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

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Harmonisation, Extraterritoriality and Production
and Processing Methods
7.1 Treaty Provisions and Harmonised Environmental Standards

What effects does harmonisation have upon the assessment of trade restrictive environmental measures as investigated above? Once environmental standards are harmonised, to what extent are measures still assessed under the rules discussed in this work? This question is addressed here for both the EC and WTO contexts, with focus being placed on product standards, as they provide the most grounds for a comparative approach.

7.1.1 Harmonisation, Legislative Powers and International Standards

"Harmonisation" denotes a range of policy instruments, from the adoption of completely unified international standards to the recognition by one state of the equivalence of another state's standards. "Standards" is used here in a wide sense, as encompassing what the TBT Agreement calls mandatory "technical regulations", voluntary "standards", as well as conformity assessment rules. When the word "harmonisation" is used in the EC context, it usually refers to the enactment of so-called secondary Community legislation. Such legislation may also encompass the whole range of harmonisation instruments, from legislation setting unified standards to legislation imposing recognition. EC harmonising legislation reflects a political compromise in striking a balance between the imperatives of the free movement of goods and those of other interests, such as environmental ones.

The WTO, on the other hand, lacks the powers to enact comparable instruments. The WTO Agreements do not empower the institutions of that organisation to enact legislation as the EC Treaty empowers the Council of Ministers and the European Parliament to issue directives, regulations, and decisions. In principle, it is not impossible that substantive environmental standards become part of the WTO set of commitments. The Members of the WTO could commit themselves to anything, including substantive environmental standards. Substantive harmonisation has taken place in the TRIPS Agreement, which includes substantive norms of intellectual property protection (e.g. the minimum protection to be given to intellectual property rights). Likewise, Members could add an Agreement on Trade and Environment to the WTO "single package". However, it is difficult to imagine what kind of substantive environmental standards could be incorporated into such an agreement. WTO Members differ

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1 See Sykes (1999a and b); Trebilcock and Howse (1998).

2 Legislation imposing recognition even had its own basis in the EC Treaty in the old Article 100b, introduced by the Single European Act but abolished by the Amsterdam Treaty.
greatly in terms of their natural and climatological endowments and their levels of technological and economic development. Moreover, as has rightly been observed, the TRIPS Agreement recognises individual intellectual property rights and provides that right-holders can have these rights enforced in their domestic judicial systems. These features appear quite difficult to transpose into environmental standards. Thus, although the TRIPS can be taken as a precedent for incorporating substantive standards within the WTO, it appears highly unlikely that standards in the environmental sphere will be incorporated or set in a WTO Agreement. It has been argued that in many cases, substantive environmental harmonisation is even unsound from an economic viewpoint.

Another problematic question is why, if at all, such standard-setting should take place within the WTO, as that organisation mostly consists of trade experts and lacks expertise in environmental and health issues, which is present in other international fora. Less ambitious and more feasible is for WTO Agreements to refer to substantive standards which have been agreed upon elsewhere. That is precisely what the TBT and SPS Agreements do.

As most of the TBT Agreement and some of the SPS Agreement deal with product standards, the provisions in these agreements that refer to international standards and their consequences for the WTO compatibility of national measures are best compared to Article 95 of the EC Treaty. Article 95 EC, it is recalled, provides legislative authority to enact 'measures for the approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market'. Most of the Community legislation based upon Article 95 harmonises product standards. Article 95(3) EC provides that the Commission must take as a basis for its legislative proposals a high level of health, safety, environmental and consumer protection, and that the Council and the European Parliament will also seek to achieve this objective when enacting the legislation. Article 95(4-6) EC at the same time lays down conditions under which Member States are allowed to maintain or introduce stricter standards than those laid down in the harmonising legislation, including the application of such standards to imported products.

According to the EC's "New Approach", the harmonisation instrument itself, usually a directive, only lays down "essential requirements" that products must meet in order to be allowed free movement in the internal market. The harmonisation of the more detailed technical standards is left to standardisation bodies. These bodies in turn refer to international standards wherever possible.

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3 Enders in Van Dijck and Faber (1996) at 71.
4 See e.g. Esty and Geradin (1998).
5 The three European standardisation bodies are CEN (general standardisation), CENELEC (electrical standardisation) and ETSI (telecom standardisation).
6 Mainly ISO (general standardisation) and IEC (electrical standardisation) standards.
ucts manufactured in conformity with harmonised standards are presumed to conform to the essential requirements and thus enjoy free movement. Once a product conforms to harmonised standards and is thus presumed to meet the essential requirements laid down in the relevant Community directive, Member States may still apply additional national provisions to protect in particular workers, consumers, or the environment. However, these provisions must comply with the Treaty, in particular Articles 28-30 thereof. This means that they may neither require modifications to the product nor influence the conditions for its placement on the market. The New Approach has not been applied to all product requirements in the EC. Important sectors such as foodstuffs, chemical products and pharmaceuticals have been excluded. Nonetheless, the harmonisation of product standards not following the New Approach is likewise usually coupled with a free movement clause, which ensures that Member States in principle cannot refuse market access to products conforming to the harmonised standards. Thus, as a general rule for the harmonisation of product standards in the EC, Member States can in principle enact stricter standards, but can only apply them to their own producers. The main exception to this general rule is provided in paragraphs 4-6 of Article 95 EC, which provide a possibility for Member States to apply stricter standards, including to imports, but only under strict conditions and under Commission scrutiny.

The SPS Agreement (Article 3.4) provides that Members shall play a full part in the relevant international organisations and their subsidiary bodies, in particular the Codex Alimentarius Commission, the International Office of Epizootics, and the international and regional organisations operating within the framework of the International Plant Protection Convention, to promote within these organisations the development and periodic review of standards, guidelines and recommendations. In its Annex A, the SPS Agreement defines ‘international standards, guidelines and recommendations’ by reference to these three organisations, adding that the SPS Committee may identify appropriate standards promulgated by other international organisations which are open for membership to all WTO Members for matters not covered by the above organisations.

