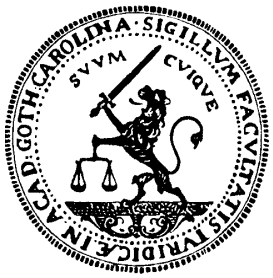

FACULTY OF LAW
University of Lund

Malin Nilsson

The Legitimacy of Unilateral Trade Measures to Protect the Environment under the Law of the European Union and the World Trade Organisation

Master thesis
20 points

Carl Michael Quitzow

EC Law/International Trade Law

HT 2000

Contents

1. Introduction

To balance the competing interests of free trade and the environment is not an easy task. Environmental concerns have in recent years, especially in industrialised countries, led to the adoption of environmental legislation restricting trade, for instance through differing product standards. There is an obvious risk that protectionist ambitions will be masqueraded as environmental concerns.[1]

The main goal for European Union[2] and international environmental policy is to achieve "sustainable development". This term is rather vague, but it basically means that economic growth must be accompanied by protection of the environment. Some of the profits from trade are in fact used for environmental purposes. However, a sustainable growth can not be assumed. It must be provided for in trade agreements. If the right balance can be struck between the environment and free trade, this may promote the efficient use of resources. The ongoing "fair trade – free trade" debate is a very important topic on the present and future European and international trade agenda.[3]

The Treaty of Rome established the European Community in 1957. The Treaty aimed at creating a single, internal market where the same economic conditions would prevail as within just one state. To reach this objective all duties and quantitative restrictions of trade between the Member States must be abolished, barriers to the free movement of business, labour and capital removed and a common external customs tariff established.[4]

The "trade versus the environment debate" takes place in the European Union against a background of shared responsibility for environmental protection. The competence of the Member States in this area remains substantial, but not absolute. The doctrine of pre-emption in areas of concurrent jurisdiction means that Member States may, in the absence of

[1] Birnie, Patricia W. and Boyle, Alan E., "International Law and the Environment", Oxford 1993, p. 131-133.

[2] See the 7th Recital of the Preamble and Article B of the European Union Treaty. Before the Treaty of Amsterdam sustainable development was only a specific objective of the European Community, see Article 2 of the EC Treaty. Now the Union shall implement the Rio Declaration (UN Doc. A/CONF.151/5/Rev.1) and Agenda 21 in its policies.

[3] Calster van, Geert and Deketelaere, Kurt, "Amsterdam, the IGC and Greening the EU Treaty", European Environmental Law Review January 1998, p. 13-14; Esty, Daniel C., "Greening the GATT – Trade, Environment and the Future", Washington D.C. 1994, p. 61-63. See also European Journal of International Law No.2 2000, which contains several articles from a symposium on the role and limits of unilateralism in international law.

[4] A very important issue is that the Member States have to set external trade barriers to replace the national ones imposed by each Member State. The external barriers have remained unaffected by the European internal integration. See further Rauscher, Michael, "International Economic Integration and the Environment" from "The Greening of World Trade Issues", Hertfordshire 1992, p. 175 ff.

Community legislation, maintain or introduce such measures, as they deem appropriate for protecting the environment. However, when a Member State adopts such unilateral regulations, this has an impact on the Internal Market, since it may give rise to trade barriers. National regulations creating restrictions of import, export, consumption and production directly affect trade, while other regulations affect trade indirectly by having an impact on the conditions of market access or competition.[5] This means that these national measures must always be compatible with the EC Treaty.

Articles 28-30 of the Treaty of Amsterdam[6] guarantee unobstructed movement of goods between the Member States. According to Article 28 EC, national governments are prohibited from imposing quantitative import restrictions and all measures having equivalent effect on import of goods from the other Member States. Article 29 EC contains a similar prohibition concerning exports. Article 30 EC lists a number of exceptions to the prohibitions, among others the protection of the health and life of humans, animals and plants.[7]

These Treaty provisions have often given rise to disputes concerning the compatibility of national environmental law with the free movement of goods. This is despite the fact that the environment as such is not mentioned in these provisions. Since the list in Article 30 EC is exhaustive, the European Court of Justice has elaborated supplementary grounds, which justify trade barriers concerning import and export of goods, the so-called rule of reason- or Cassis de Dijon-doctrine. According to this doctrine, environmental protection can justify national trade barriers. The national authorities must prove that these grounds justify the legislation they have passed, or wish to pass.

The fundamental principles of international trade in goods are laid down in the General Agreement on Tariffs and Trade[8], the GATT, concluded in 1947. The European Union is a party to the GATT. The main purpose of the Agreement is to create a free trade area[9] and hence achieve a more liberal climate for the international exchange of goods. The GATT has frequently been used as a role model for other international trade agreements. The provisions of the EC Treaty concerning quantitative restrictions on imports and measures having equivalent effect have their origin in Article XI of the GATT prohibiting quantitative import restrictions. However, it must be

[5] Coleman, Martin, "Environmental Barriers to Trade and European Community Law", European Environmental Law Review December 1993, p. 295; Esty, p. 24.
[6] OJEC 1997 C 340/173.
[7] Articles 28-30 EC have replaced Articles 30-36 of the Treaty of Rome.
[8] General Agreement on Tariffs and Trade of 30 October 1947, TIAS No. 1700 UNTS 188.
[9] A free trade area is an area where custom tariffs and other quantitative restrictions on substantially all trade have been abolished for goods originating from the participating states. A group of states, which have established a common external customs tariff or apply common trade restrictions externally, are members of a customs union. The European Community is such a union.

remembered that this does not necessarily mean that the different provisions are applied and interpreted in the same manner.

1.1 Purpose

The main purpose of this thesis is to examine to what extent, and under what circumstances, the Member States of the European Union may introduce non-tariff trade barriers in order to reinforce domestic environmental policy preferences, in the absence of Community harmonisation. There is a broad range of situations where a Member State may seek to attain a legitimate interest. The examination in this thesis will be restricted to the most common situations where regulations of product quality restrict imports.

To get a better perspective on the European Community rules in this area, I have found it useful to compare these rules with the GATT regulation. The criteria for evaluating the legitimacy of national law under the Agreement are essentially the same as under Community law, but the international trade regime is considered to be less environmentally friendly than that of the European Union. To be able to find out why, I have compared the application of the criteria by the European Court of Justice and different GATT/WTO Panels.

1.2 Method

The list of literature on the free movement of goods within the European Union in general, and Article 28 EC in particular, is long. Environmental issues and their relationship with Article 28 appear to be less frequently studied. When writing this thesis I found articles from different law reviews very useful, the most useful being the European Environmental Law Review. The database ”Eurolaw Infobase Search” containing the case law of the European Court of Justice was also a useful source of information. The most important source of GATT law and documents is the official homepage of the World Trade Organisation, http://www.wto.org.

The most important source of information on the concrete application and interpretation of the different criteria used when evaluating national legislation is case law from the European Court of Justice and various GATT/WTO Panels. A large part of this thesis is therefore concerned with analysing this case law.

The main part of the thesis will consist of an examination of the law of the European Union. Firstly, the prohibition of quantitative restrictions and secondly, the legitimate interests which can motivate exceptions to this prohibition and the criteria that are used to evaluate these exceptions, will be dealt with. The analysis of the GATT will follow the same pattern, but here more emphasis have been laid on environmental exceptions and the

evaluating criteria, and less on the concept of quantitative restrictions. Finally, I have drawn some conclusions on how and to what extent these two trade regimes take account of the need to protect the environment and if there really are any major differences as regards the application and interpretation of the environmental exceptions.

2. The Problem

The basic problem in this area of the law is that trade affects the environment. Production and consumption patterns can promote the protection of or lead to harmful consequences for our environment. This problem is reflected in national, European Community and international legislation and policy. As protection of the environment has become a priority, there has been a rapid development of protective legislation limiting free trade. To ensure other states' compliance with environmental standards, the use of trade sanctions have been acknowledged. To adopt laws which strike the right balance between free trade and the environment is difficult, since this kind of legislation reflect deep societal values which may not be shared by other states. This may even be a problem within a relatively limited area, like the European Union.[10]

However, not only environmentalists are interested in restricting free trade. National protectionist motives may masquerade as environmental concerns. In one of the most important cases as regards environmental protection within the European Union, Denmark had put restrictions on containers for beer and soft drinks as an anti-pollution measure. The European Commission observed that the regulation was not applicable to containers for milk and wine, which were not subject to the same kind of competition between domestic and foreign producers as beer and soft drinks containers.[11]

It is thus certainly true that environmental legislation can restrict trade, but this does not necessarily mean that free trade interests conflict with those of environmental protection. Free trade may be good for the environment. It increases a state's per capita income, which is the result of increased market access and expansion of trade, and it may therefore provide more resources for protecting the environment. The higher the income of a state, the more likely it is to use its resources to protect the environment.[12]

However, it is difficult to make a clear distinction between a genuine concern for the state of the environment and "green protectionism". In the latter situation laws are adopted in disguise of environmental protection, but the real purpose of the legislation is to protect the domestic market from outside competition. It must be kept in mind that the principle of free trade always has to be balanced against this kind of protectionism when dealing with the preservation of the environment.

[10] Goldenman, Gretta, "Transboundary Transfers of Dangerous Goods" from "European Environmental Law – A Comparative Perspective", London 1996, p. 342.
[11] Case 302/86 Commission v. Denmark [1988] ECR 4607.
[12] Coleman, p. 296.

3. Article 28: Scope of Application

3.1 The Dassonville Formula

Notwithstanding the fact that the Member States of the European Union may pass laws to protect public health and/or the environment, there are several cases where the prohibition against measures having equivalent effect to quantitative import restrictions, limits this possibility. This is a most important restriction on national and Community environmental policy and legislation.[13] The main reason for this is the very wide interpretation adopted by the European Court of Justice of the Article 28 EC term "measures having equivalent effect".

In the Dassonville case[14] a "measure having equivalent effect" to a quantitative import restriction was defined as *a national measure which is capable of hindering, directly or indirectly, actually or potentially, intra-Community trade*. Since this definition is very broad, it seems fair to assume that a large number of national measures to protect the environment are covered by the prohibition in Article 28. The definition includes not only regulations which affect imports for instance import permits and tests, but also regulations that are applicable to both imported and domestic goods, including rules concerning safety, labelling and quality requirements. The same is true for a regulation which requires that certain equipment be used when manufacturing a product, since this in practice will make the use of products lawfully marketed in other Member States more difficult. These kinds of regulations are capable of hindering the free movement of goods between the Member States in the event of disparities in national legislation.[15] From the case law of the European Court of Justice it thus follows that products, which are lawfully produced and marketed in one

[13] Article 28 EC thus addresses regulations introduced by not only the Member States, but also measures taken by the Community institutions and, to a certain extent, by private persons or organisations. See Krämer, Ludvig, "Environmental Protection and Article 30 of the EEC Treaty", Common Market Law Review 1993, p. 115. However, I will focus on national legislation. For an overview on how Article 28 and the rule of reason may affect national law, see Ds 1990:76 "Romfördragets Artikel 30 – Om EG-rättens sk. Cassis de Dijon princip", p. 39-52, 55-61 and 104-106.

[14] Case 8/74 Procureur du Roi v. Benoit and Gustave Dassonville [1974] ECR 837. The approach taken by the Court of Justice in the Dassonville case is effects-based rather than intention-based. This means that the scope of free movement law is broader than it would have been if the Court had to establish a protective intent behind a challenged national measure. The latter option requires an examination of subjective, often controversial, factors, while an effects-based approach relies upon the determination of objectively justifiable factors that can be established in advance.

[15] Jans, Jan H. "European Environmental Law", 1st Edition, London 1995, p. 206; Pagh, Peter, "EU Miljöret", Copenhagen 1996, p. 161-162.

Member State, must be granted market access in the other Member States. This rule is often referred to as *the principle of mutual recognition*.[16]

In short, if one interprets the principle to mean that market access can not be denied lawfully produced and marketed goods, the Member States may not use differences in technical or quality requirements to refuse market access. This categorical definition, made by the European Commission, in practice means that market access must be granted regardless of whether any harmonisation has taken place at the Community level. As a consequence the Member States may have to adapt their legislation although there are no common rules. This may ultimately lower product standards, something that many environmentalists fear.[17]

Article 28 is applicable without distinction to goods, which have been produced in the Community and to those which have been imported to any of the Member States and thereby put into free circulation within the internal market, irrespective of their actual origin.[18]

It should be remembered that the fixing of standards for a product has nothing to do with the use of the same. In other words, the free movement of goods should clearly *be distinguished from the use of these goods*. The latter is not covered by the Dassonville formula. An example is that the authorisation of a pesticide under Directive 91/414[19] does not mean that this may be used in, for instance, water protection areas.[20] The use of goods is normally linked to general town and country planning. This has very largely been left to the Member States. They may, for instance, decide where they want to build roads, and such decisions affect the use of cars. A decision to create a nature protection habitat for fauna and flora may affect land use, agricultural practices and the use of pesticides.

