase's papers 'The Theory of the Firm' and 'The Problem of Social Cost'. For a criticism of the way the 'law and economics' movement has subsequently modified the Coase theorem, see Fletcher (1999).
"New" institutional economics enables comparative institutional analysis by providing for the analysis of different institutions and organisations at the same time. Examples of these approaches which are relevant to the topic of this study include a comparative institutional analysis of the various 'trade-off devices' applied in 'trade and...' conflicts before international and federal dispute resolution bodies. The same author has taken a first step in building on new institutional economics to develop a theory on international economic organisations. The theory builds on previous works in institutional economics that focused on transaction costs to compare the market with the firm, and the market with government regulation. It seeks to apply a transaction costs analysis to assess international regulation as compared to business firms and national regulation. Finally, the issue of non-tariff barriers in international trade and the concepts of "regulatory competition" and "regulatory harmonisation" between states have attracted economists and lawyers alike.

1.4 Aim, Structure and Scope of the Research

1.4.1 Aims and Structure of this Work

The aim of this work is to review the way "negative integration" clauses as well as "environmental justifications" operate in the EC and the WTO, and how they limit the environmental policy choices of the members of these organisations. As accounted earlier in this introductory Chapter, trade and environment conflicts are increasingly coming to the fore in both the EC and WTO. With a thorough study of the commitments in this respect in both organisations it is hoped to provide some clarity in a heated yet often poorly informed debate. In addition to raising academic interest, this work also hopes to provide information for national and European policy-makers on the possibilities and problems of conducting environmental policies in the light of trade liberalisation commitments. In addition, the author hopes to provide some insight into the important question as to whether the rules on trade and environ-

98 An important work of institutional economics, written in the context of the US federal system, is Komesar (1994). It has inspired Poiares Maduro (1998a), an interesting study of the role of the European Court of Justice in EC law on the free movement of goods.


101 A first attempt has also been made to apply this theoretical framework to actual international economic organisations, particularly the Association of South East Asian Nations (ASEAN), by Kiriyama (1998).

102 See e.g. Sykes (1999a and 1999b) and (1995), Pelkmans (1997); Trebilcock and Howse (1998); and the special issue (2000-2) of JIEL devoted to "Regulatory Competition".
ment in the EC and the WTO enable adjudicators to strike a reasonable balance between conflicting interests.

Why compare trade and environment in the EC and the WTO? The differences between these organisations as described above are clear. However, there are several reasons for a comparison. First and foremost, the nature of the provisions studied, as well as the kind of disputes in which they have been invoked, are similar to an important extent. The basic question that can be asked in both the EC and the WTO is what room their rules leave to their members to pursue environmental policies by measures affecting trade. Moreover, the provisions of the EC Treaty studied in this work have largely been modelled on the relevant GATT provisions. Secondly, the EC and WTO do not live in separate worlds. On the one hand, the EC is a regional agreement which is supposed to be in conformity with the basic principles of the multilateral trading system. The EC's own policies, inter alia in the environmental field, must comply with WTO commitments. On the other hand, the WTO is a young organisation whose reach into the domestic legal and policy arenas of its Members goes well beyond that of its predecessor, the GATT. It is only natural, then, for the WTO to look at experiences in other trade liberalisation contexts when it is increasingly confronted with trade-environment conflicts. Among the sources of inspiration, the EC with its well-developed case-law is a prime candidate. This is not to suggest, however, that the WTO can only learn from the EC. Conversely, as already stated, the EC is bound to comply with WTO law, and the WTO may be expected to increasingly affect developments in the EC.\(^{103}\)

Approaches based on legal theory in general, conventional treaty interpretation or the specifics of European integration will not suffice in bringing to the fore the similarities and differences of the two organisations under examination. There are no ready-made theories on comparing regional economic integration with the youthful World Trade Organisation.\(^{104}\) Accordingly, the approach of this study is modest; it does not attempt to design an overall theoretical framework. Its point of departure is the interpretation of a number of rules in the EC Treaty and the WTO Agreements. The approach is largely based on case-law and academic literature. Occasional references are made to the different structures and institutional contexts in which the studied rules function. Perceived similarities between EC and WTO law have prompted some to speak of "convergence", while others have even advocated taking the EC as a "model" for further developments in the WTO.\(^{105}\) As a scholarly observer, the tendency to look for similarities and generalities between two sets of rules comes almost naturally.