The TBT Agreement is less clear as to what should be understood by “international standards”. It does not define them or list organisations as the SPS Agreement does. It does provide in Annex 1 that the terms in the ISO/IEC Guide on General Terms and Their Definitions Concerning Standardisation and Related Activities shall have the same meaning when used in the TBT Agreement, but subsequently adds its own definitions of a technical regulation.

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9 See EC Commission (2000a).
a standard and a conformity assessment procedure. An explanatory note to the definition of “standard” adds to the lack of clarity. It provides that whereas standards prepared by “the international standardisation community” - a term that remains undefined - are based on consensus, the TBT Agreement also covers documents that are not based on consensus. It is unclear whether “documents” refers to documents laying down standards that have been internationally agreed upon, but not by ‘the international standardisation community’, or rather to national standards or technical regulations, or to both. Probably, international standards not based on consensus are meant. Understandably, the lack of clarity as to what is an international standard under the TBT Agreement is one of the items under discussion in the TBT Committee.

In the WTO, as said, there is no harmonising legislative authority, so there are no instruments equivalent to Community directives. However, both the SPS and TBT Agreements oblige Members to base their measures on international standards, except if they wish to apply stricter standards (Article 3.1 and 3.3 SPS) or deem the international standard to be ineffective or inappropriate (Article 2.4 TBT). There is a presumption of conformity with the SPS Agreement and the GATT on the part of SPS measures conforming to international standards (Article 3.2 SPS), and a presumption of conformity with the main discipline in the TBT Agreement for technical regulations in accordance with international standards (Article 2.5 TBT). Thus, although in the WTO there is no presumption of free movement for products conforming to international standards, national product requirements conforming to international standards will generally not hamper the importation of a product that conforms to the same international standards. However, in the absence of a notion like “essential requirements” and of a free movement presumption, a Member can always oppose an additional product requirement being applied to the importation of a product, even if it conforms to an international standard. Conformity with an international standard, in other words, does not exhaust the range of objectives that national product requirements may pursue. For example, a product may conform to an international safety standard and nevertheless be refused because it does not meet an environmental standard. Moreover, the SPS and TBT Agreements leave ample room for Members to impose stricter standards than relevant international standards.

The only way for EC Member States to oppose the importation of a product meeting harmonised standards based on Article 95 is to invoke paragraphs 4-6

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10 Annex 1 TBT further defines an ‘international body or system’ as a body or system whose membership is open to the relevant bodies of at least all WTO Members. However, that reference is relevant to voluntary standards rather than mandatory technical regulations on which this work concentrates.

11 Explanatory Note to the definition of “standard” in Annex 1 TBT.

12 See e.g. documents G/TBT/W/121 (Japanese proposal, with correction); G/TBT/W/87 and 113 (EC proposals); G/TBT/W/143 (Canadian proposal), and G/TBT/W/131 (Communications from the IEC and ISO).
of that provision. As these paragraphs are invoked by Member States to apply national measures that deviate from harmonised protection levels, the Commission applies the conditions in these paragraphs strictly. WTO Members, on the other hand, can determine that an international standard is inappropriate, ineffective or insufficient to achieve their chosen protection level. Although a challenge under the SPS or TBT Agreement may oblige them to demonstrate that this is indeed the case, their stricter standards are not subjected to approval by a WTO body, as is the case under Article 95 EC. A further important difference between the EC and the WTO in this respect is that Article 95(3) lays down the Community's ambition to achieve a high level of health and environmental protection when enacting harmonising legislation. Both the TBT and SPS Agreements lack any such reference to the high protection levels of international standards.

Harmonisation of environmental and health standards is not only based on Article 95 EC, but also on Article 175 EC and Article 152(4) EC. As the Court has said, the Community rules do not seek to effect complete harmonisation in the area of the environment. Article 176 EC allows Member States to maintain or introduce more stringent protective measures than the protective measures adopted pursuant to Article 175 EC. This provision affirms that stricter national standards must be compatible with the Treaty, but does not subject such standards to Commission approval. Arguably, the looser wording of Article 176 EC as compared to Article 95(4-6) is precisely the result of the type of standards that are normally harmonised under Articles 175 and 95 respectively. Under Article 175, standards for air quality, surface water, nature protection reserves etc. are harmonised. Such standards are not applied to products and have less bearing on the free movement of goods, and the same holds true for stricter national standards. It is not entirely clear to what extent Article 175 may be used for harmonising product standards. If this were done, there might be an evasion of paragraphs 4-6 of Article 95, which guarantee that once standards are harmonised and thereby a Community level of protection has been agreed, the application of stricter standards to imports remains exceptional. Thus, the harmonisation of product standards should preferably take place on the basis of Article 95, not 175 EC. Production methods may also be harmonised under Article 175. Such standards cannot as such be applied to products, as they address manufacturers. However, it is argued in this work that the proper legal basis is Article 95 if the production methods have a significant impact on production costs. Finally, Article 152(4) explicitly allows stricter national measures in the case of the harmonisation of quality and safety standards for organs and human substances, and explicitly excludes harmonisation of health-incentive measures. It also provides for the harmonisation of veterinary and

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13 Case C-318/98 Fornasar, para. 46.
phytosanitary measures with the direct objective of protecting human health, without clarifying whether stricter measures are allowed.

