

# Greening the WTO Agreements

## *Can the Treaty Establishing the European Community be of Guidance?*

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### I. INTRODUCTION

The trade-environment linkage will invariably have to play an important role in the next round of trade negotiations at the World Trade Organization (WTO), whenever that will be. In contemplating a greening of the WTO agreements, negotiators could turn their attention to other free trade agreements. For example, it is often suggested that the Treaty establishing the European Community (TEU) deals quite successfully with the trade-environment linkage (see, for example, von Moltke, 1995; Steinberg, 1997).

This article discusses whether the TEU is actually more environmentally friendly than the WTO agreements and whether it can provide a role model for greening the WTO agreements. It analyses whether European Union (EU) Member States have greater leeway in enacting environmental measures than WTO Members have and how the WTO agreements could become reformed accordingly. Note that environmental measures are to be interpreted broadly here, encompassing measures aimed at the protection of the natural environment, such as the conservation of resources, the preservation of species or the prevention of global warming, as well as measures aimed at the protection of animal and human health and life.

Of course, in some sense the EU represents a unique construct, a supra-national institution, the existence and development of which is heavily influenced by historical circumstances and the political will for European integration. It is no wonder then that it contains far-reaching and somewhat unique provisions, for example for the harmonisation of environmental standards among its Members. On the other hand, it can be understood as a regional free trade agreement, albeit a particularly far developed one, and there is therefore no reason why it could not provide guidance for other free trade agreements. As we will see later on, while, for example, the WTO agreements do not provide for the harmonisation of international standards, lessons can still be learned from the TEU since some WTO agreements do encourage the harmonisation of standards among its Members or via other international organisations. In other words, the fact that the EU and the WTO represent substantially different levels of integration

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and will most likely remain so, does not imply that lessons cannot be drawn from the former for a reform of the latter.

It will be important for the analysis in this article to distinguish between environmental measures EU Member States can undertake in the absence and those they can undertake in the presence of Community harmonisation. Furthermore, I will look at the leeway countries have in dealing with scientific uncertainty and consequently at the role of the precautionary principle. Finally, I examine what the TEU and the WTO agreements—especially its most important agreement, the General Agreement on Tariffs and Trade (GATT)—have to say on whether countries have the right to unilaterally impose trade restrictions aimed at environmental protection outside their own jurisdiction.

It seems pertinent to state right from the start what issues are not covered by this article and why. First, I do not look at the differences in the environmentally friendly language contained in the Principles Chapter of the TEU and in the preamble to the Agreement establishing the WTO. The main reason is that neither is directly enforceable and therefore do not establish any substantive rights for countries to enact trade-restrictive environmental measures. Second, the whole area of environmental subsidies is omitted. The rules governing (environmental) subsidies are extremely complex and their analysis would be beyond the scope of this article.<sup>1</sup> Also, environmental subsidies more often than not are granted for economic reasons and are not really in the environmental interest as they blatantly violate the polluter-pays principle. As it happens, the TEU is somewhat more permissive with respect to granting environmental subsidies and for the reason just given should therefore not be taken as a guide for WTO reform. Third, implementation and enforcement of nominal environmental standards is also omitted. While non-implementation and non-enforcement of such standards represents a major problem for environmental protection, the TEU only contains provisions for supervision of the implementation and enforcement of Community enacted environmental measures, not for domestically enacted measures, unless they are required by Community legislation. Since none of the WTO agreements currently has, nor is likely to have in the future, provisions similar to those TEU provisions allowing for Community legislation, the TEU cannot be of guidance on this aspect. With these qualifications in mind, let us start in analysing what leeway EU Member States have in enacting environmental measures in the absence of Community harmonisation.

## II. ENVIRONMENTAL MEASURES TAKEN IN ABSENCE OF COMMUNITY HARMONISATION

Any free trade agreement will have at its heart the binding of tariffs (as in the case of GATT) or the complete prohibition of tariffs (as in the case of the EU's customs

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<sup>1</sup> See, for example, Kim (1999) for the WTO's Agreement on Subsidies and Countervailing Measures and Ziegler (1996, pp. 115–127) for the TEU.

union) among its Members.<sup>2</sup> However, next to tariffs, the most important obstacle to trade comes from quantitative restrictions and measures having equivalent effect. This is true in general and for environmental measures in particular, for example, in the form of product standards or labelling requirements. Hence, any free trade agreement will, to some extent at least, need to abolish such restrictions.

#### A. ELIMINATION OF QUANTITATIVE RESTRICTIONS

Article 28 of the TEU therefore states that “quantitative restrictions on imports and all measures having equivalent effect shall be prohibited between Member States” (see analogously Article 29 for quantitative restrictions on exports). While the meaning of quantitative restrictions is self-evident, what constitutes “measures having equivalent effect” requires further interpretation. In a landmark decision (*Dassonville* case), the European Court of Justice (ECJ) provided a very broad definition:

“all trading rules enacted by Member States which are capable of hindering, actually or potentially, directly or indirectly, intra-Community trade are to be considered as measures having equivalent effect to quantitative restrictions” (ECJ, 1974, p. 852).

Article XI.1 is GATT’s equivalent to Articles 28 and 29 of the TEU. It states that:

“no prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licences or other measures, shall be instituted or maintained by any contracting party on the importation of any product of the territory of any other contracting part or on the exportation or sale for export of any product destined for the territory of any other contracting party.”

While the wording of this Article is somewhat different from Articles 28 and 29 of the TEU and Article XI.2 of GATT takes out some areas from the scope of Article XI.1, the real difference between the two articles stems from the fact that Article XI needs to be interpreted in the context of Article III of GATT. Article III.2 states:

“The products of the territory of any contracting party imported into the territory of any other contracting party shall not be subject, directly or indirectly, to internal taxes or other internal charges of any kind in excess of those applied, directly or indirectly, to like domestic products.”