It should always be kept in mind that the Community and the Member States have shared competence in the area of environmental law, the reason being that this is supposed to optimise the protection of the environment. This aim underlies several articles in the Treaty dealing with the environment.[21] The basic notion is that the environment must not remain unprotected. If the Community does not protect the environment, it must not prevent the Member States from doing so.[22]

---

[16] Case 120/78 Rewe-Zentral AG v. Bundesmonopolverwaltung für Branntwein [1979] ECR 649.
[17] Quitzow, Carl Michael, ”Fria varurörelser i den Europeiska gemenskapen – En studie av gränsdragningen mellan gemenskapsangelägenheter och nationella angelägenheter”, p. 305-307, Göteborg 1995.
[18] Case C-131/93 Commission v. Germany [1994] ECR I-3303.
[19] Council Directive 91/414 concerning the authorisation of pesticides (OJ 1991 L 230/9).
[20] Krämer, p. 114.
[21] Article 95 paragraphs 3-4; Article 174 paragraph 2; Article 176 EC.
[22] Krämer, p. 114-115.

The principle of mutual recognition, as it is expressed in the Cassis de Dijon case[23], may thus be understood as an attempt to compensate the Member States for the extensive interpretation of Article 28 and to compensate the Union for the ongoing problem of lack of harmonisation. EC law does not always adequately protect certain public interests.[24] Mutual recognition and the recognition of certain mandatory requirements which may justify exceptions to Article 28, forces the Member States to harmonise their product standards. The Cassis de Dijon case thus makes clear that protection of the environment should be a matter resolved at the Community level and not by unilateral trade measures. The principle of the open market is crucial when dealing with what may be considered as national, rather than Community, matters.[25]

3.2 The Keck Mithouard Case

Since the definition of "measures having equivalent effect" is very broad, it is also possible to use it to attack almost any national import regulation. In other words, it is easy to abuse. After the Dassonville judgement many proclaimers of free trade argued that all regulations concerning trade were at least indirectly and potentially capable of hindering the free movement of goods between the Member States. As a reaction to this, the Court of Justice made a significant distinction as to what measures must be deemed to hinder trade. In the Keck Mithouard case[26], it was decided that applying national regulations which prohibit or restrict certain *selling arrangements* to products from other Member States is not encompassed by the Dassonville formula, provided that the regulations apply to all affected traders in the Member State and provided that they, in law and in fact, affect the marketing of domestic and foreign products in the same manner.

By this judgement the Court of Justice made the scope of application for the Dassonville formula more narrow. It must however be kept in mind that Keck Mithouard concerned regulations for selling arrangements, and is not applicable when the national regulations concern conditions for market access in one Member, where a product have already been lawfully marketed in another Member State.[27] It is possible that it is necessary to make a distinction between rules concerning the distribution of goods and rules for the marketing of those goods, as their influence on market access

[23] Case 120/78 Rewe-Zentral AG v. Bundesmonopolverwaltung für Branntwein [1979] ECR 649.
[24] Quitzow, p. 300.
[25] Quitzow, p. 308-310.
[26] Joined Cases C-267/91 and C-268/91 Criminal Proceedings against Bernard Keck and Daniel Mithouard [1993] ECR I-6097.
[27] Pagh, p. 162-163. See also Case C- 412/93 Société d'Importation Edouard Leclerc-Siplec v. TFI Publicité SA and M6 Publicité SA [1995] ECR I-179 and Case C-67/97 Criminal Proceedings against Ditlev Bluhme [1998] ECR I-8033, in particular paragraph 21 of the Judgement.

may differ. Rules concerning the distribution of goods regulates for instance opening hours and prices. These rules deal with selling arrangements.[28]

National measures dealing with marketing, for instance the possibility to market a certain product, may to a greater extent affect the selling of imported goods, and therefore market access and the possibility to obtain shares of the foreign market. Such rules should hence be covered by Article 28 EC. If the Keck Mithouard case is interpreted to cover only distribution of goods, the judgement can not be regarded as a "landmark case", but is really a clarification of the Court's earlier case law concerning the limits of the Dassonville formula.[29]

In short, the most important part of the judgement is the mentioning of the principle of mutual recognition. The case shows that the principle is the fundament of the internal market. The Member States have a possibility to unilaterally regulate the distribution if goods. However, one must make clear which ways of distribution may contradict Article 28. According to Quitzow the best criterion for doing so is to consider whether a unilateral trade measure influences producers when they choose markets for their products or a purchaser's possibility to choose between domestic and imported goods. Crucial for determining the applicability of Article 28 is hence the right of economic operators to be granted market access in other Member States, not merely the interests of the Union or the Member States.[30]

If national rules satisfy the criteria in the Keck Mithouard case, there is no need to review these rules further according to the exceptions allowed by Article 30 EC or the rule of reason-doctrine. The Keck Mithouard case may have consequences for environmental law, especially for regulations concerning product policy, for instance rules whereby a pesticide could only be sold on prescription or to certain persons. Such regulations may be considered lawful without further review.[31]

3.3 The Concept of Goods

Rules concerning the free movement of goods are frequently referred to by the European Court of Justice when it is faced with having to determine the scope of Article 28 EC. However, the term "good" is not defined in the Treaty. The European Court of Justice once defined goods as products which have economic value and thus may be the object of commercial

[28] Quitzow, p. 176.
[29] Quitzow, p. 176-177.
[30] Quitzow, p. 31-33 and 179-180. It should be noted that this approach to determining the applicability of Article 28 EC is unique. However, it appears that the application of this criterion leads to a more objective determination of the applicability of Article 28, than if one was to rely entirely on the interests of the Union or the Member States.
[31] Jans, p. 207.

transactions.[32] That decision concerned antiques however, and is not really relevant as far as the environment is concerned.

The most important question concerning goods in the area of environmental law has been whether wastes fall under the notion of goods or not. This is due to the fact that waste can be considered to have negative economic value, that is the holder of the waste pays someone else to dispose of it.

In the Walloon Waste case[33] the Belgian Government claimed that waste is not to be considered a good within the meaning of Article 28. The Government stated that operations for the disposal of waste are covered by Treaty provisions relating to the free movement of services. Since waste did not have an intrinsic commercial value, it could not be sold.[34]

The Belgian argument is not totally without merit. According to one point of view, waste has a negative economic value and the disposal thereof is therefore not primarily a commercial transaction to purchase waste, but an act that is a service, namely the removal of waste. As stated above, the holder of the waste pays for somebody to take it off his hands. Although the significance of this distinction is limited in practice – the rules relating to the freedom to supply services and goods are rather similar – the Court of Justice took the other point of view, and stated that *objects which are transported over a frontier to give rise to a commercial transaction* are subject to Article 28. The nature of these transactions is irrelevant.[35]

The Court of Justice also rejected a distinction between recyclable and non-recyclable waste, since this would be difficult to apply in practice, especially with respect to border control. A distinction would be based on uncertain characteristics, which due to technical advances and the profitability of reused waste would change with time. The question of who is the payer should not be decisive either, since political, economic or social circumstances would, also in this case, lead to ever changing classifications of commercial transactions. A legal definition should not vary according to economic circumstances. All wastes should therefore be considered as goods under Article 28 of the Treaty.[36]

From this it may be concluded that the crucial criterion for whether or not a good is subject to Article 28 is whether it is capable of being the object of a commercial transaction. This is also the case for waste, despite its negative value.

The Walloon Waste case thus shows that national measures restrictive of trade are not covered by the freedom to supply services. This judgement was

[32] Case 7/68 Commission v. Italy [1968] ECR 633.
[33] Case C-2/90 Commission v. Belgium [1992] ECR I-4431
[34] Paragraph 25 of the Judgement.
[35] Paragraph 26 of the Judgement. See also Jans, p. 207-208.
[36] Paragraphs 27-28 of the Judgement. See also Krämer, p. 116.

implicitly confirmed in the Vanacker case[37], in which the rules relating to the free movement of goods were applied to a French regulation prohibiting the export of waste oils.

3.4 "Measures having Equivalent Effect" – Case Law of the European Court of Justice

There are several decisions by the European Court of Justice in which environmental legislation has been regarded as "measures having equivalent effect".

In the Improsol case[38] the Court of Justice found that a Dutch prohibition of selling, storing or using any plant protection product not authorised by national law, may affect imports from other Member States where this product is admitted. It is therefore capable of constituting a barrier to trade. Such rules are thus measures having equivalent effect.

A Danish regulation whereby manufacturers and importers were required to market beer and soft drinks only in reusable containers which had been approved by national authorities, was subject to Article 28 EC.[39] In practice the regulation meant that goods could not be marketed in non-returnable containers. Therefore it was impossible to import beer and soft drinks which had been lawfully marketed in other Member States, but which did not meet the Danish requirement. The foreign manufacturers furthermore had to establish a system for returning containers which meant that they faced high transportation costs.

In a 1990 case[40], a Dutch regulation prohibiting import and keeping of red grouse was held to violate Article 28. The regulation could not be justified in respect of a bird that does not occur naturally in the territory of the legislating Member State, but in another Member State (the United Kingdom), where it may be hunted lawfully.

In the Balsamo case[41] it was argued that a prohibition to supply customers with non-biodegradable bags for their purchases violated Article 28. However, since the national court had not submitted a question on the matter, the Court of Justice was not required to rule on this point. But since the prohibition put an almost total ban on the sale of non-biodegradable

[37] Case C-37/92 Criminal Proceedings against José Vanacker and Andrée Lesage [1993] ECR I-4947.
[38] Case 125/88 Criminal Proceedings against H.F.M. Nijman [1989] ECR 3533.
[39] Case 302/86 Commission v. Denmark [1988] ECR 4607.
[40] Case C-169/89 Criminal Proceedings against Gourmetterie van den Burg [1990] ECR I-2143.
[41] Case 380/87 Enichem Base and Others v. Comune di Cinisello Balsamo [1989] ECR 2491.

bags, it would most likely be regarded as falling within the scope of Article 28.[42]

It is clear from the Walloon Waste case[43] that a national prohibition of the disposal of foreign waste also falls under Article 28.

A Danish regulation which prohibited the keeping on an island of all species of bees, except for the local subspecies of the brown bee, was held to be a measure having equivalent effect within the meaning of Article 28. The regulation hindered the import of brown bees to a certain part of Danish territory and thus intra-Community trade.[44]

According to Swedish legislation, authorisation is required for the distribution of and insemination with semen of pure-bred breeding animals of the bovine species from another Member State. This is not contrary to Article 28, provided that the sole purpose of the requirement is to ensure that the person authorised possess the necessary qualifications for the intended operation. The purpose must not be to restrict trade.[45]

In yet another case concerning Swedish legislation, a general prohibition on industrial use of trichloroethylene[46] was scrutinised. Such a prohibition is of course likely to bring about a reduction in the volume of trichloroethylene imported to Sweden. Furthermore, although the legislation stated that individual exemptions to the prohibition may be granted, the obligation imposed on economic operators to apply for such an exemption itself meant that the Swedish measure amounted to a quantitative restriction or a measure having equivalent effect.[47]

In short, all these decisions show that national legislation concerning trade in goods which are potentially dangerous to the environment, is likely to be subject to the prohibition in Article 28.[48] This does not mean that such regulations per se are prohibited, but it does mean that they will have to be justified in the light of one of the exemptions to the Article.[49]

---

[42] Jans, p. 209-210.
[43] Case C-2/90 Commission v. Belgium [1992] ECR I-4431.
[44] Case C-67/97 Criminal Proceedings against Ditlev Bluhme [1998] ECR 8033. However, the prohibition was justified as a measure to protect the life and health of animals under Article 30 EC, since the survival of this particular subspecies of the brown bee was threatened in the event of mating with other species.
[45] Case C-162/97 Criminal Proceedings against Gunnar Nilsson and Others [1998] ECR I-7477.
[46] Trichloroethylene has been labelled as a carcinogen, and thus constitutes a threat to human health.
[47] Case C-473/98 Kemikalieinspektionen v. Toolex Alpha, judgement of the 11 July 2000.
[48] Jans, p. 210
[49] It should be noted that Article 28 EC does not prohibit discrimination of domestic products from the legislating Member State. Only if a product typically contains parts imported from other Member States, is the regulation in violation of Article 28. See Pagh, p. 162-163.