International standard-setting not only takes place within the organisations the TBT and SPS Agreements explicitly refer to. Standards developed within international bodies not expressly mentioned may also play a role in interpreting WTO provisions. Moreover, an important part of international environmental law is laid down in multilateral environmental agreements (MEAs). Such agreements contain principles and rules, but sometimes also substantive environmental standards. The WTO Agreements do not currently expressly refer to such agreements. However, MEAs already play a role in interpreting GATT provisions, and are increasingly likely to do so in the future.\footnote{See also Sections 4.6.1 and 5.4.3.}

If environmental standards are unlikely to be agreed upon within the WTO, they will continue to be set outside the WTO. Their relationship with WTO commitments, as well as who is to decide upon that relationship, will therefore continue to be a potential problem.\footnote{The Committee on Trade and Environment has carried out important work in cooperation with secretariats of a large number of MEAs in taking stock of potential conflicts. See in particular documents WT/CTE/W/160, Matrix on Trade Measures Pursuant to Selected MEAs, and WT/CTE/W/191, Compliance and Dispute Settlement Provisions in the WTO and in Multilateral Environmental Agreements.} Clarification of the relationship between WTO commitments and MEAs is part of the post-Doha negotiating agenda, at least with regard to WTO members that are also parties to MEAs. However, agreement will be difficult to find, and clarification may be sought through dispute settlement procedures. Many MEAs are based on a non-contentious model, and have no or less efficient dispute settlement procedures than the WTO. As a result of this, and of the relatively efficient and successful WTO dispute settlement procedures, governments may be expected to resort to WTO dispute settlement rather than dispute settlement under MEAs or the International Court of Justice.

This expected tendency creates two problems. First, why should those aspects which governments cannot agree upon at even the highest political level be left to international dispute settlement bodies? Although there is no easy answer to this question, it should be noted that where treaties contain widely formulated norms and provide for dispute settlement procedures, these norms can be seen as a mandate for the adjudicatory body to interpret them.\footnote{Trachtman (1999) at 36a. Cf. Bronckers (1999a and 1999b).} In principle, states can always interfere if they are unhappy about the results of such interpretation. However, it is difficult to agree politically, as was demonstrated by the difficult decision-making process at recent Ministerial Conferences. Thus, the responsibility laid upon the adjudicatory body is heavy, and that body may accordingly be expected to search for ways to show deference to states' choices in its interpretations. Secondly, if any dispute settlement body is going to decide on
the relationship between trade and environment commitments, why that of the WTO? The preference of the complainant is likely to be the WTO in most cases, as it will typically be the complainant who wants trade interests to prevail and who wishes to see a swift resolution of the dispute.\(^7\)

The problem of which disputes concerning the intersection between international commitments on trade and on environment are brought before the Appellate Body could be accommodated by agreeing in MEAs on dispute settlement procedures with a clear mandate, and by deference to such procedures on the part of WTO panels and the Appellate Body. However, as said, MEAs do not necessarily rely on dispute settlement, which is not always an appropriate manner to tackle global environmental challenges. Moreover, problems may arise when parties to a dispute disagree on what is the appropriate forum for their dispute.\(^8\) Perhaps the International Court of Justice is best suited to decide upon such problems of competence. However, the WTO Dispute Settlement Understanding rather coercively stipulates that Members are to have recourse to the DSU rules if they seek redress of a violation of WTO obligations or other nullification or impairment of benefits under the WTO Agreements.\(^9\) Thus, if a party challenges an environmental measure pursuant to an MEA under the WTO rules, the Appellate Body will play a decisive role as the forum in which the intersection of international trade law and international environmental law is addressed.\(^10\) Although the Appellate Body does not consist of experts on international environmental law, experience up to now provides reason to assume that the Appellate Body will show due diligence in properly taking developments in international environmental law into account. Nevertheless, a modification of the DSU provision mentioned above and involvement of the ICJ in disputes over competence to decide over disputes at the intersection of international trade law and international environmental law are worth consideration.

### 7.1.2 Interplay between the Legislature and the Adjudicator

In the EC, a “horizontal interplay” between the adjudicator and the legislator takes place in all subject areas where the EC and its Member States share competencies, and where both Community harmonisation and national measures are controlled by primary Community law. The trade-environment nexus is a good example of this interplay. In the absence of harmonisation, if

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\(^7\) See Ohloff and Schloemann (1998).

\(^8\) The swordfish dispute between the EC and Chile is a case in point. Complaints were brought both in the WTO and before the Law of the Sea Tribunal. However, the dispute was settled amicably. See OJ (2000) L 95/67, and www.europa.eu.int/comm/trade/miti/dispute/swordfish.html.

\(^9\) Article 23.1 DSU.

\(^10\) Trachtman (1999) at 364.
a national trade-related environmental measure is challenged before a national court (e.g. by a trader) or before the ECJ (e.g. by the Commission), there are two possible outcomes: either the measure is found to violate the EC Treaty and must be modified by the national legislator, or the measure is upheld. In the latter case, the distortions to the functioning of the internal market caused by the measure may nevertheless be removed through legislative action at the Community level. As the Commission stated in its communication after the Cassis de Dijon judgment, its harmonisation work is mainly directed at national laws posing barriers to trade that are admissible under the Court's criteria for Articles 28-30.\(^{21}\) The European Commission, in its role as a “guardian of the Treaties”, plays a strategic part in this interplay. It has the sole right of initiative to enact proposals for legislation concerning the internal market. It also has the discretion whether or not to commence infringement actions against Member States. Thus, to some extent the Commission is able to influence the direction of solutions to trade-environment conflicts. It may commence an infringement action against a Member State’s environmental legislation if it deems that legislation to be too restrictive of intra-Community trade. If the Court agrees, the Member State will have to repeal or amend its legislation. If the Court upholds the national legislation, the Commission can still propose legislation in order to ‘harmonise away’ the trade-restrictive effects of the national legislation, or at least part of it.