In other words, WTO Members have the right to impose regulations and requirements on goods even if these hinder the free flow of products, as long as imported products are accorded treatment no less favourable than domestic products (so-called national treatment obligation).<sup>3</sup>

In principle therefore WTO Members have the right to restrict the free flow of products as long as they do not discriminate against imported products. Note,

<sup>2</sup> In spite of the existence of specific agreements such as the Agreement on Sanitary and Phytosanitary Measures (SPS Agreement) and the Agreement on Technical Barriers to Trade (TBT Agreement), which will be dealt with later on, GATT remains the major regime setting rules relevant to environmental measures. This will be even more so if a Panel ruling in the recent *Asbestos* case (WTO, 2000) that product bans for environmental reasons are to be judged according to GATT, not according to TBT rules, is confirmed by the Appellate Body.

<sup>3</sup> The terms “goods” and “products” are used interchangeably here.

however, that discrimination against imported products does not need to be explicit (or *de jure*). Even an “origin-neutral” measure, which does not explicitly distinguish between foreign and domestic products, can be discriminatory if it has a disproportionate impact upon foreign goods (so-called *de facto* discrimination). It would be beyond the scope of this article to examine the very complex case law governing when products are to be considered “like products” and whether WTO Panels should look for the existence of a “protectionist intent” and for the effect of a measure on conditions of competition in a market in deciding whether an “origin-neutral” measure is *de facto* discriminatory (so-called “aim and effects” approach).<sup>4</sup> What matters for the purpose of this article is that environmental measures, which are neither *de jure* nor *de facto* discriminatory, do not violate Article III of the GATT.

The TEU does not contain such a national treatment rule. Consequently, environmental protection measures that hinder the free flow of goods without discriminating against imported goods do not violate Article XI of the GATT, but are in conflict with Article 28 of the TEU (Petersmann, 1994, p. 167).<sup>5</sup> In some sense, therefore, GATT is more environmentally friendly on this aspect than the TEU. The reason for this important difference stems from the fact that the TEU (and its predecessors) put enormous emphasis on the creation of a single market among its Member States. Any measure negatively affecting imported goods is therefore in general regarded as an obstacle to be removed in the quest for a single market, even if this measure affects domestic goods negatively as well and no discrimination against imported goods is apparent.

## B. EXCEPTION CLAUSES

Like most trade rules, the prohibition of quantitative restrictions is subject to exceptions. Article 30 of the TEU states that: “the provisions of Articles 28 and 29 shall not preclude prohibitions or restrictions on imports, exports or goods in transit justified on grounds of”, *inter alia*, “the protection of health and life of humans, animals or plants ... Such prohibitions or restrictions shall not, however, constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States.” The wording of this article was heavily influenced by GATT’s own exceptions clause in Article XX:<sup>6</sup>

“Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same

<sup>4</sup> An excellent treatment can be found in Hudec (1998).

<sup>5</sup> This applies only with respect to imports and therefore only to Article 28, not Article 29. As Geradin (1997, p. 11) explains: “the notion of a ‘measure having equivalent effect’ on exports has been interpreted by the Court of Justice as only covering measures that on their face or in their effects discriminate against exports”.

<sup>6</sup> The caption and Article XX(b), but not Article XX(g), are also contained in Article XIV of the General Agreement on Trade in Services (GATS). While GATT regulates trade in products, GATS regulates trade in services.

conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:

...

(b) necessary to protect human, animal or plant life or health;

...

(g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption;"

One obvious difference between the two Articles, apart from some more minor differences in wording, is that GATT exempts, under certain conditions, measures "relating to the conservation of exhaustible natural resources", whereas the TEU does not. This is important as it opens another avenue for justifying certain environmental measures and is all the more important since measures falling under Article XX(g) of the GATT do not need to pass the "necessity" test (on the interpretation of this requirement, see further below). What both Articles have in common, however, is that none of them explicitly mentions environmental protection as a justification for trade-restrictive measures! The reason for this is that GATT and the EC Treaty (one of the predecessors of the TEU) were established in the 1940s and 1950s. Nevertheless, this omission remains quite striking given that the TEU and the Agreement establishing the WTO, of which GATT forms part, were negotiated in the beginning and mid-1990s so that the relevant provisions could have been changed. As concerns the WTO, the failure to introduce the term environment in some form into Article XX of the GATT is the more astonishing as Article 2.2 of the Agreement on Technical Barriers to Trade (TBT Agreement), another of the WTO agreements revised during the Uruguay Round, specifically includes protection of the environment as one of the legitimate objectives for setting up technical regulations, which potentially can restrict trade. It is unclear whether WTO parties wanted to make a distinction between justifiable exceptions to the GATT and those to the TBT Agreement obligations. A draft discussion paper by the GATT Secretariat, issued during the time of the Uruguay Round, suggested to negotiators that "the common understanding of Parties, based on the opinion of the GATT legal service division, is confirmed that measures necessary to protect human, animal and plant life and health are understood to include measures necessary to protect the environment" (see Wilkinson, 1994, p. 401). A draft discussion paper does not carry any legal status, however, so the exact scope of Article XX of the GATT with respect to environmental measures remains somewhat unclear.

Obviously, while many environmental protection measures can be subsumed under the protection of human, animal or plant life or health, or under the conservation of exhaustible natural resources (in the case of GATT), there will also be many measures falling outside the proper scope of these exceptions.<sup>7</sup> Interestingly, in

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<sup>7</sup> For example, measures aimed at the prevention of global climate change would be difficult to subsume under these terms.

both cases the insufficiency of the text of the agreements has become somewhat corrected by case law.

### C. CASE LAW WIDENING THE ENVIRONMENTAL SCOPE OF THE EXCEPTION CLAUSES

In the case of the EU, the ECJ, after having given a very broad meaning to “measures having equivalent effect” to quantitative restrictions (*Dassonville*) and after having persistently ruled that the exceptions in Article 30 are to be interpreted narrowly, soon realised that the combined effect would be that its Member Countries’ leeway to enact public policy measures would become severely restricted, not only in the environmental area. Thus, in another landmark decision (*Cassis de Dijon* case), the ECJ corrected this shortcoming in ruling that:

“obstacles to movement within the Community resulting from disparities between the national laws ... must be accepted in so far as those provisions may be recognized as being necessary in order to satisfy mandatory requirements relating *in particular* to the effectiveness of fiscal supervision, the protection of public health, the fairness of commercial transactions and the defence of the consumer” (ECJ, 1979, p. 662, emphasis added).