4. Article 30 and the Rule of Reason: Scope of Application

4.1 Article 30 – General Remarks

The mere fact that national environmental legislation falls under the prohibition in Article 28 EC, does not necessarily mean that the entire piece of legislation must be put aside as incompatible with Community law. Article 30 EC justifies certain restrictions of trade if they are *necessary to protect the health and life of humans, animals or plants, provided that they do not constitute a means of arbitrary discrimination or a disguised restriction of trade* within the European Union. Thus the first part of the Article states certain non-economic purposes to justify exceptions, while the second part emphasises that there are limits to applying Article 30.[50]

The Member State, which has adopted the trade restrictive regulation, must prove that Article 30 is applicable, that is that the criteria for its application have been met. The Court of Justice has held that Community law does not permit national rules where market access is subject to proof by the importer that a certain product does not present a health threat.[51]

It should be emphasised that the burden of proof must be seen in connection with the precautionary principle in Article 174 paragraph 2 EC. To do so means that it is not necessary in every case to have unambiguous scientific proof that the product or substance in question is harmful. It is permissible to have protective measures provided that there is a strong suspicion that the product or substance is a health threat.[52]

The non-economic purposes listed in Article 30 can justify exceptions to the principle of free trade, but they do not belong to the areas where the Member States have exclusive powers to legislate. The European Court of Justice has clearly stated that once harmonisation of these areas of the law take place, it is no longer possible for the Member States to invoke Article 30. Exceptions to Community rules will then be granted according to the rules in the harmonising piece of legislation.[53]

[50] Pagh, p. 165.
[51] Case 174/82 Officier van Justitie v. Sandoz BV [1983] ECR 2445.
[52] Jans, p. 213. See also Case C-473/98 Kemikalieinspektionen v. Toolex Alpha, judgement of the 11 July 2000.
[53] Case 148/78 Pubblico Ministero v. Tullio Ratti [1979] ECR 1629.

4.2 Environmental Protection as a Mandatory Requirement – General Remarks

Because of the wide interpretation of "measures having equivalent effect" in the Dassonville case[54] and the limited scope of Article 30 EC, it has been necessary for the European Court of Justice to solve the problem of the lawfulness of national regulations that from one perspective appears legitimate, but from another falls under the prohibition on measures having equivalent effect to import restrictions as interpreted in Dassonville.[55]

To solve this problem, the Court of Justice has provided ways to justify certain trade restrictions that are not encompassed by the list in Article 30. The Cassis the Dijon judgement[56] and subsequent decisions, show that *in the absence of harmonisation, obstacles to the free movement of goods resulting from disparities between the national laws must be accepted in so far as such rules, where they are applicable to imported and domestic products without distinction*[57]*, may be recognised as being necessary to satisfy mandatory requirements recognised by Community law*.[58] This statement by the Court of Justice expresses the so-called rule of reason exception. In the Cassis de Dijon case, the Court referred to effective tax control, protection of public health, fairness of commercial transactions, and defence of consumers as such requirements. The reasoning in the case implies that the list of justifiable interests is not exhaustive.

Protection of the environment was added to this list in the Danish Bottles judgement.[59] The Court of Justice held that protection of the environment is one of the essential objectives of the Community and it may as such justify certain limitations on the principle of the free movement of goods. The protection of the environment is a mandatory requirement which may limit the application of Article 28 EC.[60]

When considered in the light of the earlier case law of the Court of Justice, the decision was no surprise. The Court used remarkably few words to establish that protection of the environment justifies import regulations. The statement was later confirmed in the Walloon Waste case.[61]

To merely state that protection of the environment may justify restrictions on trade, does not solve all problems of interpretation. In the Walloon Waste case, the question came up whether a Member State may block the import of

[54] Case 8/74 Procureur du Roi v. Benvoit and Gustave Dassonville [1974] ECR 837.
[55] Pagh, p. 174.
[56] Case 120/78 Rewe Zentral AG v. Bundesmonmopolverwaltung für Branntwein [1979] ECR 649.
[57] The non-discrimination requirement encompasses both direct and indirect discrimination.
[58] Paragraph 8 of the Judgement.
[59] Case 302/86 Commission v. Denmark [1988] ECR 4607.
[60] Paragraph 8 and 9 of the Judgement.
[61] Case C-2/90 Commission v. Belgium [1992] ECR I-4431.

waste simply because it comes from abroad, in light of the proximity and self-sufficiency principles. The Court of Justice uses the reference to self-sufficiency *only* when answering the question of whether the regulation is discriminatory.[62] It does not apply the principle to justify the protective regulation. The regulation was justified since the risks of environmental harm arose from a combination of a limited national waste disposal capacity and a very large influx of foreign waste.[63]

It is thus clear that the Court of Justice considers the list in Article 30 to be exhaustive and not capable of being enlarged. The interests mentioned in Cassis de Dijon are "separate" from the ones in Article 30. However, in practice the rule of reason doctrine has the effect of adding several more interests to this list in Article 30, although the conditions for applying the doctrine are not the same. The approach taken by the Court of Justice makes a differentiation between regulations to protect health and life and other environmental rules almost superfluous.

4.3 Protection of Health and Life or of the Environment

When comparing the wording of Article 30 EC with the environmental policy objectives of the European Union as defined in Article 174 paragraph 1 EC[64], it is not farfetched to assume that protection of the environment falls under Article 30. Protection of the environment is mentioned in both articles and protection of animals and plants could be in included in what many would like to refer to as protection of the environment. However, this is not the case.[65]

According to the case law of the European Court of Justice, national law restricting imports to protect the living environment will not be justified under Article 30 without there being *a threat to health or life*. Since Article 30 EC is an exception to a fundamental provision of the Treaty, it must be interpreted narrowly.[66]

The Court of Justice has ruled that a national regulation adopted only for the sake of protecting the environment does not fall under Article 30.[67] Another example of a narrow interpretation is the Court of Justice's decision in the

[62] Paragraph 34 and 35 of the Judgement.
[63] Paragraphs 29-32 of the Judgement. See also Jans, p. 227.
[64] Article 174 paragraph 1 reads as follows: " Community policy on the environment shall contribute to the pursuit of the following objectives: preserving and protecting the environment; protecting human health; prudent and rational utilisation of natural resources; promoting measures at international level to deal with regional or worldwide environmental problems."
[65] Pagh, p. 166.
[66] Case 46/76 W.J.G. Bauhuis v. Netherlands State [1977] ECR 5. See also Jans, p. 213.
[67] Case 172/82 Syndicat National des Fabricants Raffineurs d'Huile de Graissage and Others v. Groupment d'Interêt Economique "Interhuiles" and Others [1983] ECR 555.

Walloon Waste case[68], where import prohibitions of non-harmful wastes, which do not directly threaten health or life can not be justified under Article 30. Because of the special characteristics of waste, it becomes a threat to the environment even before it becomes a health hazard.

It appears that the Court of Justice makes a distinction between the exception for environmental protection under the rule of reason and protection of health under Article 30. While it is thus possible that measures taken to protect the environment may also protect human health, it is clear that many regulations adopted to protect the environment can not be seen as protecting the health and life of humans, animals or plants. Such regulations are, for instance, environmental taxes, eco-labelling, waste prevention measures, environmental impact assessments and environmental liability regulations. Even measures to reduce pollution of water, air and soil or to reduce the noise level of cars, will only fall under Article 30 if its interpreted very widely. This would contradict the above mentioned interpretation rule of the Court of Justice.[69] Considering the approach taken, it must be doubted whether measures not addressing a direct health threat is covered by Article 30.[70]

Nevertheless, in principle it would have been possible to adopt a wider interpretation of Article 30. It is difficult to make a clear distinction between what constitutes protection of the environment and protection of health and life according to Article 30. Perhaps it is therefore possible to protect the environment by invoking Article 30 in an indirect manner. When a state imports waste there will be demonstrable health consequences, even if the waste is not toxic or dangerous. From a longer perspective this is certainly the case, especially if the state has a limited capacity for receiving or disposing of the waste. Perhaps a somewhat wider interpretation would have been appropriate from this perspective. Furthermore, in a case concerning Dutch regulations on how to remove waste from butcher shops, the Dutch Government invoked Article 30 claiming that the purpose of the regulations was to protect both human health *and* the environment. Nowhere in the judgement does the Court of Justice say that this would automatically render Article 30 inapplicable.[71] From this perspective one could argue that certain environmental interests fall within the scope of Article 30.[72]

[68] Case C-2/90 Commission v. Belgium [1992] ECR I-4431.
[69] Krämer, p. 118.
[70] Jans, p. 213.
[71] Case 118/86 Openbaar Ministerie v. Nertvoedersfabriek Nederland BV [1987] ECR 3883. It should be noted however that the Dutch regulations resulted in an indirect prohibition, which was not considered to be necessary to attain the pursued objective. The regulations were rejected according to the proportionality principle. See also cases Case 125/88 Criminal Proceedings against H.F.M. Nijman [1989] ECR 3533 and Case 94/83 Criminal Proceedings against Albert Heijn BV[1984] ECR 3263.
[72] Jans, p. 213-214.

Another example, which demonstrates that the limit between protection of the environment and health and life is unclear, is the Red Grouse case[73] where a Dutch prohibition against import of the wild bird species red grouse was examined in the light of Article 30, since it was adopted to protect life and health of animals. In yet another case, the Court of Justice decided that national legislation concerning plant protection products with the purpose to protect both the environment and the health of humans and animals is to be reviewed according to Article 30.[74]

To conclude, in order to determine whether a regulation aims at protection of health or life or of the environment, one must look at the *direct effect of the measure*. If a regulation directly affects the protection of humans, fauna or flora, it may be justified under Article 30. Where this is not the case, its main objective is to protect the environment. To prohibit the marketing of earrings containing nickel aims at preventing human allergy, and thus to protect human health. To restrict the use of chemicals that may damage the ozone layer aims at protection of the environment. Although many of these chemicals can cause cancer and constitute a threat to human life, this is an indirect risk and the measure remains mainly environmental.[75]

The distinction between Article 30 EC and the rule of reason-doctrine[76] is important, since the conditions for applying Article 30 are not the same as those of the rule of reason. Protection of the health and life of humans, animals and plants is not the same as protection of the environment. Environmental protection is a much more comprehensive concept. The deposit and return system in the Danish Bottles case would probably not have been justified under Article 30. The interests at stake in the case were among others the prevention of waste, conservation of energy and promotion of reuse, interests which are less easily encompassed by Article 30. The material scope of the rule of reason is wider and thus offers the Member States more room when adopting protective measures.[77]

However, it must be remembered that when applying the rule of reason, the contested rule must be applicable without distinction to imported and domestic products. This strict requirement, which is not mentioned in Article 30, is the most important distinction in the scope of application between the two rules. In this aspect the rule of reason is narrower in its material scope than Article 30. It must also be kept in mind that when

[73] Case C-169/89 Criminal Proceedings against Gourmetterie van den Burg [1990] ECR I-2143. See also Pagh, p. 168.
[74] Case 272/80 Criminal Proceedings against Frans-Nederlandse Maatschappij voor Biologische Producten BV [1981] ECR 3277.
[75] Krämer, p. 118.
[76] Case 120/78 Rewe Zentral AG v. Bundesmonmopolverwaltung für Branntwein [1979] ECR 649; Case 302/86 Commission v. Denmark [1988] ECR 4607.
[77] Jans, p. 228.

applying the rule of reason the Court of Justice deals with national rules and not specifically trade restrictions.[78]

[78] Quitzow, p. 301.

5. Criteria for Applying Article 30 and the Rule of Reason

5.1 The Presence of a Real Danger to a Protected Interest

It may be implied from the case law of the European Court of Justice, that the first criterion for applying Article 30 EC and the rule of reason is that there must be *a real danger threatening a protected interest*, that is public health or life or the environment.