The Court has determined that a measure adopted on the basis of Article 95 of the Treaty must genuinely have as its object the improvement of the conditions for the establishment and functioning of the internal market, i.e. the elimination of obstacles to free movement or the elimination of distortions of competition.\(^{22}\) It has been argued that the Community may, on the basis of Article 95, only legislate as regards those matters falling within the ambit of Article 28 EC.\(^{23}\) This would imply that the Community could not harmonise “selling arrangements” meeting the Keck test on the basis of Article 95. More generally, it implies that the Court’s interpretation of Article 28 is instrumental in determining the scope of the Community’s legislative mandate in Article 95. However, there have also been instances of harmonisation under Article 95 concerning subject-matters that had little to do with trade.\(^{24}\) Moreover, there are no instances in which the Court itself has made explicit the linkage between Articles 28 and 95.\(^{25}\) In any event, this point illustrates that the inter-

\(^{21}\) OJ 1980 C 256/2.

\(^{22}\) Case C-376/98 Germany v. Parliament and Council at paras. 83-84.

\(^{23}\) See Weiler (1999) at 372: ‘[T]he broader the catch of Article 30 [now 28], the broader the legislative competences of the Community.’


\(^{25}\) As noted by Mortelmans and Van Ooik (2001) at 126, who argue that it would be logical that only those measures falling within the prohibition of Article 28 could be harmonised under Article 95.
play between the Commission and the Court works both ways. If the Commission can somewhat steer the direction of trade-environment issues by deciding against which trade obstacles to address in infringement procedures, its legislative proposals for harmonisation will in turn be influenced by the Court’s findings as to the scope of Article 28, which may vary over time. Moreover, the horizontal interplay in the EC is not confined to the relationship between the Commission and the Court; the Council and European Parliament also play a role in disputes concerning the proper legal basis of harmonising legislation. On that point there is also vertical interplay, as illustrated by cases in which Member States that have been overruled in the Council when harmonisation was enacted then challenge its legal basis.\textsuperscript{46}

Horizontal interplay between the adjudicator and the legislator present in the EC is largely absent in the WTO. The WTO legislator is the Ministerial Conference that convenes once every two years. Recent Ministerial Conferences and the continuing deadlock in the Committee on Trade and Environment demonstrate how difficult it is for over 140 Members to “legislate”, i.e. to change or add to the existing agreements. The General Council, which is composed of representatives of all the Members, convenes once a month and conducts the functions of the Ministerial Conference in the intervals between its meetings.\textsuperscript{47} The Ministerial Conference and the General Council have the exclusive authority to adopt interpretations of the WTO Agreements.\textsuperscript{48} Amendments to the Agreements must be decided by the Ministerial Conference.\textsuperscript{49} Both authoritative interpretations and amendments are very difficult to agree on. Thus, in the WTO, there is a bias for “negative integration” without accompanying “positive integration”.\textsuperscript{50} This may result in a “regulatory gap”, when national environmental measures are struck down for violating WTO commitments, and international measures cannot be politically agreed upon.\textsuperscript{51} In some respects, this situation may be compared to the situation prevailing in the EC before the 1987 Single European Act made it possible to enact harmonising legislation by qualified majority. During the 1970s and early 1980s, a great deal of environmental harmonisation was precluded by the fact that Member States had a veto. During that same period, the ECJ gave an important impetus to the internal market by interpreting the relevant provisions quite liberally. This impetus in turn paved the way for renewed legislative activity under the Commission’s plan to achieve the internal market by 1992.

\textsuperscript{46} As in Case C-376/98 Germany v. Parliament and Council mentioned above.
\textsuperscript{47} Article IV:1 and IV:2 of the WTO Agreement.
\textsuperscript{48} Article IX:2 of the WTO Agreement.
\textsuperscript{49} Article X of the WTO Agreement.
\textsuperscript{50} Cf. Trachtman (1998) at 51.
\textsuperscript{51} Cf. the “regulatory gap” referred to in the EC context in Micklitz and Weatherill (1994).
In the absence of legislative capacity in the WTO comparable to that in the EC, a similar judicial-legislative dynamic appears impossible in the WTO. It should be noted, moreover, that the "judicial activism" of the ECJ did not only result in a "pro-trade" attitude. If Article 28 was given its wide interpretation of prohibiting trade obstacles and imposing recognition during this period, the Court at the same time accepted the mandatory requirements as justifications for national measures. Moreover, it accepted that environmental protection is one of the Community’s essential objectives, and that it constitutes a mandatory requirement. The remaining question is whether similar "judicial activism" is called for in the WTO, as long as governments do not agree on positive integration inside or outside the WTO. It is submitted that in view of the different objectives of the WTO and the EC, similar activism is not called for. The WTO is not striving to attain an internal market. Panels and the Appellate Body should respect the textual limitations of the agreements they interpret, and not read into them more trade liberalisation commitments than their text warrants. At the same time, WTO dispute settlement will need to take on board all external "positive integration", i.e. all environmental standards and principles that have been internationally agreed upon and that are potentially relevant to it when interpreting WTO provisions in trade-environment disputes. Moreover, it should be recalled that harmonisation is not confined to standards and principles; it includes the recognition of equivalence. The more environmental standards are recognised as being equivalent, the less trade barriers will be caused by their application to imports. The WTO can play an important role in this respect, as the TBT and SPS Agreements contain the beginnings of recognition requirements.

7.2 Extraterritoriality, Production Methods and Unilateralism

The above considerations regarding harmonisation demonstrate that it is not always easy to compare the EC and the WTO. The same is true for the issues of extraterritoriality, production and processing methods (PPMs) and unilateralism. Although disputes concerning these issues have been presented to both the ECJ and the GATT and WTO dispute settlement bodies, the manner in which they have been presented and addressed differs to an important extent. In the WTO, the three disputes in which unilateral measures based on PPMs were taken to pursue extraterritorial environmental objectives, US-Tuna-Dolphin I and II and US-Shrimp-Turtle, all concerned import prohibi-

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32 See Cases 240/83 ADBHU and 302/86 Danish Bottles, respectively.
tions of products from exporting Members whose authorities did not impose PPMs that were equivalent to the PPMs imposed domestically by the importing Member.\textsuperscript{14} In the EC, most of the relevant cases concerned export rather than import restrictions. Only in Gourmerterie van den Burg and Preussen Elektra were imports at issue. The ECJ has as yet not taken a clear position on extraterritorial protection, PPM-based measures, and unilateralism. However, it has in fact given contradictory hints as to its position. In most of the ECJ cases on these issues, there was relevant secondary Community legislation, which enabled the Court not to take a definite stance on whether unilateral PPM-based measures protecting the environment outside the Member State taking the measure are principally prohibited, or rather allowed in principle but subject to strict conditions.