In other words, this ruling, which became known as the *Cassis de Dijon* doctrine or the rule of reason, allows countries to impose quantitative restrictions or measures having equivalent effect for “mandatory requirements”. These requirements need not be listed in and therefore extend Article 30. While this ruling does not explicitly mention environmental protection, it does not preclude it either from forming a “mandatory requirement”. Later rulings, especially the landmark decision on *Danish Bottles* confirmed that “the protection of the environment is a mandatory requirement” (ECJ, 1988, p. 4630). Furthermore, the ECJ proved willing to give animal life protection in Article 30 of the TEU a rather broad meaning covering the preservation of species and the conservation of biodiversity more generally (ECJ, 1998a).

As concerns GATT, an environmentally friendly expansive interpretation of Article XX was undertaken by the appellate body in the famous *Shrimp/Sea Turtles* case (WTO, 1998a). It explicitly rejected the argument that sea turtles do not constitute “exhaustible natural resources” in the meaning of the GATT and that measures relating to their conservation could therefore not be justified by recourse to Article XX(g). In doing so it referred to the espousal of the objective of sustainable development in the preamble to the Agreement establishing the WTO to determine:

“The words of Article XX(g), ‘exhaustible natural resources’, were actually crafted more than 50 years ago. They must be read by a treaty interpreter in the light of contemporary concerns of the community of nations about the protection and conservation of the environment. ... From the perspective embodied in the preamble of the WTO Agreement, we note that the generic term ‘natural resources’ in Article XX(g) is not ‘static’ in its content or reference but is rather ‘by definition, evolutionary’” (WTO, 1998b, para. 129).

It therefore held that sea turtles constitute “exhaustible natural resources” in the meaning of Article XX(g) of the GATT. Obviously, this does not imply that every and

any environmental protection measure could potentially become subsumed under Article XX of the GATT. However, the Appellate Body (and in its wake Arbitration Panels) seems to be willing to interpret the relevant provisions relatively widely to encompass many more environmental protection measures than would follow from a narrow interpretation of Article XX. How wide exactly, remains to be seen.

To summarise, the absence of an explicit exception clause for environmental protection measures does not seem to represent a problem in the case of the EU as relevant case law has explicitly established environmental protection as a “mandatory requirement” capable of imposing limits to the application of Articles 28 and 29 of the TEU. The GATT case is more ambiguous and problematic. While here, as well, case law has tended to broaden the scope for certain environmental protection measures to be regarded as potential exceptions to the elimination of quantitative restrictions, it remains to be seen whether the whole range of environmental protection measures can become subsumed under one of the exceptions contained in Article XX of the GATT. On this important aspect it seems, therefore, that the TEU in the context of the relevant case law is more environmentally friendly than GATT. However, both in the TEU and in GATT the application of environmental protection measures is subject to certain, but different, requirements and it is to these that we now turn.

#### D. THE “PROPORTIONALITY” REQUIREMENT IN THE TEU AND CASE LAW

In the case of the EU, the ECJ has consistently ruled that measures being justified either with recourse to one of the exceptions of Article 30 or with recourse to one of the “mandatory requirements” following the rule of reason not only need to be non-discriminatory towards imported goods, but also need to be “proportional”. While the ECJ is not always very clear and consistent in its usage of the term (Ziegler, 1996, p. 97), “proportionality” requires mainly two things. First, the measure must be “necessary” for the attainment of the aim pursued in the sense that there is no other measure less trade restrictive that could attain the aim. In other words: “If a Member State has a choice between various measures for achieving the same aim, it should choose the means which least restricts the free movement of goods” (ECJ, 1988, p. 4629). Second, the measure must be in proportion to the objective pursued. In the environmental context, this requirement means that severe restrictions of trade flows cannot be justified if they lead to only minor environmental improvements *even if there is no less trade restrictive measure for the attainment of the same environmental improvement*, i.e. even if the measure is “necessary”.

Normally, the ECJ tends to be relatively tolerant on both requirements leaving countries with substantial discretion. But it does at times rule against measures it regards as violating the “proportionality” requirement. As concerns the first requirement, total import prohibitions, for example, rarely pass the scrutiny of the court. In a typical case, the court was not convinced that the prohibition of importation of live freshwater crayfish by Germany was necessary for the protection of

domestic freshwater crayfish, saying that Germany's federal government had not convincingly shown that measures "involving less serious restrictions for intra-Community trade, were incapable of effectively protecting the interests pleaded" (ECJ, 1994, p. 3323). As concerns the second requirement, the court struck down a requirement for foreign producers to use approved re-usable containers for a deposit-and-return system in the famous *Danish Bottles* case.<sup>8</sup> While it had no doubt that: "the existing system for returning approved containers ensures a maximum rate of re-use and therefore a very considerable degree of protection of the environment" (ECJ, 1988, p. 4632) and that to allow non-approved containers would necessarily mean that the same degree of protection of the environment cannot be achieved, it found the requirement to be "disproportionate to the objective pursued" (ECJ, 1988, p. 4632). In coming to this conclusion, the court noted that a system for returning non-approved containers is capable of a considerable, if slightly lower, degree of environmental protection as well. It follows that EU Member States are not completely free in setting their own level of domestic environmental protection. Aiming for a very high level of domestic environmental protection might violate an EU Member Country's free trade obligations.

#### E. THE REQUIREMENTS OF ARTICLE XX OF THE GATT

Most authors argue that neither the GATT text itself nor the relevant case law has a similar check for whether a trade-restrictive measure is out of proportion to the environmental aim achieved (see, for example, Petersmann (1994) and Geradin and Stewardsson (1995)). In other words, GATT dispute Panels and Appellate Bodies will merely check for whether a measure is "necessary", but will not second guess the environmental aim itself if it turns out that a severely restrictive measure is necessary for its achievement. This author does not unreservedly share this opinion and has argued that there is some ambiguity at least (Neumayer, 2001, chapter 8). Following a Panel Report in the case *Thailand—Restrictions on Importation of and Internal Taxes on Cigarettes* (GATT, 1990), the term "necessary" in Article XX(b) has consistently been interpreted by Panels and Appellate Bodies as requiring that "no alternative measure consistent with the General Agreement, or less consistent with it" exist, which the challenged country could "reasonably be expected to employ". However, while no Panel has ever applied a proportionality test and some decisions read as if Panels took the level of environmental protection as a given,<sup>9</sup> neither have this nor other Panels made an explicit ruling on this important point.