In one case[79], a Dutch plant protection manufacturer was fined for an offence under Dutch legislation, which prohibits the sale, storage or use as a plant protection product of any product not approved by that law. The company in question had imported, sold or supplied a plant protection product called Fumicot Fumispore in the Netherlands. The product had been lawfully marketed in France, but not yet approved in the Netherlands. The Court of Justice decided that, in the absence of harmonisation rules relating to plant protection products, each Member State was entitled to decide what degree of protection of health and life of humans it wanted and, in particular, how strict the checks to be carried out should be, always bearing in mind that this freedom of action is restricted by the fundamental provisions of the Treaty. The Dutch rules were intended to protect public health and fell under Article 30.[80]

From this it is possible to conclude that protective legislation is justified when things like hazardous substances, products and waste might constitute an actual health risk for humans, animals or plants or a real danger to the environment. It should be noted that, in principle, all species of animals and plants are protected and not only threatened species.[81]

5.2 Causal Connection and the Requirement of Necessity

An adopted or proposed national measure must be capable of protecting a justifiable interest and of averting danger to health or life or to protect the environment. Together with the requirement of proportionality, which will be discussed in Section 5.3, this involves testing the necessity of a measure.

[79] Case 272/80 Criminal Proceedings against Frans-Nederlandse Maatschappij voor Biologische Producten [1981] ECR 3277.
[80] This decision was later confirmed in Case 125/88 Criminal Proceedings against H.F.M. Nijman [1989] ECR 3533.
[81] Jans, p. 215.

To be necessary national legislation must be *able to reach the desired result*. Necessity thus speaks to cause and effect.[82]

It is not clear how strict the European Court of Justice is in this respect, that is whether it requires only some positive effect on the interest or if more is required. In the Red Grouse case[83], Advocate General Van Gerven discussed whether a Dutch regulation banning import of the red grouse would actually have a positive effect on the protection of these birds outside the Netherlands.[84] He concluded that there was an actual possibility that the Dutch prohibition may reduce the demand for dead grouses from the United Kingdom, and thus have a positive influence on the population of birds there. There may to some extent be a casual connection between the import ban and the objective pursued. In Van Gerven's view this was enough to make the prohibition acceptable.

In a recent case[85], a Swedish ban on the industrial use of trichloroethylene was held to be justified as being necessary and appropriate to protect human health and life. The Court took account of recent medical research showing that the substance has carcinogenic effect on humans and emphasised the difficulty in establishing the threshold above which trichloroethylene poses a serious risk to human life. The ban was considered proportionate in that it, whilst protecting the workers, also took account of the undertaking's requirements in establishing a system of individual exemptions to the ban. A total ban which does not leave room for individual exceptions would most likely not have been considered necessary or proportionate.

In the Danish Bottles case[86] the Court of Justice had to assess whether the Danish legislation was to be regarded as necessary. To determine this, the connection between the deposit and return system and achievement of the pursued environmental goals was examined. According to the Court, the system was an indispensable element of a system intended to ensure reuse of containers and thus necessary to achieve the pursued goals.[87]

However, the casual connection is not always explicitly examined. In most cases it is so obvious that it does not present a problem. Therefore it is unusual that it needs to be examined in this thorough manner.[88]

---

[82] Jans, p. 215.
[83] Case C-169/89 Criminal Proceedings against Gourmetterie van den Burg [1990] ECR I-2143 See also Jans, p. 216.
[84] Opinion of Mr Advocate General Van Gerven delivered on 20 March 1990.
[85] Case C-473/98 Kemikalieinspektionen v. Alpha Toolex, judgement of 11July 2000.
[86] Case 302/86 Commission v. Denmark [1988] ECR 4607.
[87] Paragraph 13 of the Judgement.
[88] Jans, p. 216.

5.3 The Proportionality Principle

As stated above, the fact that one of the non-economic purposes mentioned has led to the adoption of protective legislation does not mean that the Member States are free to legislate as they please. The principle of proportionality must be respected. In short the proportionality principle means that a national regulation must restrict trade as little as possible, that is there must be no measures that are less restrictive, but adequate, available. The restriction must not go beyond the inevitable restrictions that are justified by the pursuit of environmental protection.[89]

The proportionality principle in fact consists of three premises. A national measure is proportionate when it *pursues a legitimate political objective,* when the measure is *necessary to achieve this objective* and when there is *no alternative measure that is less restrictive* available.[90]

The proportionality principle is applied when reviewing a national regulation under Article 30 and the rule of reason. Despite many judgements on Article 28 EC, the details of the principle remains open, in particular as regards environmental questions, since very few environmental cases have ever been decided by the European Court of Justice in this respect. It should however be observed that the Court of Justice has a tendency to interpret the proportionality principle more restrictively under the rule of reason doctrine than under Article 30.[91]

Since the application of this principle is dependent on the concrete case at hand, it must be done on a case-by-case basis. Therefore the reasoning of the Court of Justice differs with the kind of protective legislation challenged in the case. The application appears to vary with the protected interest.[92]

5.3.1 Plant Protection Products

In cases relating to the regulation of plant production products, the European Court of Justice seems to be rather lenient when reviewing national rules in the light of the proportionality principle.[93]

In one case, bulbs imported to France from the Netherlands had been treated with a plant protection product that was forbidden in France. The French import prohibition was justified under Article 30. However, if the considerations underlying the prohibition should change due to new scientific research or other circumstances, so that the prohibition no longer

[89] Case 240/83 Procureur del la Republique v. Association Defense des Brûleurs d'Huiles Usagées [1985] ECR 531.
[90] Krämer, p. 120-121.
[91] Pagh, p. 176.
[92] Pagh, p. 169.
[93] Pagh, p. 170.

was justified, the national authorities were under an obligation to reconsider the matter.[94]

However, it would not be possible for a Member State to introduce an authorisation system, which in practice means that only persons who live in that Member State is permitted to sell plant protection products. This would clearly violate the proportionality principle. Thus even though the Member States, in the absence of harmonisation, may adopt regulations requiring pesticides to be approved before being granted market access, such approval may not require unnecessary chemical tests or analyses where such have already been carried out in other Member States and the results are available upon request.[95]

5.3.2 Additives in Foodstuffs

The European Court of Justice seems to be stricter when applying the proportionality principle to regulations concerning approval and labelling of additives in foodstuffs. One example of this is the Cassis de Dijon case[96], where German regulations concerning labelling of French liqueur, failed to pass the proportionality test.

In another case, an importer was charged with adding vitamins to mineral water without permission from the authorities. The Court of Justice accepted the permit system as such, but found that a regulation requiring the importer to prove that the additives he uses does not present a threat to human health violates the proportionality principle. It is for the Member State to prove that the additives present a health hazard.[97]

In 1999 the Court dealt with a similar situation.[98] A Swedish importer was charged with adding a non-permitted colouring substance to candy. However, in this case a Community directive[99] permitted this kind of use of the substance. The Directive was to be implemented by 31 December 1995, but the Swedish Government had failed to do so. According to Article 95.4 EC a Member State may maintain a national regulation which is contrary to a directive, if this is necessary to protect human health and life, presupposing that the European Commission has been informed of and has approved the regulation. Before confirming the appropriateness of the measure, the Commission shall make sure that it is not a means of arbitrary

[94] Case 54/85 Ministére public v. Xavier Mirepoix [1986] ECR 1067. See also Case 94/83 Criminal Proceedings against Albert Heijn [1984] ECR 3263.
[95] Case 272/80 Criminal Proceedings against Frans-Nederlandse Maatschappij voor Biologische Producten BV [1981] ECR 3277. See also Pagh, p. 170.
[96] Case 120/78 Rewe Zentral AG v. Bundesmonmopolverwaltung für Branntwein [1979] ECR 649.
[97] Case 174/82 Officier van Justitie v. Sandoz BV [1983] ECR 2445.
[98] Case C-319/97, judgement of the 1 June 1999.
[99] Council Directive 94/36/EC of 30 June 1994 concerning certain colouring substances as additives in foodstuffs (OJ 1994 L 237/13).

discrimination or constitutes a disguised restriction of trade. Article 95 thus resembles Article 30 EC. The Swedish Government had notified the Commission of the measure. However, the Commission failed to react. The importer claimed that since the time for implementing the Directive had expired and Sweden had not done so, the Directive had direct effect. Therefore, as a result of fundamental criminal law principles, the charges against him should be dropped. The Court stated that even though Article 95 gives the Member States a right to deviate from the rules of a directive, this does not hinder the direct effect of the same. The fact that a Member State notifies the Commission of such a rule in order to get it confirmed does not change that, not even when the Commission does not react to the notification. As a reaction to this judgement, Article 95 now states that the Commission must respond to a notification within six months. When confirming that a trade restrictive measure is appropriate, the Commission should apply the criteria dealt with in this thesis in accordance with the case law of the Court.

5.3.3 Protection of Animals

Another example of a very strict interpretation of the proportionality principle is the so-called Crayfish case[100], where a German law concerning protection of nature was reviewed in the light of this principle. Imported North American crayfish and water pollution has lead to the near extinction of native German crayfish. Therefore, according to this law, the import of live crayfish for commercial purposes is in principle prohibited. On application, it is however possible to derogate from this prohibition if applying the law would lead to excessive hardship or if the import is made for scientific or teaching purposes.

The German Government claimed that the prohibition was needed to protect native species of crayfish against disease and faunal distortion. The European Commission argued that this objective could be achieved by less trade restrictive measures. Germany could, for instance, have made crayfish imported from other Member States subject to health checks, and only carry out checks by sample if a health certificate issued by competent authorities in the exporting Member State accompanied a shipment.

The European Court of Justice found that the German regulation fell under Article 30 EC. It however agreed with the Commission and decided that Germany had failed to show that measures, which involved fewer restrictions on intra-Community trade, were incapable of protecting the native crayfish.

According to Jans two general conclusions can be drawn from this decision. Firstly, if a Member State totally bans imports of goods, which are harmful to the environment or present a health risk, this prohibition will not easily

[100] Case C-131/93 Commission v. Germany [1994] ECR I-3303.

pass the proportionality test. Secondly, the Court of Justice puts the burden of proof on the Member States. They must show in a convincing manner, that any less stringent alternatives the Commission may have suggested can not adequately protect the environment or health interest in an equally effective manner.[101]

5.3.4 The Danish Bottles Case

In the Danish Bottles judgement, the European Court of Justice very closely examined the application of the proportionality principle in relation to environmental restrictions on trade. The reasoning therefore warrants consideration in some detail.

5.3.4.1 The Facts of the Case

The dispute concerned Danish legislation[102] that firstly introduced a compulsory deposit and return system for containers for beer and soft drinks. Secondly, it introduced a scheme whereby the containers and the ancillary deposit and return system had to be approved by the National Agency for the Protection of the Environment. The Agency could refuse approval if, in particular, the container in question was not technically suitable, the return scheme did not ensure a sufficiently high rate of reuse or if an approved container which was of equal capacity was already available. [103] The purpose of the approval requirement was to enable any type of authorised container to be returned to any shop selling beer and soft drinks. This would achieve the highest rate of return possible. The Danish authorities argued that in order for such a comprehensive system to be workable, the maximum number of containers and return schemes that could be approved at one time had to be limited to around thirty.[104]

Following objections to the legislation by the European Commission, Denmark derogated from the second requirement[105] and permitted sale of a limited quantity of drink in non-approved non-metal containers. Sales to test the market were also permitted. Deposit and return systems had to be set up for each non-approved container, with the deposit being no less than that generally charged under approved systems. In fact containers could only be returned to the shop where they had been purchased, or another shop also selling this container, the result being that fewer containers were likely to be returned than under the approved schemes.[106]

---

[101] Jans, p. 218.
[102] Order No 397 of 2 July 1981.
[103] Paragraph 2 of the Judgement.
[104] Paragraph 15 of the Judgement.
[105] Order No 95 of 16 March 1984.
[106] Paragraph 3 and 15 of the Judgement.

5.3.4.2 The Reasoning

After stating that environmental protection is a mandatory requirement that may justify an exception from the principle of the free movement of goods and that there was no harmonising legislation concerning this area of the law[107], the European Court of Justice dealt with the proportionality principle. The Court of Justice observed that trade regulations must be proportionate to the aim they pursue. If a Member State can choose between various measures to achieve the same aim, it should choose the one which least restricts free movement of goods.[108] The Court further referred to the ADBHU case[109], in which it was decided that national measures to protect the environment must not go beyond the inevitable restrictions that are necessary and thus justified when pursuing the aim of environmental protection.[110]

In the light of these considerations the Court of Justice then reviewed the compatibility of the Danish mandatory system with this principle. An obligation to establish a deposit and return system is an indispensable element of a system intended to ensure the reuse of containers. It therefore appeared necessary to the aim pursued. This restriction on the free movement of goods was not disproportionate.[111] The reasoning implies that the casual connection was examined at the same time as the proportionality of the regulation.[112]

As regards the requirement that producers and importers must use containers approved by the National Agency, the judgement was less favourable for the Danish Government. The system for returning approved containers ensured a maximum rate of reuse and thus a very considerable degree of protection[113] for the environment, since these containers could be returned to any retailer selling beverages. Non-approved containers could only be returned to the retailer who had sold them, since it was impossible to have a similar system for them.