\textbf{7.2.1 Extraterritoriality, Unilateralism, and PPMs in the EC}

The Court is unclear concerning the acceptability of extraterritorial resource protection under Articles 28-30 EC. Extraterritorial environmental objectives may be allowed and even mandated by Community harmonisation instruments.\textsuperscript{15} However, at least in a situation where there was relevant harmonisation, the Court has shown itself to be sceptical about unilateral extraterritorial protection measures extending beyond the protection offered in the Community instrument. In Van den Burg, the Court found that Article 30 'read in conjunction with' the Wild Birds directive cannot justify extraterritorial protection measures. Although the Court's position might have been different had unilateral measures been taken in the absence of any relevant harmonisation, its mention of Article 30 suggests that it did not favourably regard import restrictions for extraterritorial protection reasons under that provision.\textsuperscript{16} However, not only was there relevant harmonisation, but the species sought to be protected in Van den Burg were confined to one Member State and were not migratory or endangered. Therefore, Van den Burg does not appear altogether to exclude the possibility that unilateral extraterritorial measures pursuing transnational and global environmental protection objectives can be justified under Article 30 (and arguably the mandatory requirements).

The Court's sceptical position with regard to extraterritorial protection goals that are confined to other Member States can also be seen in the context of export restrictions in the Nertsvoederfabriek, Hedley Lomas, and Compassion in World Farming cases. In the latter case, as in Van den Burg, there was

\textsuperscript{14} The second US-Tuna-Dolphin dispute in addition concerned an 'intermediary nation embargo', i.e. an import prohibition from GATT contracting parties that did not certify and prove that they had not imported tuna subjected to the primary embargo.

\textsuperscript{15} See Cases C-202/94 Van der Feesten and C-149/94 Vergey.

\textsuperscript{16} Cf. Scott (2000) at 128.
relevant Community legislation. And again, the Court found that the provision in that legislation allowing Member States to take stricter measures was to be interpreted as being confined to its own territory. In both cases, the Court observed that the secondary Community legislation exhaustively regulated the Member States' powers with regard to the protection goal at issue. There was an important difference, though. The provision on stricter national measures in the directive at issue in Compassion explicitly provided for such territorial limitation, while the provision in the Wild Birds directive at issue in Van den Burg did not. Nevertheless, as said, the Court thought it inappropriate for one Member State to take trade restricting measures to protect a bird that received no special protection under the directive and was lawfully hunted in another Member State in accordance with the directive.

On the other hand, in Inter-Huiles and Dusseldorp, again in the context of export restrictions, the Court appears to admit the possibility of extraterritorial protection, when the importing Member State does not offer the same extent of protection as the exporting Member State. Although not explicitly, the Court also appears to accept trade-restrictive measures aimed at protecting global commons, at least when there are relevant instruments of international law regarding the protection of these commons. Thus, in Bluhme, the Court accepted a trade-restrictive measure with reference to the Biodiversity Convention, and in Preussen Elektra, it accepted an obligation to purchase locally produced green electricity as part of a strategy to combat climate change, with reference to the Kyoto Protocol. The latter case suggests that even discriminatory measures can be taken to protect the global commons. The Court in all four cases mentioned above did not pay explicit attention to the location of the resources protected. Nonetheless, considering the Court's case-law, it may be argued that in the absence of relevant harmonisation, the possibility that extraterritorial protection measures are acceptable under Articles 28-30 EC exists. Obviously, the proportionality test may be expected to apply with particular vigour in such cases. The appropriateness of the measure in terms of its contribution to the environmental objective will not always be easy to show, and the necessity requirement will imply that the Member State taking the measure will need to explain why it had to resort to a unilateral measure. This will probably include a requirement of having first attempted to fulfil the conservation goal in the other Member State by entering into negotiations with that Member State, and by raising the matter in the appropriate Community institutions. Preussen Elektra and Bluhme suggest that the Court may be more lenient in its appraisal of unilateral extraterritorial protection measures when the protection of global commons is at stake than when the protection objective is confined to the limits of another Member State and has no transnational aspect to it. Both cases also suggest that such measures

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37 Cases C-160/89 Van den Burg, para. 9; C-3/96 Compassion, paras. 56-62.
will be more acceptable when there is relevant international environmental law regarding the problem the measure aims to address.

The issue of unilateralism in the EC is closely connected to the existence or absence of harmonising legislation. In *Hedley Lomas*, the UK was not allowed to restrict exports of live sheep because it thought Spain did not duly apply the obligations in the Community directive on slaughtering methods. The Court based this observation on Article 10 of the EC Treaty, the obligation of loyalty towards the Community, which precludes Member States from taking the law into their own hands. Indeed, Member States have various possibilities at their disposal as alternatives to unilateral action when they are of the opinion that another Member State is infringing Community law. They may start an infringement procedure against that Member State under Article 227 EC. They may also ask the Commission to check the behaviour of the other Member State, which may - upon the discretion of the Commission - lead to infringement procedures under Article 226 EC. Whether unilateralism is acceptable is less clear in the absence of Community legislation on the subject-matter at hand. In such cases, the subject-matter has not been "occupied" by the Community; therefore, Member States are in principle free to take unilateral measures, as long as they respect primary Community law. Thus, the question whether or not unilateral measures are allowed will have to be answered by interpreting Articles 28 and 30. However, if a Member State feels that its industry, consumers or animals suffer from PPMs applied in another Member State, Article 10 EC commits it to ask the Commission to present proposals for legislation to harmonise that PPM in the Community rather than to take unilateral measures. Again, the Commission has discretion; but especially if the Member State succeeds in mobilising other Member States, the Commission is unlikely to ignore its call.