As mentioned already, Article XX(g) does not contain a "necessity" requirement, such that resource conservation measures can in principle become exempted, even if

<sup>8</sup> This requirement was only binding for the marketing of beer and soft drinks in excess of 3000 hectolitres a year.

<sup>9</sup> See, for example, the Panel Report in the *Gasoline* case (WTO, 1996, para. 6.22) and, more recently, in the *Asbestos* case (WTO, 2000, para. 8.210).



less trade-restrictive measures are available. This needs to be qualified, however, as: first, Panels have provided a rather narrow interpretation of Article XX(g) as well; and second, a measure falling under this Article still needs to pass the requirements set out in the preamble to Article XX. On the first point, following the lead of a 1987 Panel in the *Canadian Salmon and Herring* case (GATT, 1987), Panels have tended to interpret the requirement that measures must “relate to” the conservation of exhaustible resources rather restrictively as “primarily aimed at”.<sup>10</sup> Furthermore, following the lead of a 1994 Panel in the *US Auto Taxes* case (GATT, 1994), Panels have consistently ruled that a measure which brings about resource conservation primarily at the expense of foreign products cannot be subsumed under Article XX(g), which requires a certain “even-handedness” such that conservation measures are imposed on domestic producers as well.

As concerns the preamble (or caption) of Article XX, it has gained importance over time, as the Appellate Body has tended to be less restrictive with respect to the requirements of Article XX(b) and XX(g), which disputed measures have to pass first before they are judged according to the preamble. It would be beyond the scope of this article to provide a detailed analysis of its requirements. Suffice it to say here that its major objective is to prevent abuse of the exceptions contained in Article XX and to strike a balance between the rights of Member Countries to invoke one of the exceptions contained in this article and the trade rights of other WTO Members. As the Appellate Body in the *Shrimp/Sea Turtle* case has put it (WTO, 1998b, para. 158):

“... the task of interpreting and applying the chapeau is ... essentially the delicate one of locating and marking out a line of equilibrium between the right of a Member to invoke an exception under Article XX and the rights of the other Members under varying substantive provisions (e.g. Article XI) of the GATT 1994, so that neither of the competing rights will cancel out the other and thereby distort and nullify or impair the balance of rights and obligations constructed by the Members themselves in that Agreement.”

Differences in the exact wording of the exception clauses notwithstanding, the attempt to strike such a balance is also common practice for the ECJ in applying TEU rules. The major difference between EU case law and GATT/WTO case law is therefore likely to stem from the fact that the GATT/WTO does not subject Member Countries’ measures to a “proportionality” test.

### III. ENVIRONMENTAL MEASURES TAKEN IN PRESENCE OF COMMUNITY HARMONISATION

EU Member States are allowed to take measures according to the rules laid out above in the absence of Community harmonisation. Where harmonising directives or secondary environmental regulations at the Community level exist, Member States are

<sup>10</sup> The Appellate Body in the *Reformulated Gasoline* case seemed to loosen this restrictive interpretation a bit, without explicitly overturning earlier Panel decisions, in noting that “primarily aimed at” is “not itself treaty language and was not designed as a simple litmus test for inclusion or exclusion from Article XX(g)” (WTO, 1996, p. 21).

only allowed to take further measures if the relevant environmental area has not been exhaustively regulated by the Community, or if the harmonisation measure contains specific safeguard clauses.

#### A. AVENUES FOR HARMONISATION IN THE TEU

There are two main ways via which such harmonisation can come about:

- Article 95—which has as its objective the adoption of “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” (Article 95.1). It is the major tool for removing differences in national regulations, which hinder the free flow of goods. Those environmental harmonisation measures, which directly impact upon the establishment or functioning of the internal market, must be based on this Article (Geradin, 1997, p. 87);
- Article 175—contained in the TEU’s Environment Chapter. It has as its objective the harmonisation of “measures answering environmental protection requirements” (Article 174.2). It is the major tool for removing differences in national regulations, which hinder the Community in pursuing the environmental objectives laid down in Article 174.1: preservation, protection and improvement of the quality of the environment; human health protection; prudent and rational utilisation of natural resources; and promotion of measures at an international level to deal with regional or worldwide environmental problems. Those environmental harmonisation measures, which impact only indirectly or incidentally upon the establishment or functioning of the internal market, are to be based on this Article (Geradin, 1997, p. 87).

#### B. UPWARD HARMONISATION AND LEEWAY FOR EU MEMBER COUNTRIES

*A priori*, harmonisation of national standards can occur at high, medium or low standards. It is quite striking and represents a great success for advocates of strong environmental policy that for both harmonisation possibilities the TEU embraces a high level of environmental protection. Article 95.3 specifies that: “the Commission, in its proposals ... concerning health, safety, environmental protection and consumer protection, will take as a base a high level of protection ...”; Article 174.2 prescribes that “Community policy on the environment shall aim at a high level of protection ...”. In practice, there are numerous examples of EU-wide harmonisation of product as well as process and production methods on a high level (Steinberg, 1997, p. 256ff).

Moreover, Article 95.10 allows for harmonisation measures to include, in appropriate cases, “a safeguard clause authorising the Member State to take, for one or more of the non-economic reasons referred to in Article 30, provisional measures

subject to a Community control procedure". Article 95.4 allows EU Member States, more generally, to maintain national provisions if they deem them necessary for the protection of the environment. In spite of existing harmonisation, new measures can be introduced if doing so is deemed necessary based on new scientific evidence relating to the protection of the environment (Article 95.5). There is even the possibility of an upward pressure on harmonised standards as the Commission is required to examine whether the harmonised standards should be raised to the higher standards of a Member State (Article 95.7). Similarly, for the second major route of Community harmonisation, Article 176 proclaims that harmonisation based on Article 175 "shall not prevent any Member State from maintaining or introducing more stringent protective measures" (Article 176).