The Court of Justice nevertheless considered the system for returning non-approved containers to be capable of protecting the environment. As far as

---

[107] It should be noted that Directive 85/ 339 on containers for liquid foodstuffs (OJ 1985 L 176/118) could not be invoked before the Court of Justice, since it did not totally harmonise this area of the law. This Directive was replaced in 1994 by directive 94/62 regulating packaging and packaging waste (OJ 1994 L 365/10).

[108] Paragraph 6 of the Judgement.

[109] Case 240/83 Procureur de la République v. Association de Défense des Brûleurs d'Huiles Usagées [1985] ECR 531.

[110] Paragraph 11 of the Judgement.

[111] Paragraph 13 of the Judgement.

[112] Jans, p. 217.

[113] It is not clear whether the Member States may, in the absence of Community legislation, choose the degree of environmental protection that they consider necessary. The judgement indicates that only a "reasonable" degree of protection is permitted. For an extensive review of this problem, see Krämer, p. 122-135.

imports were concerned, this system only affected limited quantities of beverages compared with the quantity consumed in Denmark due to the restrictive effect, which the requirement of returnable containers had on imports. Therefore the Danish legislation was disproportionate to the aim it pursued.[114]

5.3.4.3 The Walloon Waste Case

It is possible that the Court of Justice may consider the environmental mischief addressed by a trade restriction in a future case. Today such a consideration would be in the light of Article 95 paragraph 4 EC, which requires environmental legislation by the Community to take a high level of environmental protection as a base when harmonising.[115]

In the Walloon Waste case[116], discussed further below, the test of proportionality was unfortunately not discussed in detail by either the Advocate General or the Court of Justice. The Commission accepted that the Belgian import ban was necessary to protect the environment, since Wallonia's capacity to deal with a sudden influx of imported waste was limited.[117] Unlike in the Danish Bottles case, the Commission did not suggest any alternative, less restrictive measures. The Court of Justice merely stated that protection of the environment was an imperative requirement and justified the contested measure.[118]

5.3.5 What has to be Proportionate?

Another problem regarding the proportionality principle concerns the question of what exactly has to be proportionate. The problem becomes clear when considered against the reasoning of the European Court of Justice in the Danish Bottles case[119]. The arguments put forward by the European Commission and the Advocate General are interesting and relevant in this aspect.

The Commission argued that an application of the proportionality principle means that the level of environmental protection should not be extremely high. Other solutions should be accepted, even if they are less effective when pursuing a certain aim. Not all national measures to protect the environment are prima facie justified. The Member States are under an obligation to always consider whether the same result can be achieved by alternative means. The Commission stated that there must be a point, where protective rules no longer can be regarded as fulfilling one of the essential

[114] Paragraphs 20-21 of the Judgement.
[115] Coleman, p. 297.
[116] Case C-2/90 Commission v. Belgium [1992] ECR I-4431.
[117] Paragraph 31 of the Judgement.
[118] Paragraph 32 of the Judgement.
[119] Case 302/86 Commission v. Denmark [1988] ECR 4607.

objectives of the Community. *A balance between protecting the environment and the free movement of goods between the Member States must be struck.*

Advocate General Slynn also argued that a *balancing of interests* between the free movement of goods and protection of the environment is required. This is the case even if it means that a high level of protection must be lowered. The level of protection should be reasonable.[120]

In the Red Grouse case[121] Advocate General Van Gerven expressed a similar point of view.[122] He argued that two tests of proportionality should be carried out. The first was referred to as the criterion of the least restrictive alternative. Review according to this criterion together with an examination of the casual connection between a national regulation and the aim it pursues, is the requirement of necessity. But in addition, another proportionality test is required. Even if a measure has a casual connection with the pursued objective and there are no less restrictive alternatives visible, it must be subject to a second test where it is reviewed in light of the proportionality between the trade restriction and the aim it pursues. As a result, the Member State may be obliged to stop applying the regulation or instead introduce a less restrictive one, if the restrictive effect of the first regulation is disproportionate to the objective pursued. In other words, a protective legislation pursuing a justified objective, may lose its lawfulness if its contribution to the protective aim is too little compared to its restrictive effect on free movement of goods, even if there are no less restrictive means available. The principle of proportionality thus implies a *balancing*, where the interests mentioned in Article 28 EC and the rule of reason-doctrine should be weighed against the free movement of goods.

To support his view Van Gerven invoked the Court of Justice's reasoning in the Danish Bottles case. The reasoning relating to the requirement that only approved containers are permitted, seem to support his view. The Court did observe that the Danish system did ensure a considerable degree of protection for the environment. However, it also stated that a system for returning non-approved containers also was capable of protecting the environment. This system was less restrictive and therefore the other system was held to be disproportionate to the aim pursued.[123]

It is however also possible to argue that the Court of Justice's reasoning does not as such support Van Gerven's view. It is evident that the Danish import regulation was substantial, but nowhere in the judgement does the Court set off the level of protection against its effect on free trade. There is no questioning of the level of environmental protection the Danish

[120] Opinion of Advocate General Sir Gordon Slynn delivered on 24 May 1988.
[121] Case C-169/89 Criminal Proceedings against Gourmetterie van den Burg [1990] ECR I-2143.
[122] Opinion of Mr Advocate General Van Gerven delivered on 20 March 1990.
[123] Paragraphs 20-21 of the Judgment.

regulation intends to pursue. When reviewing the requirement of approved containers, the Court seems to be using a different criterion than the least restrictive alternative. It can be argued that by doing so, the Court is creating unnecessary confusion about the meaning of the proportionality principle in this area of Community law.[124]

This confusion goes back to the Court of Justice's judgement in the ADBHU case[125]. There the Court stated that the principle of free trade is not absolute, but subject to certain restrictions that are justified by the objectives of general interest pursued by the Community, provided that this principle is not substantively impaired.[126] The chosen wording seems to indicate that environmental protection is of secondary importance. The principle of free movement of goods is fundamental for the internal market and must be upheld, even if this means invalidating measures to protect the environment. When viewed from this perspective, Slynn's and Van Gerven's views are in accordance with that of the Court.[127]

It should however be noted, that in the same judgement the Court of Justice stated that the measures did not hinder the free movement of goods and that if they nevertheless were restrictive, they should not be discriminatory or go beyond the inevitable restrictions, which are justified when protecting the environment.[128] This corresponds more with the view that the proportionality principle should be used when choosing the kind of national regulations that are allowed, not when weighing the importance of environmental protection against that of the free movement of goods.[129]

According to Jans much can be said for applying the proportionality principle in the form of the least restrictive alternative. To support his view he refers to statements by the Court of Justice, where it is said that in the absence of harmonised rules for the protection of health or the environment, the Member States may decide the level of protection they consider appropriate.[130]

However, this does not mean that all kinds of trading regulations may be adopted in disguise of environmental protection. In every case, the Court of Justice must consider whether there is an environmental interest worth protecting and thus justifies a trade regulation. When doing so, the level of protection the regulation pursues may be an important factor. Whether an environmental interest is worth protecting and at what level, should be dealt

---

[124] Jans, p. 220.
[125] Case 240/83 Procureur de la République v. Association de Défense des Brûleurs d'Huiles Usagées [1985] ECR 531.
[126] Paragraph 12 of the Judgement.
[127] Jans, p. 220-221.
[128] Paragraph 15 of the Judgement.
[129] Jans, p. 221.
[130] Case C-131/93 Commission v. Germany [1994] ECR I-3303, paragraph 16 of the Judgement and Case 272/80 Criminal Proceedings against Frans-Nederlandse Maatschappij voor Biologische Producten BV [1981] ECR 3277, paragraph 12 of the Judgement.

with on its own and not be dependent on its impact on the free movement of goods. At the same time the Court should require a certain casual connection between the national regulation and the environmental aim it pursues. This is especially appropriate when national measures only have indirect positive effects on the environment. But, in short, where an environmental interest really is worth protecting and the national regulation is capable of providing that, it should not be possible to question the lawfulness of the regulation simply because it restricts trade between the Member States.[131]

5.3.6 Diagonal Application of the Proportionality Principle

Another problem which has not been discussed by the European Court of Justice when interpreting the proportionality principle, is to what extent the principle should be applied in a "diagonal" manner, that is across Treaty provisions. When the Member States introduce trade restrictive regulations to pursue a justified interest, they are under an obligation to choose the least restrictive alternative. This means that a system of permits should be preferred to a total ban and an obligation of notification to permit systems. However, these examples concern alternative measures, which have been applied in the context of one particular or a group of Treaty provisions. When applying the principle of diagonal proportionality, no less restrictive regulations may exist, not only when applying Articles 28-30 EC, but also according to other Treaty provisions, for instance Article 86 or Articles 83-84 EC.

A non-tariff regulation may be in conflict with the proportionality principle even where there are no less restrictive ones, but there is a less restrictive *tariff* instrument. Diagonal proportionality thus presupposes that the national authorities examine a wide range of alternatives each time they intend to adopt or use a restrictive regulation. The case law of the Court of Justice is not clear in this particular aspect, and it is thus uncertain whether and to what extent the proportionality principle is to be applied in this manner.[132]

5.4 Non-economic Purposes

According to the case law of the European Court of Justice, Article 30 EC and the rule of reason doctrine may only be used for non-economic purposes. This is not likely to produce any problems when applying these rules to national environmental policy, since most national legislation really is adopted to protect public health and life and/or the environment. It should nevertheless be noted that in some cases, a certain regulation, with the primary aim of protecting for instance health, would also aim to achieve an

[131] Jans, p. 221.
[132] Jans, p. 222.

economic objective. As such this is not a problem, but Member States should be cautious in these cases.[133]

5.5 Arbitrary Discrimination or Disguised Restriction of Trade

The second sentence of Article 30 EC states that national trade regulations may not constitute a means of arbitrary discrimination or a disguised restriction on trade between the Member States. The European Court of Justice has not systematically discussed what constitutes such an arbitrary discrimination or a disguised restriction. If one takes into consideration the necessity and proportionality requirements, it is perhaps questionable whether the second sentence really adds something beyond these requirements.[134]

The wording of the second sentence indicates that it is possible for domestic and foreign goods to be treated in different ways, at least in principle. This means that Article 30 differs from the rule of reason exceptions. Article 30 states that *arbitrary discrimination* of domestic and foreign goods is prohibited. This would mean that any kind of difference must be based on objectively justifiable grounds. If a Member State restricts import of a certain substance by adopting a system of import permits, this would constitute arbitrary discrimination if domestic production and marketing of this substance were not subject to the same permit requirement. Any measure applying to foreign goods must also apply to domestic ones.[135]

If trading regulations have a restrictive effect, which is not limited to what is necessary to protect the pursued interest, there may be a *disguised restriction* on trade. Evidently, there is not a sharp dividing line between this requirement and those of necessity and proportionality. In the Fumicot case[136] the Court of Justice discussed the meaning of the term disguised restriction. The Court stated that a Member State is entitled to require that a dangerous product, which has already been lawfully marketed in another Member State, have to undergo a new approval procedure. However, the national authorities are required to co-operate to relax the existing controls of trade between the Member States. Therefore, these authorities are not allowed to require unnecessary technical or chemical analyses or tests, where such have already been carried out in another Member State and the

[133] Case 118/86 Openbaar Ministerie v. Nertsvoederfabriek Nederland BV [1987] ECR 3883. See also Jans, p. 222.

[134] The concept of discrimination and what it encompasses is rather unclear. An extensive review of the term can be found in Craig P. and de Burca G., "EU Law – Text, Cases and Materials", 2nd Edition, Oxford 1998, p. 585-620.

[135] Scott, Jane, "EC Environmental Law", Harlow 1998, p. 68-69.

[136] Case 272/80 Criminal Proceedings against Frans-Nederlandse Maarschappij voor Biologische Producten BV [1981] ECR 3277.

results thereof are available to those authorities or may be placed at their disposal upon request.