\(^{103}\) Cf. De Bürca and Scott (2001); Eeckhout (1997).

\(^{104}\) To the present author's knowledge, the only tentative start towards a comprehensive theoretical framework encompassing both the EC and the WTO is found in Trachtman (1996a).

\(^{105}\) See Weiler (1999), Trachtman (1996b), and Prodi (2000), further discussed in Chapter 9.
At the same time, the intention in this work is to consider both similarities and differences as neutral, in the sense that there is no presumption that similarities or convergence are desirable, or that differences or divergence are unwanted.

Merely concentrating on environmental justifications in the EC and the WTO is of little use without a thorough preliminary study of their basic prohibitions. Before contemplating justifications, the question as to whether a measure possibly infringes a prohibition should be addressed. The structure of this work is as follows. After this introductory part, the evolution of EC law in the field of study will be analysed in part two (Chapters 2 and 3). The analysis will revolve around the interpretation of the basic prohibition in Article 28 EC, including the central notion of 'measures of equivalent effect to quantitative restrictions', and the exclusion of "selling arrangements" from that basic prohibition as developed in the case-law. Next, the focus turns to the exceptions laid down in the EC Treaty (Article 30), and the justifications for "mandatory requirements" as accepted in the case-law of the ECJ. Finally, the conditions attached to the application of these justifications are discussed. In Chapter 3, an analysis of a number of recurring themes is made, i.e., basic disciplines and typologies, justifications and conditions, the role of discrimination, and the issue of production and processing methods (PPMs). Part three (Chapters 4 and 5) analyses the evolution of GATT/WTO rules and their interpretation. Here, there are not just two pivotal provisions as in the EC, but various rules applicable to the regulatory measures of Members and their justifications in the GATT, TBT and SPS Agreements. For these Agreements, the relevant obligations, exceptions and conditions for those exceptions to apply are discussed, as well as the relationships between them. Again, a second part addresses essentially the same recurring themes as in the EC Part. In the fourth part (Chapters 6 to 10), Chapter 6 takes a comparative approach as regards the operation of the "negative integration" clauses and environmental justifications in the EC and the WTO. Chapter 7 addresses two issues in whose respect it is more difficult to compare the EC and WTO, i.e., international harmonisation and trade-restrictive measures based on production and processing methods and with extraterritorial protection goals. Chapter 8 addresses a somewhat separate question, which the author nonetheless thinks is worth consideration: the legal status of the application by EC Member States of trade-restrictive environmental measures to products from third countries that are WTO members. The study ends with a discussion of whether the EC could be regarded as a "model" for the WTO in Chapter 9, and concluding remarks in Chapter 10.
1.4.2 Research Limitations and Working Definitions

One of the most difficult aspects of a research topic is its proper delimitation. The focus in this study on ‘unilateral regulatory environmental and health measures that restrict trade in goods’ needs some further explanation.

(a) “Measures”

This work focuses on the prohibitions aimed at ensuring trade liberalisation commitments, and what are provisionally called “environmental justifications” in the EC Treaty and WTO Agreements, and how they legally affect domestic policy. Manifestations of domestic policy-making in the environmental sphere are manifold, and no attempt is made to categorise them. Often, the word “measure” is used to refer to such manifestations of domestic policy. Especially in the WTO, the use of the word “measure” sometimes causes confusion. For the sake of clarity, a “measure” is here defined as the application to imported (or exported) products of domestic laws, regulations, requirements, administrative practices, etc., that trigger the application of EC or WTO disciplines.

The extension of the prohibitions and justifications in the EC and the WTO to that which falls within the competence of domestic policy will obviously depend on their wording and scope. Generally speaking, a domestic measure’s alleged discriminatory, protectionist, or otherwise hindering effect on international trade, will trigger the application of the prohibitions in the EC Treaty or WTO Agreements. The trigger thus lies in a measure’s (potential) application to foreign products. In some cases, the measure will not be covered by these disciplines. In other cases, it will be covered by these disciplines and will need to be justified. Then, the claimed environmental purpose of the measure will come into play.