Of course, the introduction of new or the maintenance of existing more stringent national measures in the presence of Community harmonisation is subject to conditions. According to Article 95.6, the Commission decides on whether to approve or reject such measures "after having verified whether or not they are a means of arbitrary discrimination or a disguised restriction on trade between Member States and whether or not they shall constitute an obstacle to the functioning of the internal market".<sup>11</sup> As any more stringent measure potentially represents an obstacle to the functioning of the internal market, the last sentence must be interpreted as prohibiting an "inadequate" or "inappropriate" obstacle to the functioning of the market, which brings the "proportionality principle" back into play (Krämer, 1998, p. 134). It follows that the requirement contained in Article 95.6 is basically the same as in Article 30 or in the rule of reason. In other words, for more stringent national measures in the presence of Community harmonisation on the basis of Article 95, basically the same rules apply as to national measures in the absence of Community harmonisation. The same is true for Community harmonisation on the basis of Article 175, for which Article 176 simply prescribes that more stringent national measures "must be compatible with this Treaty".

The provisions requiring harmonisation measures to aim at a high protection level and allowing Member States to maintain or introduce stricter environmental standards in the presence of Community harmonisation are unprecedented for a free trade agreement. Indeed, they are unprecedented even beyond such agreements, as Krämer (1998, p. 183) correctly observes: "where, in a national constitution, could one find the requirement to obtain a high level of environmental protection?", further noting (Krämer, 1998, p. 184) that these provisions "even found entry into the area of internal market measures. As far as can be ascertained, no Member State's constitution allows similar possibilities for regions, Länder, provinces or other entities." These provisions therefore give some justification to a perspective, which regards the TEU as quite a "green" free trade agreement.

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<sup>11</sup> If the Commission rejects such a measure, then the Member State can ask the ECJ to overturn the Commission's decision.

C. LESSONS FOR THE WTO DESPITE A LACK OF COMPARABLE HARMONISATION PROVISIONS?

Can the TEU be of guidance for a reform of WTO agreements here? At first sight, it might seem as if the answer was no. None of the WTO agreements contain provisions for WTO Members to harmonise their environmental standards, nor is there any initiative among WTO Members to introduce them. Indeed, with currently about 140 WTO Member Countries, possibly rising to 170 by the end of 2002 (BNA, 2000), it would be somewhat absurd to expect any country to be in favour of such harmonisation provisions.

On the other hand, WTO agreements are not indifferent with respect to harmonisation. While GATT itself does not contain any relevant provisions, two other WTO agreements do encourage the harmonisation of standards, but leave the harmonisation process itself to individual Member Countries or other international organisations. The Agreement on Technical Barriers to Trade (TBT Agreement) encourages the adoption of international technical regulations (Article 2.4), the harmonisation of regulations (Article 2.6) and even the adoption of foreign regulations (Article 2.7) to prevent such regulations from hindering the free flow of goods. Similarly, Article 3.1 of the Agreement on Sanitary and Phytosanitary Measures (SPS Agreement) encourages the harmonisation of standards and the adoption of international standards, guidelines or recommendations. Importantly, none of these articles contain any provision calling for a "high level of environmental protection" as a base or aim for harmonisation. This is the more problematic as many international or harmonised regulations are likely to represent the lowest common denominator among participating countries such that downward pressure on some countries' standards represents a distinct possibility (Wilkinson, 1994, p. 404).

The TEU could therefore be of guidance here even though the WTO agreements lack proper harmonisation provisions. The relevant provisions within the WTO agreements encouraging harmonisation of standards could embrace the achievement of a high standard of environmental protection as an aim. Clearly such an aim could not represent an enforceable right. After all, the process of standard harmonisation itself is left to individual WTO Members or other international organisations and is therefore outside the scope of the WTO itself. However, even if non-enforceable, postulating such an aim could send an important signal encouraging WTO Members to strive for strict environmental standards.

What about the TEU provisions allowing EU Members to enact stricter domestic standards subject to specified conditions? Here, the two mentioned agreements give WTO Members some leeway as well. Article 2.4 of the TBT Agreement, for example, allows countries to deviate from international standards "when such international standards or relevant parts would be an ineffective or inappropriate means for the fulfilment of the legitimate objectives pursued, for instance because of fundamental climatic or geographical factors or fundamental technological problems". Similarly,

Article 3.3 of the SPS Agreement allows WTO Members to “introduce or maintain sanitary or phytosanitary measures which result in a higher level of sanitary or phytosanitary protection than would be achieved by measures based on the relevant international standards, guidelines or recommendations”, subject to the existence of a scientific justification, which is to be provided in the form of a risk assessment.

#### IV. SCIENTIFIC UNCERTAINTY AND THE PRECAUTIONARY PRINCIPLE

However, there is one important difference concerning a country’s leeway to deviate from international or harmonised standards, between the TEU on the one hand, and the WTO agreements (especially the SPS Agreement) on the other hand. This difference concerns scientific uncertainty and the so-called precautionary principle. The precautionary principle says that preventive measures to avoid environmental harm should (or at least can) be undertaken before there is definite scientific evidence proving that certain activities cause environmental harm.<sup>12</sup>

##### A. THE PRECAUTIONARY PRINCIPLE IN THE WTO SYSTEM

The precautionary principle has found its way into the WTO system merely in one agreement, the SPS Agreement, and also rather unsatisfactorily so. Article 2.2 of the SPS Agreement demands that an SPS measure “is based on scientific principles and is not maintained without sufficient scientific evidence, except as provided for in paragraph 7 of Article 5”. This latter article implicitly contains a rudimentary version of the precautionary principle without explicitly calling it thus. Article 5.7 says that:

“... in cases where relevant scientific evidence is insufficient, a Member may *provisionally* adopt sanitary or phytosanitary measures on the basis of available pertinent information, including that from the relevant international organizations as well as from sanitary or phytosanitary measures applied by other Members. In such circumstances, Members shall seek to obtain the additional information necessary for a more objective [sic!] assessment of risk and review the sanitary or phytosanitary measure accordingly within a reasonable period of time” (emphasis added).