5.6 Environmental Protection and Measures Applicable without Distinction

From a different perspective, the rule of reason is more limited than Article 30 EC. In principle, Article 30 may be used to justify a national regulation relating to a particular product. The Article thus permits "measures applicable without distinction". It should be noted that such specific regulations may not constitute an arbitrary discrimination. If no restrictions whatsoever are imposed on domestic products, an import prohibition constitutes an arbitrary discrimination.

When the rule of reason is applied, the regulation must *apply without distinction to domestic and foreign products*. National protective legislation justified on environmental grounds, but not encompassed by Article 30, is therefore only permitted if it is applicable without distinction.[137]

The European Court of Justice has held that a requirement that imported goods should bear an indication of their country of origin is discriminatory.[138] The mandatory requirements of consumer protection and fairness of commercial transactions can hence not be invoked. Even national regulations requiring indications of country of origin on both domestic and foreign products have been held to violate Article 28 EC since, although not formally discriminatory, they *in fact* allow consumers to choose domestic products.[139]

5.6.1 The Walloon Waste Case

In respect of environmental protection, non-discrimination was examined very closely in the Walloon Waste case.[140] The reasoning of European Court of Justice therefore warrants some consideration in detail.

5.6.1.1 The Facts of the Case

In 1987 a decree[141] issued by the Walloon Regional Executive prohibited the storage, tipping or dumping of both hazardous and non-hazardous waste in

[137] Jans, p. 228.
[138] Case 113/80 Commission v. Ireland [1981] ECR 1625.
[139] Case 231/78 Commission v. United Kingdom [1979] ECR 1447. See further Scott, p. 73-79.
[140] Case C-2/90 Commission v. Belgium [1992] ECR I-4431.

Wallonia from a foreign country or from the regions of Flanders and Brussels, subject to certain exceptions in favour of the Belgian regions. The Decree was issued after it was discovered that the population in a Walloon town was suffering from toxic contamination caused by foreign waste dumped at a local site.

The European Commission insisted that the Walloon ban on disposal of foreign non-hazardous waste was not justified by environmental protection and that it discriminated against foreign waste, even though this waste was no more harmful than waste produced in Wallonia. The prohibition was clearly discriminatory.[142] Advocate General Jacobs agreed and saw the prohibition as plainly discriminatory. Because of this, he concluded, the Danish Bottles case[143] could not serve as a precedent.[144]

5.6.1.2 The Reasoning

The reasoning of the European Court of Justice in this case has caused some confusion as to the degree to which a regulation must be applicable without distinction for the rule of reason doctrine to apply.

The Court of Justice stated that the rule of reason doctrine may only be applied to measures applicable without distinction. But to assess the discriminatory character of the Belgian rule, the Court found it necessary to consider *the particular nature of wastes*. The principle that environmental damage should as a priority be rectified at the source, laid down in Article 174 paragraph 2 EC, means that each region or local entity must take appropriate measures to receive, process and dispose of its own waste. Consequently, waste should be disposed of as close to its place of production as possible to limit its transportation. The Court moreover observed that this principle is consistent with the principles of self-sufficiency and proximity set out in the Basle Convention on the movement of dangerous waste[145], to which the Community is a signatory party. When regarding the differences between waste produced in one place and that in another and its connection to the place of production, the Belgian prohibition was not discriminatory.[146]

The judgement appears to mean that, in light of the self-sufficiency and proximity principles promoting processing of waste as close to the source as possible, locally produced waste is different from waste produced in other

---

[141] Decree of 19 March 1987 on the dumping of certain waste products in Wallonia (Moniteur Belge, 28 March 1987, p. 4671).
[142] Paragraph 33 of the Judgement.
[143] Case 302/86 Commission v. Denmark [1988] ECR 4607.
[144] Opinion of Advocate General Jacobs delivered on the 29 January 1992.
[145] Basle Convention of 22 March 1989 on the Control of Dangerous Waste and Their Elimination, Article 4.
[146] Paragraphs 34-36 of the Judgement.

regions or states. The import ban is not discriminatory, since it applies uniformly to foreign waste.[147]

It thus appears that the Court of Justice has *equated the fact that a national regulation is applicable without distinction to the absence of discrimination*. It was, as stated above, implicit in earlier case law that regulations that were formally applicable without distinction, but de facto affected foreign goods more than domestic ones, would not be accepted. This case law is difficult to reconcile with the Walloon Waste judgement. In making its distinction between local and foreign waste, the Court relied on the provisions of the above mentioned Basle Convention, which although it came into force on 5 May 1992 was not binding on the Community at the time of the judgement.[148] But even if the Convention had been ratified, it is perhaps questionable whether the Member States could derive legal rights from it to uphold import bans on wastes contrary to Community law.[149]

However, it should be remembered that in the aforementioned discrimination cases the Court had not yet dealt with the opposite situation where a regulation is not formally applicable without distinction, but proves to be such a regulation because there was no discrimination in the situation at hand. It therefore seems that a national regulation no longer has to be framed as a "measure applicable without distinction" to benefit from the rule of reason. All that is needed is an objective justification. The term "objective justification" comes from the Edeka case[150], where the Court of Justice held that like situations should not be treated differently unless this is objectively justified.[151]

Since foreign waste was treated differently from domestic waste in the Walloon Waste case, this difference had to be objectively justified. The justification was found in Article 174 paragraph 2 EC and the source principle. In short, foreign waste can not be equated with domestic waste and therefore it may be treated differently without this constituting a prohibited discrimination.[152]

The reasoning of the Court of Justice furthermore indicates that restrictions on imports are not permissible when the waste producers are under an obligation to dispose of the waste themselves, since this means that the regions or localities does not have to solve the waste problem. The principle that the European Union shall solve its own waste problems further indicates, that when a Member State has favourable conditions concerning the deposit of waste or an advanced technique for handling dangerous waste,

[147] Coleman, p. 298.
[148] At the time France was the only Member State that had ratified the Convention.
[149] Coleman, p. 298.
[150] Case 245/81 Edeka Zentrale AG v. Federal Republique of Germany [1982] ECR 2745.
[151] Jans, p. 229-230.
[152] Jans, p. 230.

the local authorities hardly will be able to prohibit the import of waste to this area.

One can conclude from this decision, that when a prohibition concerns the disposal of waste, *it seems like the free movement of goods between the Member States is not an interest worth protecting*. It is uncertain whether the approach taken in the Walloon Waste case will be applied outside the waste sector. Since the Court of Justice expressly referred to the special character of waste, this is still an open question.[153]

[153] Pagh, p. 181.

6. The General Agreement on Tariffs and Trade

6.1 General Remarks

Historically, the General Agreement on Tariffs and Trade, the GATT, contained no reference to protection of the environment. It was signed in 1947, ten years before the Treaty of Rome, and its goal was to prevent the kind of financial disasters and national protectionism that had caused the Second World War. The basic idea is a code of good commercial conduct based on the most favoured nation treatment and non-discrimination principles, in order to promote free trade.[154]

Principle 4 of the Rio Declaration on Environment and Development[155] states that environmental protection is an integrated part of the development process. Agenda 21 adds in paragraph 2 that the international community should make trade and environment mutually supportive. However, it further states in paragraph 39 that international standards for protecting the environment should be preferred and that trade restrictions should not constitute arbitrary or unjustifiable discrimination or a disguised restriction of trade. In particular, unilateral trade measures shall be avoided.

In December 1993, a round of GATT negotiations, better known as the Uruguay Round, concluded with the adoption of a Final Act[156] establishing the World Trade Organisation, the WTO. This substantially revised and supplemented the original GATT, but the core rules remained the same.[157] It was also decided to set up a Committee on Trade and the Environment to deal with these matters.[158] The Committee is open to all members of the WTO.[159] The mandate of the Committee is to identify the relationship between the environment and trade to promote sustainable development and to recommend necessary modifications of the trading system to promote

[154] London, Caroline and Llamas, Michael, "EC Law on Protection of the Environment and the Free Movement of Goods", London 1995, p. 161.
[155] Rio Declaration on Environment and Development of 13 June 1992, UN Doc. A/CONF.151/5/Rev.1.
[156] (1994) 22 ILM 13.
[157] Kiss, Alexandre and Shelton, Dinah, "Manual of European Environmental Law, 2nd Edition, Cambridge 1997, p. 588.
[158] "Decision on Trade and the Environment", GATT Doc. MTN.TNC/W/141 March 29, 1994. For an overview of the structure and agenda of the Committee, see Calster van, Geert, "The World Trade Organisation Committee on Trade and Environment: Exploring the Challenges of the Greening of Free Trade", European Environmental Law Review February 1996, p. 44-51.
[159] The European Union is a party to the GATT and a member of the World Trade Organisation. The Union may therefore participate in the work of the Committee, and has done so. The Union has considered most issues in the Committee's working programme.

positive interaction between environment and trade and, among other things, avoid protectionist measures while ensuring sustainable development.[160] The Preamble of the WTO Agreement[161] also, for the first time in GATT history, recognises the principle of sustainable development, the reason being that there is an international consensus that trade is not an end in itself but rather a means to achieve an environmentally sustainable economic development. The reference was made despite criticism by pro-traders claiming that the principle is too vague and does not promote legal certainty.[162]

Some see the WTO-agreement as an instrument that balances the principle of free trade against environmental protection. Reforms to accommodate environmental concerns will put the whole trading system at risk. Others want to incorporate new environmental provisions to preserve the credibility of the WTO and thereby maintain its central role in international economic relations.[163]

6.2 Fundamental GATT Provisions

The GATT of 1994 set outs the *principle of non-discrimination*, which has two components: the most favoured nation-clause in Article I and the national treatment-clause in Article III. Article I states that State Parties must grant the products of the other Parties a treatment that is no less favourable than that accorded to domestic products. All Parties thus share the benefits of lower trade barriers. Article III ensures that once goods have entered a market, they must be treated no less favourably than equivalent domestic goods. The Parties are thus under an obligation to limit or prohibit national laws, which impose a competitive disadvantage on imports.

---

[160] See further Kiss and Shelton, p. 588-589.

[161] Recital 1 of the Preamble of the Agreement Establishing the World Trade Organisation of 15 April 1994. The Preamble states that the WTO should allow the optimal use of the world's resources in accordance with the objective of sustainable development, seeking both to protect and preserve the environment and enhance the means for doing so. This is to be done in a manner consistent with each state's needs and concerns at different levels of economic development.

[162] Kiss and Shelton, p. 588; London and Llamas, p. 168. For an overview on sustainable development, see Ginther, Konrad, Denters, Erik and Waart de, Paul J.I.M., "Sustainable Development and Good Governance", Dordrecht 1995.

[163] Esty, p. 29 and 101-103. A recent WTO study on trade and environment makes clear that the WTO strongly believes in improved international co-operation to rectify environmental problems. Unilateral trade barriers generally make for poor environmental policies. It is also stressed that not all economic growth is bad for the environment. Higher national income is necessary for improvement of the state of the environment, but it is not enough. A state must also have sustainable environmental policies; Nordström, Håkan and Vaughn, Scott, WTO Secreteriat: "Trade and Environment", Report of October 1999; The European Union also promotes a multilateral trading framework and multilateral co-operation regarding environmental issues. Intergration of trade and environmental policies is necessary to ensure that the benefits of trade is fully realised; http://europa.eu.int/comm/environment/env-act5/chapt7.htm See also Decision 2179/98/EC by the European Parliament concerning the Union's policy regarding sustainable development (OJ L275 10/1001998 p, 0001-0013).

These Articles express the equivalent of the principle of mutual recognition in Community law. The principle of non-discrimination is the core of both systems. However, Article III has no counterpart in the EC Treaty. Article XI requiring Parties to *prohibit almost substantially all*[164] *quantitative restrictions, which are not duties, taxes or charges*. This Article thus deals with non-tariff trade barriers, and constitute the equivalent of Article 28 EC.[165]

However, Article XX of the Agreement exempts certain regulations relating to environmental protection from the prohibitions on import restrictions mentioned above.