(b) Trade Obstacles and Discrimination; “Life and Health” and “Environment”

The relevant provision of the EC Treaty prohibits quantitative restrictions and measures having equivalent effect thereto. The GATT in one provision prohibits quantitative restrictions, and in another it prohibits discrimination, or to be more precise, it prohibits internal regulations from giving less favourable treatment to imported products in comparison with their domes-

106 Henceforth, the term “domestic” should be understood to refer to policies of the Member States of the EC as well as policies of WTO Members, including the EC itself.
tic counterparts. This is called the National Treatment principle. The TBT Agreement provides specific rules for technical regulations and the SPS Agreement for sanitary and phytosanitary measures. There is another important non-discrimination provision in the GATT, which does not consider discrimination of imported products vis-à-vis domestic products, but rather discrimination of products imported from country A vis-à-vis products imported from country B. Despite its great importance to the WTO system, this principle of Most-Favoured Nation treatment is not addressed in this work. There are two reasons for this. First of all, there is no explicit mention of the Most-Favoured Nation principle in the EC Treaty, although it is implicit.\textsuperscript{107} Secondly, up to now, all trade and environment conflicts in the GATT and the WTO have focused on the prohibition of quantitative restrictions and the National Treatment obligation, rather than on Most-Favoured Nation treatment.

Both the GATT and EC Treaty provide an exception to their trade liberalisation disciplines for the protection of human, animal or plant life and health. The GATT in addition contains an exception for the conservation of exhaustible natural resources. "Environmental protection" as such is not found in either the EC Treaty exceptions to the free movement of goods, or in the GATT. However, the European Court of Justice has accepted "environmental protection" as a "mandatory requirement" that may in principle justify trade-restricting measures. And in the WTO, "environmental protection" is explicitly mentioned in a number of Agreements, notably the TBT. These differences lead to the question whether "life and health", "conservation" and "environmental protection" are different objectives, or whether they overlap, and if so, to what extent. Moreover, these concepts do not necessarily have to receive the same interpretation in the WTO and the EC.

The notion of environmental protection at first sight appears to be less clear than the protection of the life and health of humans, animals and plants, or the conservation of exhaustible natural resources. A wide interpretation of environmental protection could include both life and health protection and resource conservation. A stricter interpretation of environmental protection, however, would exclude at least life and health protection, and thus only cover those environmental objectives not directly concerned with life or health. Although much narrower than the wide interpretation, such a strict concept of environmental protection would not be devoid of meaning. Examples would include noise pollution, "horizon pollution", and non-dangerous waste. As to resource conservation,

\textsuperscript{107} EC Member States are supposed to treat all products in the internal market equally, in whichever Member State they originate. They are supposed to do the same for all products originating from third countries, once the products are put into free circulation. Article XXIV GATT provides room for preferential treatment of products from within a customs union vis-à-vis products from third countries. See Chapter 8.
in the WTO, this concept has received a wide interpretation as including the protection of living species, even if that might have been expected to have been covered by life and health protection. In the EC, resource conservation is not separately mentioned. It could be covered by environmental protection and by life and health protection. In this work, "environmental protection" as a general term is loosely used in the broadest sense, including life and health protection, environmental objectives not directly related to life and health, resource conservation, and the protection of "global commons" such as the ozone layer, the atmosphere, and biological diversity. However, when specific treaty provisions and judgments are discussed below, "environmental protection" usually has a narrower scope, not covering "life and health" protection.\(^{108}\)

(c) Trade in Goods; Non-fiscal Measures; Focus on Imports

There are three important limitations to the kind of rules under scrutiny in this work. First of all, this study addresses trade in goods, not services.\(^{109}\) The author is aware of the increasing role of services in both global and European trade. Trade in services has been covered by the EC Treaty from its entry into force, along with goods and the other free movement subjects (capital and persons, in the form of freedom of movement for workers and freedom of establishment). Not covered by the 1947 GATT, trade in services is now covered by WTO disciplines in the GATS, although in a less far-reaching manner than goods.\(^{110}\) Despite the growing importance of trade in services and its increasing coverage by WTO disciplines, however, there are good reasons to concentrate the analysis on goods. First, the interface between environmental regulation and trade in goods has a longer and richer history than the interface with trade in services (or other EC freedoms). Experiences in the environment-goods interface will most probably have an influence on developments regarding services as well. Secondly, domestic environmental policies interfere more easily with disciplines on trade in goods than with disciplines on trade services. Thirdly, constraints of space and time urge a limitation of the scope of the analysis.