As discussed in Chapter 3, the ECJ has accepted tax differentiation on the basis of PPMs in a number of cases. Internal taxes may differentiate on the basis of objective criteria without regard to product origin, including the raw materials used or production processes employed, as long as there is no discrimination or protection, i.e. as long as any tax advantages are extended to imports. Moreover, tax differentiation is compatible with Community law only if it pursues objectives which are themselves compatible with the Treaty and its secondary legislation. In *Outukumpy Oy*, the Court explicitly stated that a tax differentiation according to PPMs based on environmental considerations is acceptable, as long as importers are given an opportunity to demonstrate the PPM applied in producing the imported electricity so as to qualify for a favourable rate. Considering this consistent case-law regarding tax differentiations,

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18 See Cases 127/75 Bobie, 148/77 Hansen, 21/79 Commission v. Italy (Regenerated Oils), 140/79 Chemial Farmaceutici.
19 Case C-213/96 Outukumpy Oy.
the question arises whether a national *regulatory* measure that differentiates products according to their production methods might be acceptable under Articles 28-30 EC, if it allows imported products to be marketed if they are accompanied by a certificate or label stating their production method.

The European Court of Justice has as yet not been confronted with measures making imports dependent on the policies of the governments of exporting Member States, as has been the case in the WTO. The situation in *Hedley Lomas* can to some extent be compared to the WTO disputes, in that the export restrictions were motivated by the perceived failure by the authorities in the importing country to duly implement a Community directive. In view of the institutional framework in the EC, and of the obligation of solidarity laid down in Article 10 EC, it appears that unilateral measures to target government policies in other Member States, e.g. by making imports dependent on policies regarding production methods, is not acceptable under Articles 28-30 EC. On the other hand, as argued above, it does not seem to be impossible from the outset that measures making the marketing or sale of products, including imports, dependent on how products are produced can be justified by Article 30 or the mandatory requirement of environmental protection. The ECJ has also not been faced with such measures up to now. Perhaps this is because production methods are partially harmonised in the EC. It is recalled that according to the *Cassis de Dijon* case-law, there is a presumption that products lawfully produced in a Member State should have access to the entire Community market, unless obstacles to such access can be justified. The obligation to purchase locally produced green electricity at issue in *Preussen Elektra* referred to the production method of electricity. At the same time, it excluded all imported electricity, including green electricity from other Member States. It may be argued that if such a discriminatory measure can be justified, a measure based on a PPM that equally applies to imported and domestic goods should also be able to find justification for the trade obstacles is causes. If so, the case-law on regulatory measures would be brought into line with that on tax measures.

The question as to whether a PPM-based labelling requirement is acceptable under Articles 28-30 EC may need to be addressed by the European Court of Justice in the near future. A Dutch legislative proposal currently pending essentially requires all wooden products placed on the Dutch market to bear a mark indicating whether or not the product originates from an area subject to a management plan for sustainable forestry. This management plan must be approved by a body recognised either by the Dutch Council for Accreditation or by any organisation with which the Council for Accreditation has a mutual recognition agreement. 40 A declaration made on the basis of a document issued

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40 Dutch Parliament, proposal to amend the Wet milieubeheer (Dutch Environmental Management Act), Kamerstukken 23982 and 26998, especially the proposed Articles 9.2, 9.4-9.8, and 9.16; the addition on foreign accreditation organisations was added later.
by a foreign organisation and recognised by the Dutch Environment Minister is equated with this approval. Likewise, permission to issue a certificate conferring the right to apply a "positive mark" on sustainably produced wood is granted by a body recognised either by the Dutch Council for Accreditation or by any organisation with which the Council for Accreditation has a mutual recognition agreement. Such permission may be equated with a declaration by a recognised body that the applicant meets the requirements in the Dutch law or equivalent requirements. In turn, such a declaration may be issued on the basis of a document issued by a foreign organisation recognised by the Dutch minister that is capable of assessing the sustainability of wooden products in an independent, reliable and expert manner.41

The proposal was notified to the European Commission in accordance with the directive on the notification of technical regulations.42 The Commission and ten Member States as well as Norway delivered detailed opinions criticising the proposal.43 In its detailed opinion, the Commission acknowledged that sustainable forest management is an acceptable objective, and thus did not question the acceptability of the extraterritorial nature of the Netherlands' protection objective. However, the Commission raised serious doubts as to the appropriateness, necessity and proportionality of the proposed measure, with regard to wood products both from within the Community and from third countries.44 Subsequently, in its reaction to the Dutch response to the detailed opinions, the Commission did question the extraterritorial nature of the measure's protection goal. In addition, it pointed at the Community's initiatives towards a common policy regarding the protection of tropical forests, and stated that in its view, voluntary labelling would be more appropriate and a less trade-restrictive measure to fulfil the objective pursued.45 At the time of writing, the Dutch government still has to sign the legislative bill. If it does so, the Commission intends to commence infringement procedures.