6.3 Article XX Exceptions

Non-discrimination is the principal requirement of the GATT, but even if a national measure is discriminatory, it can still be compatible with the Agreement. Article XX provides for the adoption of national measures that are inconsistent with the GATT. Regulations necessary to protect human, animal or plant life or health or relating to the conservation of exhaustible natural resources if they are made effective in conjunction restrictions on domestic production or consumption. These are two of the *legitimate non-economic interests* that may be justified under the GATT. The exceptions give states considerable scope to pursue their own domestic environmental policies. However, the burden of proof is put on the legislating state, forcing it to defend its policy as an Article XX exception. In addition, Article XX is to be interpreted narrowly, since it is an exception to the principle of free trade. States are also required to show that there are no less restrictive policy instruments available. These requirements are very similar to the ones in Community law. Article 30 gives the Member States a possibility to limit the free trade principle when certain enumerated public interests so require. A national measure that satisfies the requirements in the Article is permitted, even though it is a restriction of trade. The wording of Article 30 EC is similar to that of Article XX.[166]

At first sight, the GATT does seem to give states a rather wide discretion when pursuing domestic environmental goals. As long as the non-discrimination requirements are met, regulations affecting domestic production may be imposed. A state can do anything to imported products

[164] Article XI subparagraph 2 enumerates certain exceptions to this prohibition, hence the words "substantially all". An inventory of trade measures that is considered to constitute quantitative restrictions can be found in "Analytical Index: Guide to GATT Law and Practice", 6th Edition, Geneva 1994, p. 287-297.
[165] Article II prohibits tariff trade barriers, requiring State Parties to apply agreed tariffs.
[166] Quitzow, p. 235.

that it does to its own, and it may do anything necessary to protect its own production processes.[167]

There is *no mention of the environment as such* in Article XX.[168] Negotiations during the Uruguay Round to amend Article XX in this aspect failed. Only specific environmental interests like the protection of living organisms and exhaustible natural resources are mentioned.[169] This is also similar to Community requirements. The environment as such is not mentioned in Article 30 EC. However, the environment can still be protected as a mandatory requirement under Community law. This is not possible under the WTO regime.

Finally, it should be noted that since the purpose of the GATT is to create a free trade area, caution is advised when using the exceptions in Article XX to find out the intent of the authors of the Agreement. Article XX has been frequently invoked by GATT Dispute Settlement Panels to hold national regulations incompatible with the Agreement. Contrary to the teleological interpretation of Community law used by the European Court of Justice, which has enabled the progress of environmental law, *the Panels' interpretation has always been very restrictive*. However, it should be noted that the limits of the exceptions in Article XX were attained by attaching two conditions to the chapeau of Article XX, not by narrowing down the scope of the biological exceptions.[170]

6.3.1 Article XX Subparagraph b

According to Article XX subparagraph b it is possible to derogate from the provisions of the GATT, if this is *necessary to protect the life or health of humans, animals or plants*. This is thus the equivalent of Article 30 EC. When looking at the prepatory works of the Article, it is easy to conclude that the intent was to cover only sanitary restrictions.[171] During the debate on this provision there was no explicit reference to an environmental purpose. Moreover, the term "sanitary" was used repeatedly to characterise the subparagraph.

[167] Esty, p. 101-103. In this aspect it is fair to say that the GATT is relatively flexible, and not at all as rigid and narrow as some environmentalists claim.
[168] It should be noted that the WTO Agreement on Technical Barriers to Trade permits states to protect the environment as such. However, it is doubtful whether such a reference is to scarce to solve the problem of environmental protection. See further London and Llamas, p. 163.
[169] Esty, p. 104 and 222.
[170] Charnowitz, Steve, "Exploring the Environmental Exceptions in GATT Article XX", Journal of World Trade 1991, p. 46; London and Llamas, p. 162.
[171] "Analytical Index: Guide to GATT Law and Practice", p. 525; GATT, BISD, I/50

When invoking subparagraph b, it is not required that corresponding domestic safeguards exist under similar conditions in the importing state. Instead this is stated in the Chapeau of Article XX.[172]

6.3.1.1 The Requirement of Necessity

There is little historical evidence defining the term "necessary". However, past GATT Panels have given it a far-reaching interpretation.

Traditionally a measure has *not been considered necessary if an alternative measure was available, which was not inconsistent with other GATT provisions* and which a Party could reasonably be expected to use. Moreover, if no GATT consistent measure was reasonably available, the Party must use the measure that leads to the least degree of inconsistency with other GATT rules. However, the Panels did not care to spell out the type of modifications a state could be reasonably asked to make. The reasoning in this case was confirmed in a later dispute concerning Thai restrictions on import of cigarettes.[173] If an inconsistency is "unavoidable" to reach the environmental goal pursued, it appears to be necessary. This wording is similar to the "indispensable" criterion used in EC law. However, the "least restrictive" criterion appears to be interpreted more broadly under Community law, since there appears to be no balancing between effect and purpose under the GATT regime and hence no application of the proportionality principle.

It is clearly a worthy objective that Parties shall use the measure which is the least inconsistent with the GATT. However, it is not clear how this condition can be read into the Agreement so casually. The question is whether this gives sufficient guidance to national governments when making decisions concerning environmental goals and the means to achieve them. This is arguably a very high hurdle for establishing a rule that is consistent with the Agreement, since one can easily imagine that it almost always exists policy choices which would be less restrictive, for instance resorting to international co operation. Presumably all articles of the Agreement would be taken into account when determining whether this is so. The question then becomes one of how to weigh, for instance, an action inconsistent with Article XI against one inconsistent with Article XIII. Furthermore, if the words "nothing in this Agreement" is to be read literally, why should any conditions besides those in the Chapeau be relevant?[174] These problems are very similar to the ones encountered by the European Union concerning legal certainty and predictability, the availability and

[172] "Analytical Index: Guide to GATT Law and Practice", p. 521-522.

[173] "Thailand – Restrictions on Importation of and Internal Taxes on Cigarettes", GATT Doc. DS10/R.

[174] Charnowitz, p. 49-50. See also Esty, p. 222, where the author gives an alternative interpretation of the term "necessary" ("/…/not clearly disproportionate in relation to potential environmental benefits and equally effective policy alternatives that are reasonably available").

effectiveness of alternative measures and the diagonal application of the proportionality principle.

6.3.2 Article XX Subparagraph g

According to the exception in Article XX subparagraph g it is possible to derogate from the provisions of the GATT if this *relates to the conservation of exhaustible resources and is made effective in conjunction with restrictions on domestic production or consumption*. The origin of this exception is rather obscure. It was proposed by the United States, but there is no official statement of purpose.[175] The natural resources referred to were most likely raw materials or minerals, in contrast to natural resources capable of being renewed, like animals and plants. However, recent developments show that also renewable resources can be protected under subparagraph g.[176]

6.3.2.1 Relating to Conservation

In a 1988 case[177], the expression "relating to conservation of exhaustible resources" was defined to mean that a trade regulation had to be *primarily aimed at* such conservation. Hence a trade measure does not have to be necessary or essential to the conservation of a natural resource. This makes this exception less difficult to invoke. However, the definition does provide an effective way to screen out measures with merely an indirect relationship to conservation, and it was probably introduced to impose a burden of proof which is comparable to the one imposed by the necessity requirement in subparagraph b.[178]

In the Shrimp Turtle case[179]concerning protection of sea turtles, dealt with below, the WTO Appellate Body addressed the "primarily aimed at" test, but did not either confirm or dismiss it. It did, however, indicate that the test it prefers is one of a *"close and genuine relationship of ends and means"*. The national measure in question was not disproportionately wide in scope and reach in relation to the policy objective, and the means reasonably

[175] See U.S. Department of State Bulletin Vol. XIII, No. 337, Point V9, 1945, at 926.
[176] Charnowitz, p. 45-46; see also "United States – Prohibition of Imports of Tuna and Tuna Products from Canada", GATT Doc. 29/S/91; "United States - Import Prohibition of Certain Shrimp and Shrimp Products", WT/DS58/AB/R.
[177] "Canada – Measures Affecting Exports of Unprocessed Herring and Salmon", GATT, BISD, 35S/114.
[178] "Analytical Index: Guide to GATT Law and Practice", p. 539; Charnowitz, p. 50-51; Mavroidis, Petros C., "Trade and Environment after the Shrimps-Turtles Litigation, Journal of World Trade February 2000, 73-74.
[179] "United States – Import Prohibition of Certain Shrimp and Shrimp Products", WT/DS58/AB/R.

related to the ends.[180] The alternative test the Appellate Body suggests is probably less stringent than the "primarily aimed at" test.[181]

6.3.2.2 Domestic Production or Consumption

This criterion has been applied in two cases concerning conservation of fish stocks as exhaustible resources.[182] In the Tuna Dolphin case an exception was not justified, since the United States had not put restrictions on domestic consumption.[183] In the Herring Salmon case, it was held that a trade restriction had to be *primarily aimed at rendering effective domestic restrictions*.[184] However, the Canadian rules failed to meet this test.

The Panels in the Tuna Dolphin case did not explain why trade regulations should make domestic restrictions effective, rather than being complementary to these restrictions. By requiring that a trade regulation shall facilitate a domestic programme, problems arise when there is no domestic production or consumption to restrict. If, for instance, a state puts a ban on importing wild exotic birds although there are no tropical forests in this state, it is hard to see how such a ban can make a make a domestic programme effective. Another problem arises when the product being prohibited, for instance tuna, is not the one being conserved, for instance dolphins. Strictly speaking, neither is being produced. Dolphins are not consumed and tuna not conserved. Of course the facts of the case can be fitted in under Article XX subparagraph g, but it takes a little imagination. As regards Article XX subparagraph b, the product being imported and the one being conserved can be entirely different.[185]

6.3.3 The Tuna Dolphin Case

The Tuna Dolphin Reports clearly illustrate the difficulties encountered when invoking the environmental exceptions under Article XX b and g. Although the Reports were never adopted by the GATT Council, they were the starting point of the never ending discussion on free trade and the environment.[186] The case highlights the controversy between different levels of environmental protection and their impact on the GATT, and therefore merits some consideration in detail.

---

[180] Paragraph 136 and 141 of the Report. The Act was also made effective in conjunction with restrictions on American vessels and thus even handed.
[181] Calster van, Geert, "The WTO Appellate Body in Shrimp Turtle: Picking up the Pieces", European Environmental Law Review April 1999, p. 114-115.
[182] GATT, BISD, 29S/108-109 and 35S/113.
[183] GATT, BISD, 29S/108-109.
[184] GATT, BISD, 35S/114. See also "Thailand – Restrictions on Importation of and Internal Taxes on Cigarettes", GATT Doc. DS10/R.
[185] Charnowitz, p. 51-52.
[186] Esty, p. 31; Feddersen, Christoph T., "Recent EC Environmental Legislation and its Compatibility with WTO Rules: Free Trade or Animal Welfare?", European Environmental Law Review July 1998, p. 207.

6.3.3.1 The Facts of the Case

The 1992 American Marine Mammal Act[187] requires the Government to reduce the incidental killings of marine mammals by commercial fishermen. In addition to imposing limitations on American fishermen, the Act requires the Secretary of Commerce to either certify that other states have taken steps to prevent killing of marine mammals or else to prohibit the import of tuna products from offending states, if their national environmental protection programme is not comparable to the American one. In the Eastern Pacific Ocean schools of tuna often swim beneath schools of dolphins, which serve as a trap for the fishing of tuna with purse seine nets. In 1992, the American fishing fleet had practically stopped fishing in this area. The Act aims at protecting these dolphins against incidental killings due to certain fishing techniques. Based on this law, Mexican tuna imports were banned from the United States since Mexico could not prove that its national programme was comparable to that of the United States.

Mexico claimed that its right to sell tuna in the United States had been violated, challenged the American ban and asked for a GATT dispute settlement panel to solve the dispute. The United States claimed that the ban was justified under Article XX subparagraph b or g.

6.3.3.2 The Reasoning

The first Panel[188] concluded that the import ban inappropriately discriminated against Mexican tuna and violated Article III of the GATT. Next it therefore had to examine whether the Act was justified under Article XX subparagraph b or g.

The Panel rejected that the Act was necessary to protect living organisms on grounds that the exception did not encompass harm outside the jurisdiction of the legislating state, and because the United States could have resorted to less restrictive means to achieve this objective. As regards Article XX subparagraph g, the Panel merely stated that conservation of resources could not be unilaterally pursued outside the national context. The first Report was not adopted by the GATT Council and has no precedential value.