The second limitation lies in this work’s focus on non-fiscal environmental policies. Domestic measures interfering with trade can roughly be divided into fiscal and non-fiscal measures. Fiscal measures include duties or charges levied on imported products only (border measures) such as tariff duties and other charges, and duties levied on imported products to offset dumping or subsidies. They also include internal taxation levied on products, which may be imported.

\(^{108}\) See further Section 6.2.

\(^{109}\) Although occasional reference is made to trade in services, see Section 5.3.3.

\(^{110}\) In the GATS, some of the most important disciplines, such as National Treatment, are not generally applicable as in the GATT, and are only binding upon the regulations of WTO Members with respect to those services regarding which they have made specific commitments.
Examples are excise duties and value-added taxes (VAT). Fiscal measures are disciplined by separate provisions in both the EC and WTO contexts. This work does not purport to address those disciplines exhaustively, although occasional reference is made to them. Non-fiscal measures, on the other hand, comprise quantitative restrictions and other limitations to or prohibitions on imports or exports (border measures) as well as the application of any internal regulatory manifestation of policy (laws, regulations, administrative practices, etc.) to imported or exported products. This wide range of non-fiscal "internal measures" includes product requirements, labelling requirements, restrictions on the transportation, distribution, selling and advertising of products, and so on. When applied to imports, all such measures may in principle trigger the application of EC and WTO rules.

Finally, although occasional reference is made to exports, the focus of the study is on rules that address measures applied to imported goods. Although domestic environmental measures may well interfere with export flows, the bulk of the attention in both case-law and literature has been on effects on imports. This is no great surprise, as much of the discussion on the compatibility of domestic measures with international disciplines is influenced by the dilemma between allowing the pursuance of legitimate objectives and precluding such objectives from being abused for undesirable protectionist purposes. Obviously, protectionist voices will generally advocate restricting imports rather than exports.

(d) States and the EC as Actors

In the EC, there are currently 15 Member States, while accession is being negotiated with 12 states in Central and Eastern Europe, as well as with Turkey. In the WTO, there are over 140 Members. The large majority of WTO Members are states, among which are the EC Member States, but there are also non-state WTO Members. According to the WTO Agreement, the Contracting parties to the GATT and the European Communities became original Members of the WTO. Thus, the EC itself has become a Member of

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111 See Section 3.4.5.
112 Accession negotiations are currently taking place between the EC and Latvia, Lithuania, Estonia, Poland, the Czech Republic, Hungary, Slovenia, Cyprus, Malta, and the Slovak Republic, whose accession is expected by some as early as 2004, and with Bulgaria, Romania, and Turkey, which will need more time.
113 In late 2001, China became the 143rd WTO Member, and negotiations with inter alia Russia are being held.
114 Article XI:1 WTO Agreement. Moreover, any 'separate customs territory possessing full autonomy in the conduct of its external commercial relations and in the other matters provided for in this Agreement and the Multilateral Trade Agreements' may accede to the WTO. Article XII:1 WTO Agreement.
the WTO and is therefore bound by the WTO rules just as its Member States are. The emphasis in this work on states and the European Community as actors is by no means self-evident. Non-state actors, such as private individuals, business enterprises, and non-governmental organisations, play an important role in the EC legal order and an increasingly important one in the international legal order(s). However, for a comparison between the EC and WTO, the basis chosen are these organisations' rules concerning the limitations posed by trade liberalisation commitments to their members' regulatory behaviour for environmental reasons, and the interpretations of these rules in dispute settlement procedures. A focus on states (and the EC as a WTO Member) as main actors then seems appropriate. This is of course not to say that other actors are irrelevant, or that state action is not viewed as a series of outcomes of internal interest clashes. Yet laying the emphasis on, for example, the role of individuals and national courts as actors in the development of the free movement of goods in the EC legal order provides a difficult basis for a comparison with an organisation like the WTO, which does not impose the direct applicability of its rules in national courts, in whose dispute settlement body citizens have no standing, and to which national courts cannot refer questions on the interpretation of WTO rules.