7.2.2 Extraterritoriality, Unilateralism, and PPMs in the WTO

In the WTO, the nature of the measures at issue in US-Tuna-Dolphin and US-Shrimp-Turtle has arguably shaped much of the debate, including a misunderstanding that PPM-based measures are WTO-incompatible per se, as violations of Article XI GATT not justified by Article XX GATT. The current

41 Proposed Articles 9.4 and 9.8 of the Wet Milieubeheer.
42 Directive 98/34. OJ 1998 L 204/34.
43 Detailed opinions within the meaning of Article 9(2) of Directive 98/34. The only Member States not having reacted are Denmark, Greece, Luxembourg and Ireland.
44 Documents on file with the author.
45 Ibid.
author does not argue that PPM-based measures that make imports dependent upon government policies in exporting countries are covered by the Note Ad Article III, and should therefore be assessed under Article III rather than Article XI. However, PPM-based measures that do not target products according to whether the authorities in the exporting country impose the same PPMs as the country taking the measure could well be assessed under Article III including the Note thereto. It has been argued in this work that measures restricting the sale, offering for sale, etc. of products on the basis of PPMs can be assessed under Article III:4 rather than Article XI GATT. The discussion of such measures will concentrate on the issues of “likeness” and “less favourable treatment”, before any justification under Article XX becomes relevant. Admittedly, there are no examples of panel or Appellate Body reports that have actually found products “unlike” on the basis of their PPMs. The issue of the compatibility with Articles III and XX GATT of a PPM-based internal regulatory measure has as yet not been presented in any dispute. However, within the realm of tax discrimination, a GATT panel has suggested that differentiation on the basis of PPMs may affect “likeness”. Moreover, as the Appellate Body in EC-Asbestos has called for an evaluation of all relevant factors in determining “likeness”, it does not seem to be ruled out that products are not “like” despite their physical similarity. Finally, the Appellate Body in the same case has suggested that “less favourable treatment” may in the future receive a more flexible interpretation than previously. This may also be relevant to regulatory measures that do not differentiate on the basis of product origin but on the basis of PPMs.

As regards Article XX, an evolution can be discerned in the GATT/WTO interpretations of both the issue of extraterritorial protection goals and that of unilateral PPM-based measures. As to the location of the resources protected, the first panel in US-Tuna-Dolphin left it open whether Article XX could allow the protection of animals or resources outside the jurisdiction of the country taking the measure, and the second thought that in principle Article XX allowed to do so. The Appellate Body in US-Shrimp-Turtle specifically declined to rule on this point, but it did accept a sufficient link to US jurisdiction of the migratory species whose protection was sought, thus suggesting that Article XX could indeed accommodate measures seeking to protect animals that spend most of their time outside the jurisdiction of the protecting Member. As regards the principal question whether Article XX could at all be invoked to justify unilateral PPM-based measures, both panels in US-Tuna-Dolphin as well as the panel in US-Shrimp-Turtle condemned the measures at issue essentially because they

46 Japan-Alcohol 1987, para. 5.7: ‘[…] the “likeness” of products must be examined taking into account not only objective criteria (such as the composition and manufacturing processes of products) but also the more subjective consumers’ viewpoint (such as consumption and use by consumers) […]’. Emphasis added.

47 On the second panel report, see Weiss (1995a).
feared that the multilateral trading system would be endangered if it allowed measures making imports dependent on the exporting states adopting certain policies. The Appellate Body in *US-Shrimp-Turtle*, however, rejected this view and even stated that most measures seeking justification under Article XX condition imports on the adoption of policies by other countries. While this statement is not entirely correct in the author's view, it marks an important shift in dispute settlement on unilateral PPM-based trade restrictive measures. Now, the door appears to have been opened for such measures. As the implementation dispute in *US-Shrimp-Turtle* shows, even measures targeting countries and violating Article XI may be justified by Article XX. However, if such measures are to be accepted, the Member taking them will have to show that it has made serious efforts to reach international agreement on the protection objective with all the countries it is targeting, and is not arbitrarily or unjustifiably discriminating by not taking into account differing circumstances in exporting countries, or by not allowing sufficient guarantees of due process in the administration of its measures.

Phrasing PPM-based measures in a non-import-specific and non-discriminatory manner in order to have them assessed under Article III rather than Article XI GATT looks promising, but is not without its own problems. First of all, some Members perceive import restrictions as the only way to address a number of pressing environmental problems, because they fear that market-based non-discriminatory measures such as a prohibition of selling dolphin-unfriendly tuna, cannot be effectively enforced and thus lose most of their anticipated effect on foreign producers. If this problem is real, it seems to be accommodated by the Appellate Body's acceptance, in principle, of unilateral origin-based measures when strict conditions are fulfilled. Secondly, and related thereto, how can a non-origin-based and non-discriminatory PPM-based measure effectively be applied to imports? An obligation to label or certify imported products appears to be the only viable way in which to do this. This raises questions such as the following: Should the labelling obligation be extended to domestic producers even if their production is already regulated? To what extent should foreign certification be accepted? Is mandatory labelling or certification based on PPMs covered by the TBT, by GATT or by both? Such questions are at issue in discussions on the WTO compatibility of the Dutch wood labelling legislative proposal mentioned above. After the notification of this proposal under the TBT Agreement, several WTO Members commented upon it, most of them criticising it as an unnecessary obstacle to international trade within the meaning of Article 2.2 TBT and asking for further explanations as to its justification under Article 2.5 TBT.\(^\text{48}\)

The US argued in *US-Tuna-Dolphin II* that the position taken by the EC to the effect that Article XX GATT did not allow extraterritorial protection was

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\(^{48}\) Notification: G/TBT/Notif.98.448. Reactions from Canada, Malaysia, Thailand, Indonesia, Norway and Poland on file with the author. The Malaysian reaction is documented as G/TBT/W/96. Discussions on the proposal are found in documents G/TBT/M13 and G/TBT/W/102.
inconsistent with the position it had taken with respect to Article 30 EC in *Van den Burg.* The Commission had in this case unequivocally argued that Article 30 could cover the protection of animals outside the jurisdiction of the Member State taking the measure. The EC responded that the US had misread the Court’s judgment in *Van den Burg,* and that in any event, Article XX GATT should not be interpreted by reference to Article 30 EC, which had gone through a wholly different evolution of interpretation in the common market.

This example illustrates that the EC does not necessarily take the same view of the acceptability of unilateral PPM-based measures with extraterritorial protection objectives within the EC and in the external sphere. Indeed, the line with regard to such measures may be drawn differently in the EC and in the WTO, in view of the respective objectives and institutional frameworks of both organisations. However, the EC has also taken a rather ambiguous position on the issue of the compatibility with WTO rules of unilateral measures based on PPMs as such. This ambiguity can be explained to some extent by the fact that the Community is an amalgam of institutions with differing objectives and preferences. Even within the Commission, several directorates have different agendas on issues such as trade and environment.