In one of the most important cases, a WTO Panel and Appellate Body have ruled against a European Communities (EC) import ban on beef from cattle raised with growth hormones, arguing that the scientific reports the EC had put forward as a risk assessment “do not rationally support the EC import prohibition” (WTO, 1998b, para. 197). The EC had justified its import ban *inter alia* with the existence of widespread uncertainty with respect to the health risks of beef from cattle raised with growth hormones. In doing so, it explicitly took recourse to the precautionary principle. Equally

<sup>12</sup> It has been enshrined as Principle 15 into the Rio Declaration on Environment and Development at the UN conference in 1992, but under the name of precautionary approach: “In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.”

explicitly, however, it refused to invoke Article 5.7 of the SPS Agreement as a foundation for taking recourse to the precautionary principle. The EC justified this refusal in saying that its measures were “definitive”, not “provisional”, so that it could not base its measures on Article 5.7 which, to recall, allows WTO Members to adopt precautionary SPS measures where relevant scientific evidence is insufficient only provisionally (WTO, 1997, para. IV.239). Because the EC did not invoke Article 5.7 in justification of its measures, the Panel did not spend much effort on examining whether the disputed measures could be justified by the precautionary principle. While it wondered whether the precautionary principle “could be considered as part of customary international law” (WTO, 1997, para. 8.157), which would impact upon the interpretation of the SPS Agreement rules in accordance with Article 3.2 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (Dispute Settlement Understanding (DSU), one of the WTO agreements), it immediately rejected this possibility. It ruled that the precautionary principle “would not override the explicit wording” of SPS Agreement rules, “in particular since the precautionary principle has been incorporated and given a specific meaning in Article 5.7 of the SPS Agreement” (WTO, 1997). Since the EC was not invoking Article 5.7, the Panel saw no necessity to assess the disputed measures in the light of the precautionary principle.

The WTO Appellate Body confirmed the Panel’s ruling. It stated that the precautionary principle cannot be invoked to absolve a country imposing an SPS measure from undertaking a risk assessment and that “the principle has not been written into the SPS Agreement as a ground for justifying SPS measures that are otherwise inconsistent with the obligations of Members set out in particular provisions of that Agreement” (WTO, 1997, para. 124). Furthermore, it agreed with those who dispute that the precautionary principle is internationally and widely accepted as general or customary international law, noting: “that the precautionary principle, at least outside the field of international environmental law, still awaits authoritative formulation” (WTO, 1997, para. 123). Thus it actually went one step further than the Panel, as the Panel did not examine and therefore did not explicitly doubt whether the precautionary principle should be considered part of customary international law.

#### B. A CRITIQUE OF THE STANDING OF THE PRECAUTIONARY PRINCIPLE IN THE WTO SYSTEM

The incorporation of the precautionary principle within the WTO system is fundamentally unsatisfactory. No full account is taken of the widespread existence of uncertainty in modern life. This is for two reasons: First the precautionary principle is confined to one single agreement and second this SPS Agreement allows only provisional measures to be justified with recourse to the precautionary principle.

Implicitly the SPS Agreement seems to be guided by a view that considers only risks, but not uncertainties. Risk refers to a situation where the set of all possible states of the world, the probability distribution over the set of possible states, and the resulting

consequences can be objectively known with enough effort by scientists. Uncertainty, however, refers to a situation where the probability distribution over a set of possible states of the world and the resulting consequences cannot be known objectively (cf. Neumayer, 1999, pp. 99–101). Because they cannot be known objectively, there cannot be definite scientific evidence. In these cases then, scientists can merely provide best guesses based on judgements—sophisticated and informed judgements—but guesses nevertheless. Scientists themselves will then differ, and sometimes quite dramatically so, with respect to an assessment of the dangers posed by uncertainties.

Unfortunately, uncertainties do not merely exist on the fringe. Instead they are a central characteristic of modern life. Be it the potential danger that “mad cow disease” (BSE) can be infectious for human beings as well, or the potential health dangers from beef stemming from cattle raised with growth hormones, or the dangers from genetically modified organisms (GMOs)—the central characteristic of these and other cases is the uncertainty of the danger posed. There is no scientific consensus on either the likelihood of the dangers occurring or the severity of the consequences should they occur. The SPS Agreement with its insistence on “proving” the dangers with the help of an objective scientific risk assessment is misguided in its belief in the ability of science to provide definite and reliable evidence on novel and as yet insufficiently known dangers to human health.

### C. THE PRECAUTIONARY PRINCIPLE IN THE TEU

The TEU is more advanced than the WTO agreements in explicitly embracing the precautionary principle as a general guiding principle, not confined to SPS measures. Nominally, it can only be found at one point in the TEU, namely in its Environment Chapter in Article 174.2, which states that Community policy on the environment “shall be based on the precautionary principle and on the principles that preventive action should be taken ...”. The Commission itself insists, however, that the principle and its application must not be confined to this article (European Commission, 2000, p. 10).<sup>13</sup> Indeed, in various communications, the Commission has insisted on the relevance of the precautionary principle, especially with respect to consumer health and food safety. For example, one communication states that: “the Commission will be guided in its risk analysis by the precautionary principle, in cases where the scientific basis is insufficient or some uncertainty exists” (European Commission, 1997a, p. 20). Similarly, in a Green Paper on the General Principles of Food Law in the European Union, the Commission confirms that: “where a full risk assessment is not possible, measures should be based on the precautionary principle” (European Commission, 1997b, p. viii).

<sup>13</sup> The Commission does not provide a justification for this view. It could possibly be deduced from Article 6 of the TEU, which states that as one of the principles of the TEU “environmental protection requirements must be integrated into the definition and implementation of the Community policies and activities ... , in particular with a view to promoting sustainable development”.