(e) PPMs: Harmonisation and Unilateral Action

Measures affecting trade flows are often enacted because of worries concerning global or transboundary environmental problems. They pose particular problems to the EC and WTO rules when they are framed in terms of production or processing methods (PPMs). In contrast to product characteristics, such PPM-based policies do not just impose requirements as to products as they are traded, but seek to prescribe how their production should take place in the exporting country. In the remainder of this work, PPMs and related problems are discussed in separate Sections both in the EC and WTO contexts.

Another issue that is addressed with regard to both EC and WTO rules is international harmonisation or standard-setting as a way of tackling regulatory differences that may disturb trade. The main focus of this work is on how the relevant rules relate to unilateral measures of members of the WTO and the EC. However, in the EC, the room for unilateral action is disciplined not only by the provisions of "primary EC law" on the free movement of goods, but also by relevant "secondary EC law", i.e. Community legislation in the field of environmental or health standards. Such legislation represents a multilateral solution to striking a balance between the demands of market integration and

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115 The Dutch legislative proposal on mandatory wood labelling referred to above provides an example of such a measure.
safeguarding legitimate non-economic interests. Often, though, the balance struck is not uniform and all-encompassing. The standards agreed upon at the Community level in many cases only establish a minimum level of protection, leaving individual Member States with room to go beyond that level. Although this study discusses secondary Community legislation, it does not elaborate on its intricacies. Secondary Community legislation in some cases renders recourse to the primary EC Treaty rules impossible. In assessing national policies going beyond Community standards, the primary Community rules on the free movement of goods often come into play. Thus, the primary EC Treaty provisions that are the main focus of this study cannot be considered in isolation from secondary EC law.

In the WTO, as argued above, there is no legislative capacity to set standards in fields such as health or environmental protection. Here too, the focus of the WTO provisions studied is on disciplining the unilateral domestic policies of members. However, that is not to say that at the global level, no multilateral action is taken to address environmental and health problems. First, environmental and health standards may be agreed upon multilaterally in international bodies and organisations, such as the International Standardisation Organisation and the Codex Alimentarius. The SPS and TBT Agreements refer to such multilateral standards, and provide more lenient disciplines to national measures that are in conformity with relevant standards than to measures that deviate from them. Secondly, numerous so-called multilateral environmental agreements (MEAs) address environmental and health issues. These MEAs sometimes directly affect trade relations by containing provisions regulating trade in the products or species concerned.\footnote{The most important examples are the Basel Convention on Dangerous Waste, the Convention on International Trade in Endangered Species, and the Montreal Protocol on Substances containing CFCs.} Even without explicitly regulating trade, they may present issues of compatibility with WTO provisions.\footnote{For example, the Kyoto Protocol provides for emissions trading as one of the mechanisms to achieve reductions of greenhouse gas emissions in order to curb global warming. Emissions trading rules still need to be elaborated, but their compatibility with WTO rules has already been discussed. See Werksman (1999).} The WTO Agreements do not explicitly refer to any specific MEA.\footnote{With the exception of the SPS Agreement, which in Article 3.4 refers to standards developed in organisations operating under the framework of the International Plant Protection Convention. The absence of further references to MEAs in the WTO may be contrasted with the NAFTA, which in Article 10.4 explicitly provides that in case of conflict, the provisions of a number of MEAs shall have priority over those of the NAFTA.} This study does not focus on the relationship between WTO rules and international standards and MEAs. The provisions of the SPS and TBT Agreements as they relate to international standards are discussed, and at various occasions, reference is
made to the relevance of MEAs to the interpretation of WTO rules. This is a logical consequence of the fact that the WTO rules are not self-contained, but are part of general public international law. Nevertheless, the main focus of the analysis is on situations where a WTO member takes a measure in the absence of relevant international standards.

119 See especially Sections 4.6, 5.4.3, 5.4.5, and 7.1.

120 As recognised and emphasised by the Appellate Body in various dispute settlement reports, e.g. *US-Gasoline* and *US-Shrimp-Turtle*. 