For example, the European Parliament in 1998 passed a resolution reflecting the view that PPMs should play a role in “likeness” determinations under Article III GATT in accordance with the aim and effect test. In preparations for the WTO’s 1999 Seattle Ministerial Conference, the Community suggested as one of the priority issues ‘a clarification of the relationship between WTO rules and Non-Product Related Processes and Production Methods requirements and, in particular, of the WTO-compatibility of eco-labelling schemes.’ Subject to transparency and non-discrimination in the creation and administration of such schemes being safeguarded in a multilateral framework, ‘there should be scope for a clear understanding that there is room within the WTO to use such market based, non-protectionist instruments as a means of achieving environmental objectives and of allowing consumers to make informed choices.’ The Commu-

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49 The US accused the Netherlands, which acted as co-complainant in *US-Tuna-Dolphin II* representing the Netherlands Antilles, of similar inconsistency.

50 *US-Tuna-Dolphin II,* unadopted, paras. 3.25 and 3.48, respectively.

51 European Parliament Resolution A4-0125/98, adopted on 30 April 1998: ‘Urges the Commission to advocate [...] that the WTO should draw up a Statement of Understanding concerning the application of the principle of “like products” which enables otherwise identical products to be differentiated where the production or processing of such products have different impacts on the environment. This Statement of Understanding should elaborate on the findings of the Panel on the US tax treatment of automobiles (the so-called “Gas Guzzlers” ruling).’
nity also suggested establishing rules on eco-labelling schemes based on a life-cycle approach in the context of the TBT Agreement.52

In contrast, as said above, the Community in the second Tuna-Dolphin dispute argued against extraterritorial protection. In its submissions to the panel in the Japan-Alcohol dispute, the Commission warned that 'the aim-and-effect test could open the door to claims that the extraterritorial application of environmental regulations concerning non-product related processes and production methods is not contrary to Article III.'53 Interestingly, the EC itself has taken various legislative initiatives that resemble the measures at issue in the GATT/WTO disputes on PPMs and extraterritoriality. Many of these initiatives do not so much aim to protect animals threatened with extinction, but rather animal welfare. For instance, a recent Council regulation provides for the compulsory labelling of eggs on the basis of farming methods. The compulsory labelling applies to all eggs sold in the European Community, whether they are produced in the EC or emanate from third countries. However, in the case of third-country eggs, indication of the farming method may be replaced by the indication 'farming method not specified', and by an indication of origin if third country procedures do not offer sufficient guarantees as to equivalence with the technical rules and standards applicable to Community procedures.54 Arguably, the latter indications may function as a negative label much in the same way as the not 'certified to be sustainably produced' label proposed by the Netherlands. The Community has notified the egg labelling regulation under the TBT Agreement.55 Its WTO compatibility has so far not been challenged. Other examples of EC unilateral action also aiming at PPMs in third countries are the proposed leghold trap regulation that eventually was not applied,56 and

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53 [original footnote 46] 'According to the Community, the generally accepted view is that an imported product and a domestic product manufactured in accordance with different non-product related PPMs [...] are still "like" and cannot therefore be treated differently under internal regulations. This interpretation is supported by the two unadopted panel reports on [US-Tuna-Dolphin I and II]. Under the aim-and-effect test one could argue that tuna harvested with a high rate of incidental dolphin killing is not like to other tuna because the distinction does not have a protectionist purpose.'

54 Council Regulation 5/2001 amending Council Regulation 1907/90, OJ 2001 L 2/1. Interestingly, neither of these two regulations refers to any specific Treaty Article as their legal basis. They are based upon Council Regulation 2771/75, which refers to Articles 36 and 37 (common agricultural policy).

55 WTO document G/TBT/Notif.00/428.

proposals to prohibit animal testing of cosmetics that initially included an import prohibition.\textsuperscript{57}

At some stage, a WTO challenge to EC legislation unilaterally prescribing PPMs for third country goods is likely to occur. What will then happen will be interesting not only from the point of view of WTO law, but also for the EC itself. As said, a legislative proposal for the mandatory labelling of wood products in one Member State has been vehemently criticised by the Commission, and may lead to both internal EC proceedings and WTO proceedings. It will be interesting to see whether the Community is of the opinion that while one Member State is not allowed to impose PPM-based measures on third-country imports, the Community as a whole is allowed to do so. Other EC measures may be expected to pose less problems of WTO compatibility, as they are based on MEAs. Examples are regulations restricting trade in products damaging the ozone layer pursuant to the Montreal Protocol,\textsuperscript{58} restricting trade in hazardous waste pursuant to the Basel Convention,\textsuperscript{59} and restricting trade in endangered species pursuant to the Convention on International Trade in Endangered Species of Flora and Fauna.\textsuperscript{60} Sometimes, the Community measures go further than their obligations under the MEA require them to do, which may raise questions of international law regarding the relationship between these MEAs and the WTO commitments.

\textsuperscript{57} Council Directive 76/768, modified by Council Directive 93/35 (sixth modification), provided in Article 4 that Member States had to prohibit the marketing of animal-tested cosmetics, irrespective of whether they were produced in the EC or in third countries. For fear of WTO incompatibility, in the proposal for the seventh modification, COM(2000)189, the cosmetics directive no longer prohibits the marketing of animal-tested cosmetics, but only the carrying out of animal tests within the EC.

\textsuperscript{58} Regulation 3093/94, OJ L 1994 333/. A proposed revision is found in COM(98)398.

\textsuperscript{59} Regulation 259/93 OJ L 1993 30/1.

\textsuperscript{60} Regulation 338/97, OJ L 1997 61/1