The case law of the ECJ has tended to confirm the relevance of the principle in disputes over internal barriers to trade. For example, in a case concerning Greek restrictions on the import of frozen chicken potentially infected with salmonella, the court recalled that it “has consistently ruled that where the data available at the present stage of scientific research do not make it possible to determine with certainty the number of pathogenic micro-organisms above which a food product represents a danger to health, in the absence of harmonization in this field, it is for the Member States to determine, with due regard to the requirements of the free movement of goods, the level at which they wish to ensure that human life and health are protected” (ECJ, 1993, p. 2087). Similarly, in judging on the validity of export bans of beef from the UK in order to contain the diffusion of BSE, the ECJ held that: “where there is uncertainty as to the existence or extent of risks to human health, the institutions may take protective measures without having to wait until the reality and seriousness of those risks become fully apparent” (ECJ, 1998b, p. 2259).

## V. UNILATERALLY IMPOSED TRADE RESTRICTIONS AIMED AT EXTRA-JURISDICTIONAL PROTECTION

### A. WTO RULES AND RELEVANT CASE LAW

The last major topic to be analysed here is the unilateral imposition of trade restrictions aimed at the protection of the environment outside a country's jurisdiction. This topic has of course been at the heart of two of the most famous and most fiercely fought over environmental disputes before the WTO, namely the US embargo on tuna caught with purse seine nets resulting in the incidental killing of dolphins (GATT, 1993) and the US embargo on shrimp and shrimp products harvested with methods resulting in the incidental killing of sea turtles (WTO, 1998a). It would be beyond the scope of this article to analyse the pertinent rulings in detail here (for this, see Neumayer (2000) or Neumayer (2001, chapter 8)). Suffice it to say that the Appellate Body in the *Shrimp/Sea Turtles* case came to the conclusion that, in principle, unilaterally imposed trade measures against countries in order to protect the environment outside the imposing country's jurisdiction can be justified by one of the environmental exemptions in Article XX of the GATT. The extra-jurisdictional reach of such measures as such does not render them GATT inconsistent. However, the requirements for unilateral trade measures to be GATT consistent are quite stringent and difficult to meet. According to the Appellate Body in the *Shrimp/Sea Turtles* case, the United States would have had to engage in bilateral or multilateral negotiations with shrimp harvesting countries (WTO, 1998, para. 166). Only if these had proven to be unsuccessful, could the United States have introduced unilateral measures. These unilateral measures would have needed to be designed such that differing conditions in different countries are taken into account (WTO, 1998, paras 163–165), that all countries are granted the same “phase-in” periods (WTO, 1998, para. 174), that the United States undertakes the same effort in transferring sea turtle safe harvesting



technology to all relevant parties (WTO, 1998, para. 175), and that the import certification process is transparent and allows affected countries to be heard and to appeal against non-certification (WTO, 1998, para. 180). The Appellate Body in the *Shrimp* case thus opened the *theoretical* possibility for the imposition of trade measures, aiming at the protection of the environment outside the imposing country's jurisdiction to be consistent with WTO rules. It seems fair to say, however, that at the same time it put up so many conditions which such measures would need to fulfil, that *in practice* it would be quite difficult for them to pass scrutiny. But it remains true that these measures are not *a priori* GATT inconsistent.

#### B. TEU RULES AND RELEVANT CASE LAW

What is the position of the TEU and the relevant case law on this important topic? Krämer believes that the TEU allows such unilateral trade measures, arguing that "the requirement of nature protection and, more generally, of the protection of the environment is not geographically limited" (Krämer, 1998, p. 140) in the TEU and that therefore "a Member State may protect humans or the fauna and flora in another Member State where there is threat to health or life of animals or plants" (Krämer, 1998, p. 141). However, he represents a minority position, since, as Ziegler (1996, p. 85) explains, most legal authors consider that the geographical scope of Article 30 or the rule of reason "justifies only national measures for the protection of domestic territory, as a Member State's responsibility under the principle of territorial sovereignty does not go beyond national borders".

The case law is also not entirely clear on this question and it seems at times as if the ECJ shied away from making an explicit ruling (Notaro, 2000). The very few existent case law decisions seem to buttress the majority view, however. For example, the ECJ ruled that the Netherlands did not have the right, on grounds of bird protection, to impose an import ban on Scottish red grouse (ECJ, 1990). It ruled that Article 30, read in conjunction with the relevant Council Directive on the conservation of wild birds "must be interpreted as meaning that a prohibition on importation and marketing cannot be justified in respect of a species of bird which does not occur in the territory of the legislating Member State but is found in another Member State where it may lawfully be hunted under the terms of that directive and under the legislation of that other State, and which is neither migratory nor endangered within the meaning of the directive" (ECJ, 1990, p. 2165).<sup>14</sup> In another case, which never went before the ECJ, the Commission did not object to a German prohibition of imports of *corallum rubrum* from Italy, even though neither Italian nor

<sup>14</sup> It is somewhat ironic, then, that the EU as a supra-national institution has at times tended to impose, or at least threatened to impose, unilateral trade restrictions on non-EU Members for the extra-jurisdictional protection of the environment, particularly with respect to animal welfare issues such as animal testing and leghold trapping, for which it has meanwhile concluded bilateral agreements with the three major leghold trapping countries Canada, Russia and the United States (European Communities, 1997, 1998). See also the informative discussion on this subject in Van Calster (2000).

European law called for the protection of this species and it could therefore be harvested lawfully in Italy.<sup>15</sup> This case cannot be regarded as evidence for the general right to impose unilateral trade sanctions for the protection of the environment outside a country's jurisdiction, however. The reason is that the German prohibition was based on a European regulation, which explicitly allowed for:

- measures aimed at the protection of species in the country of origin; and
- measures aimed at the protection of species not covered by the regulation.

The TEU and its relevant case law therefore does not seem to give EU Member States the right to impose trade restrictions for the protection of the environment outside their own jurisdiction. It actually seems to be more restrictive in this respect than the relevant WTO appellate body interpretation of Article XX of the GATT. The TEU can therefore not be of guidance for a “greening” of WTO agreements. Indeed, while many environmentalists argue that countries should have the right to impose such restrictions, if only as a matter of last resort, this author has argued on another occasion that to introduce such rights would be counter-productive. It would enable more powerful countries to coerce less powerful ones into submission to their own idiosyncratic regard of what constitutes environmentally proper behaviour. It would pose the danger of allowing protectionism in green disguise in entering a slippery slope at the end of which rule-based behaviour becomes replaced with the unilateral exertion of power (see Neumayer, 2001, chapter 8, for details). On a global scale relevant to the WTO, it might even be environmentally harmful as it might lead to a further alienation of less powerful developing countries and might destroy the co-operative spirit necessary for the enactment of multilateral environmental agreements.

## VI. CONCLUSION

This comparative analysis of the environmental friendliness of the TEU and the WTO agreements suggests the following conclusions to be drawn:

- As concerns environmental measures taken in the absence of Community harmonisation, the TEU is more tolerant than GATT, the major WTO agreement, in some aspects and less tolerant in others. On the one hand, the TEU lacks a national treatment provision, contained in GATT, such that even non-discriminatory environmental measures can violate the free trade provisions of the TEU. On the other hand, the full range of environmental measures has become explicitly recognised by the ECJ as exemptions potentially justifying restrictions to the free flow of goods. It remains to be seen, how expansively future dispute Panels and Appellate Bodies will interpret Article XX of the GATT and whether this article in its current wording, which does not mention the environment at all, will ever be able to cover the whole range of

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<sup>15</sup> The case is briefly described in Krämer (1991, pp. 166ff.).

environmental measures. However, on the negative side again, an EU Member State is not fully free in setting its own level of domestic environmental protection since the ECJ checks whether a measure necessary to achieve an environmental objective is out of proportion to the objective itself. WTO Members, on the other hand, are in principle free to set their own level of domestic environmental protection as Dispute Panels and Appellate Bodies have, so far, not applied a proportionality test. As concerns environmental measures taken in absence of Community harmonisation, the TEU therefore can only be of guidance for a greening of the WTO agreements in so far as Article XX of the GATT should become clarified to encompass the whole range of environmental measures. There are two routes to do this. The first one would be via an expansive interpretation through dispute Panels and Appellate Bodies. However, this route would stretch the existing language of Article XX of the GATT substantially. Furthermore, WTO Members, especially developing countries, have been rather hostile to the expansive interpretation of WTO agreements by Panels and the Appellate Body, as can be seen in their reaction to an expansive interpretation of the Dispute Settlement Understanding, allowing so-called *amicus curiae* briefs from non-State actors to be considered in the dispute proceedings (ICTSD, 1999). The second route would be to amend GATT during the next round of trade negotiations, which needs a two-thirds majority and has effect only for those Members that have accepted the amendment (Article X.3 of the Agreement Establishing the WTO).

- As concerns environmental measures taken in the presence of Community harmonisation, the TEU clearly their very environmentally friendly. The TBT and the SPS Agreement do not contain proper harmonisation provisions like the TEU does. Nevertheless, both agreements encourage the harmonisation of standards among their Member Countries and via international organisations. What they do not contain, however, are provisions embracing a high level of environmental protection as the base for harmonisation (Article 95 of the TEU) or the aim of harmonisation (Article 175 of the TEU). The TBT and the SPS Agreement could therefore become amended such that the adoption of standards achieving a high level of environmental protection is encouraged. Again, such amendment would need a two-thirds majority and has effect only for those Members that have accepted the amendment (Article X.3 of the Agreement Establishing the WTO). It is highly unlikely that developing countries will support such an amendment, however, as they are very concerned that strict technical or sanitary and phytosanitary standards will create non-tariff barriers against their exports. The more important will then in turn become the leeway countries have in deviating from international or harmonised standards. Unfortunately, no case law exists which provides a binding interpretation on the safeguard clauses in Article 2.4 of the TBT Agreement

and the case law on the relevant provisions in the SPS Agreement has tended to restrict the leeway of the WTO Members, especially with respect to the precautionary principle, to which we now turn.

- The precautionary principle represents the one aspect where WTO rules on allowing countries to impose stricter domestic standards are clearly inadequate from an environmental perspective. The TEU and its relevant case law provides EU Member States with much greater leeway to determine their own level of protection in the face of scientific uncertainty. The TEU can therefore be of some guidance for a reform of the WTO agreements. First, WTO Members should have the right to base environmental measures upon the precautionary principle outside the limited confines of the SPS Agreement. The preferred option would be to include a relevant clause in the GATT. Second, within the SPS Agreement's Article 5.7, recourse to the precautionary principle should not be confined to provisional measures only. Reform of the SPS Agreement and GATT would again need a two-thirds majority and is highly unlikely to be achieved as many WTO Members seem to fear that a strengthening of the precautionary principle could lead to an increase in non-tariff barriers to trade and potential protectionist abuse.
- As concerns unilateral trade restrictions aimed at extra-jurisdictional environmental protection, the TEU and its relevant case law seems to be more restrictive than GATT has lately become due to the reasoning of the Appellate Body in the *Shrimp/Sea Turtles* case. Because of this and because, as argued above, allowing countries to enact such unilateral restrictions might be counter-productive even from an environmental perspective, the WTO agreements should not become reformed in this direction and the TEU can be of no guidance here.

This article has tried to show ways in which the TEU and its relevant case law can be of guidance for a greening of WTO agreements. It has not looked at other regional agreements, most notably the North American Free Trade Agreement (NAFTA), as this would have been beyond the scope of the article and is the subject of ongoing research. Most of the proposals for an environmentally friendly reform of WTO agreements discussed above are likely to encounter substantial resistance from many, particularly developing, countries such that the prospects for these reforms becoming realised are not very bright. Again, it would be beyond the scope of this article to discuss ways in which this resistance can be overcome—on this, see Neumayer (2001) for an extensive discussion. Resistance might be less if it can be shown that some of the reform proposals are based on existing provisions in other trade agreements such as the TEU, which function successfully. If this article can thus contribute to alleviating some of the concerns against a greening of the WTO agreements, it has fulfilled its objective.

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