Since the Panel Report was not adopted, the European Union brought a further complaint, objecting to the "secondary" embargo imposed on all states which trade in tuna with Mexico. The second panel's decision turned

[187] PL 92-522, 86 Stat. 1027.
[188] "United States – Restrictions on Import of Tuna", GATT Doc. DS21/R (Tuna Dolphin I).

on a more solid ground, namely the unilateral nature of the American measure, to hold the import ban illegal.[189]

When determining whether the import ban fell under Article XX subparagraph g, the Second Panel used *a three-step analysis*. Firstly, it determined whether the *policy* pursued by the trade measure fell under conservation of natural resources. The Panel stated, in contrast to the first Report, that the GATT does not absolutely prohibit regulations that may be applied extraterritorially. Subparagraph g applies also when the protected resources are located outside the legislating state's territory.[190]

Secondly, it was determined if the *measure* was related to the conservation of exhaustible resources and made effective in conjunction with restrictions on domestic production and consumption. The phrase "relating to" was defined to mean "primarily aimed at". Both the primary and secondary ban was imposed to force other states to change their internal policy, since the bans could only be effective if such changes occurred. Such measures are not primarily aimed at conservation or made in conjunction with "domestic" restrictions. Another view would seriously impair the balance of rights and obligations contained in the GATT.[191]

Thirdly, a measure has to be in conformity with the requirements set out in *the Chapeau* of Article XX. However, since the essential conditions in the second step were not fulfilled, the Panel did not move on to the third step.

The Panel applied the same analysis to the American claim that the Act was necessary to protect the life and health of dolphins as stated in subparagraph b. Firstly, it was stated that it is not clear whether this provision can be applied to animals located extraterritorially. Secondly, the Panel defined the word "necessary" to mean indispensable or unavoidable in the absence of any reasonably available GATT consistent alternatives. The conclusion was therefore once again that the goal of the American Act was to force other states into changing their policies, and that the Act was not effective without such changes. Therefore it was not necessary. Therefore the Panel once again refrained from moving on to step three.[192]

This analysis is very similar to the one used by the European Court of Justice. It is determined whether there is a legitimate interest worth protection, whether it is necessary to use the particular measure at hand for this protection and finally, whether the measure is discriminatory or a disguised restriction of trade.

[189] "United States – Restrictions on Import of Tuna", GATT Doc. DS29/R (Tuna Dolphin II).
[190] Paragraph 5.16-5.20 of the Report.
[191] Paragraph 5.23-5.27 of the Report.
[192] Paragraph 5.37-5.39 of the Report.

6.4 The Chapeau

Once it has been established that a national measure falls under Article XX subparagraph b or g and therefore is provisionally justified, it must still be decided whether this measure is not applied in a manner, which constitutes *arbitrary or unjustifiable discrimination between states where the same conditions prevail, or a disguised restriction on trade*. If the national measure pass this test, it is ultimately justified and thus compatible with the GATT. The requirements in the Chapeau are also similar to the ones in Community law. However, unjustifiable discrimination is not mentioned.

6.4.1 Arbitrary or Unjustifiable Discrimination

To qualify for an exception under Article XX, national regulations must not involve arbitrary or unjustifiable discrimination in states where the same conditions prevail. The Shrimp Turtle case is a good illustration of the application of this condition.

6.4.1.1 The Shrimp Turtle Case

6.4.1.1.1 The Facts of the Case

The case dealt with a complaint by India, Pakistan, Thailand and Malaysia concerning the American Endangered Species Act[193]. The Act imposes an import ban on shrimp and shrimp products not harvested by trawlers using methods which protect sea turtles. A state can be certified as complying with the Act and exempted from the ban if a state has provided evidence of the adoption of a turtle protection programme comparable to that of the United States. A state can also be exempted if the average rate of incidental killings of sea turtles is comparable to that of the United States. Guidelines issued also makes certification dependent on the adoption by other states of harvesting methods, which are comparable to American ones.

The complainants held that the import ban is inconsistent with Article XI of the GATT, prohibiting non-tariff trade barriers. The United States admitted that the ban was a quantitative restriction, but claimed that it was justified under Article XX.

[193] Public Law 93-205, 16 U.S.C. 1531 et seq.

6.4.1.1.2 The Reasoning

The WTO Panel[194] essentially had to examine whether Article XX leaves room for measures whereby one state imposes an import ban on a product because of the internal conservation policies of the exporting state. When doing this, the Panel firstly examined the Chapeau and the specific exception in subparagraph g secondly, contrary to the traditional approach. The Second Tuna Dolphin Panel dealt with the same thing, but as a part of the "related to" test.

The Panel held that a State Party could not be allowed to introduce measures conditioning market access upon the adoption of certain conservation policies by the exporting states. This constitutes unjustifiable discrimination. If one Party is permitted to do this, so are the others. This may lead to unpredictability and ultimately jeopardise the entire WTO system of mutual market access.[195]

In July 1998 the United States lodged an appeal against the Report. The WTO Appellate Body rejected the Panel's application of the Chapeau.[196] The Chapeau focuses on the way a measure is applied not how it is designed to pursue a certain policy goal. The latter is examined when determining if a measure falls under one of the specific exceptions in Article XX.[197] Furthermore, the Panel should have looked at the purpose of the Chapeau, not the WTO as a whole, the central issue being whether the measure was applied in such a way as to constitute an abuse of a given exception.[198] In short, the Panel should have followed the established *two tier analysis* and examined the conditions of the subparagraphs first, and then apply the Chapeau. The purpose of the Chapeau is to prevent abuse, and its application is thus necessarily case bound. There is no general standard for discriminatory or disguised restrictions, which can justify the exclusion of a national measure a priori, simply because it forces other states to change their policies. This is hence a rejection of this part of the second Tuna Dolphin Report. [199] Perhaps it is also an indication of a recognition that the WTO strives for more than just economic development.

The Appellate Body nevertheless found that the import ban has been applied in a way which is *unjustifiably discriminatory*, since US officials applies a

---

[194] "United States - Import Prohibition of Certain Shrimp and Shrimp Products", WT/DS58/R.

[195] The Report was heavily criticised. For a critical comment on the Panel's reasoning see Calster van, Geert, "The WTO Shrimp/Turtle Report: Marine conservation v GATT Conservatism", European Environmental Law Review November 1998, p. 307-314.

[196] "United States – Import Prohibition of Certain Shrimp and Shrimp Products", WT/DS58/AB/R.

[197] Paragraph 111 of the Report; see also "United States – Standards for Reformulated and Conventional Gasoline", WT/DS2/AB/R.

[198] Paragraph 112-121 of the Report.

[199] Paragraph 120 of the Report.

rigid and unbending standard when granting import permits and ignores other adopted conservation measures than those comparable to American ones. This finding was reinforced by the failure of the United States to conclude international agreements for conservation of sea turtles, before adopting the import ban. The measure's unilateral character heightened this discrimination.[200]

The application of the Act also constituted *arbitrary discrimination*. There is no transparent, predictable certification process followed by the responsible officials, and hence no possibility for the applicants to asses whether the Act is applied in a fair and just manner, contrary to the due process requirement in Article X of the GATT. Recourse to Article XX was rejected on the above mentioned grounds.[201]

6.4.2 Disguised Restriction of Trade

The disguised restriction requirement was probably intended to be *a check against the masking of protectionist motives in environmental disguise*. However, a less stringent approach has been suggested by GATT Panels. In the Tuna Dolphin case[202], the Panel found that since the American law was adopted and publicly announced as a trade measure, it was not disguised. In another case[203] it was held that it was not the construction of a measure, but the application thereof, that needed to be examined. The Panel then concluded that the measure at hand was published in the Federal Register and based on a valid patent which had been established. Because of this there was no disguised restriction. In a third case[204] it was held that due to non-negotiation and absence of scrutiny of the impact the national regulation had on foreign producers, the law in question was a disguised restriction of trade.

The decisions suggest that the transparency of a trade regulation may be a factor that can exempt the same from the prohibitions in the GATT. If a regulation is publicly announced, it may basically be right out protectionist. A more strict interpretation is probably needed to prevent abuse of Article XX. It is not an easy task to determine whether an environmental measure really is protectionist.[205]

---

[200] Paragraph 161-172 of the Report. In addition to this, the United States discriminates between different states since the time period granted to change the harvesting policies varies between different states.

[201] Paragraph 177-184 of the Report. The Panel has now been recalled, since the claimants do not consider that the United States have fulfilled its obligations under the GATT.

[202] "United States – Restrictions on Import of Tuna", GATT Doc. DS29/R (Tuna Dolphin II).

[203] "United States – Imports of Certain Automotive Spring Assemblies", GATT, BISD, 30S/125.

[204] "United States – Standards for Reformulated and Conventional Gasoline", WT/DS2/AB/R.

[205] Charnowitz, p. 48.

7. Conclusion

If one looks at the case law of the European Court of Justice of today, it appears to tip the scales in favour of environmental protection. The distinction between local and foreign waste in order to satisfy the non-discrimination test is particularly supportive of this view. It is possible that the Walloon Waste case[206] was "an isolated incident", the outcome of which may largely have been the result of the particular circumstances of the case. The Danish Bottles judgement[207] was certainly a victory for environmentalists, but caution is advised when determining the legal consequences of the case or its influence on the future case law of the Court of Justice. However, the cases seem to be a part of a trend, where the Court gives precedence to protecting the environment over the fundamental principle of the free movement of goods.[208]

Following the Walloon Waste decision, the French Government banned all imports of household waste when discovering illegal shipments of German hospital waste. The European Commission has not challenged the regulation. The same applies to the German packaging waste recycling scheme, which the other Member States see as a barrier to the free movement of goods.[209]

However, the current application of broad principles, like necessity and proportionality, makes it difficult for the Member States to determine the limits and standard of the level of protection permissible. This may ultimately undermine the principles of legality and legal certainty. Nevertheless, the core provisions of the Treaty of Amsterdam relating to free trade, go far beyond anything the WTO has achieved. An independent enforcement agency and the superiority and direct effect of Community law provide for a kind of enforcement the WTO can only dream of. The European Union maintains the most well-developed environmentally friendly trade rules due to its integrated organisation and its geographical location amongst "green countries". The GATT did not intend to limit the participating states' sovereignty. At the international level this can only be done by agreement.

Both the European Union and the WTO system recognises unilateral measures which serve certain non-economic, legitimate interests, but which, at the same time, are not applied in a manner that constitutes arbitrary discrimination or a disguised restriction of trade. States are free to adopt the

[206] Case C-2/90 Commission v. Belgium [1992] ECR I-4431.
[207] Case 302/86 Commission v. Denmark [1988] ECR 4607.
[208] Coleman, p. 307; Mahmoudi, Said, "EU:s miljörätt", Stockholm 1999, p. 180. For a different view, see Emiliou, Nicholas and O'Keeffe, David, "The European Union and World Trade Law – After the GATT Uruguay Round", Chichester 1996, p. 186-189.
[209] Coleman, p. 307.

policies they deem necessary for the protection of the environment as long as, in doing so, they fulfil their obligations and respect the rights of other states under Community law and the GATT. This ultimately means that the restriction must not be applied in an arbitrarily discriminatory manner or a disguised restriction of trade. It appears that states are free to choose their own standard of protection, but that the type and number of trade measures they may use when pursuing these standards are limited.

While both the European Union and the WTO have a rule suggesting that an introduced import restriction must be the least trade restrictive means necessary to achieve the measure's legitimate purpose, the European Court of Justice has interpreted this rule more broadly than it has been interpreted under the GATT. The Court has interpreted the rule as requiring "proportionality", and hence created a balancing test between the restrictive effect of the measure and the purpose it seeks to achieve. This is a rather subtle difference, but it seems to have a rather big impact on the application of Community law, and perhaps makes the whole, qualitative, difference.

However, one specific concern which has not been dealt with under the GATT is de facto discrimination, by way of different product norms in different states. This problem has been dealt with extensively under Community law. The reason for this may lie in the fact that the European Union seeks to establish a real internal market where there are no frontiers. The GATT only sought to establish a free trade area. Perhaps the problem of de facto discrimination may be dealt with through the "in conjunction with restrictions on domestic production or consumption" requirement.[210]

The European Union welcomed the Shrimp Turtle Report. The European Union Trade Commissioner recently said that the Appellate Body has made it clear that trade restrictions to pursue environmental goals are legitimate in the eyes of the WTO.[211]

Unrestricted trade in all goods will inevitably conflict with environmental protection policies, in particular when these are not supported by both the importing and exporting state. This may impede the use of trade sanctions by environmentally conscious states. Unilateral measures definitely have a role to play, for instance when, in light of the precautionary principle, there is no consensus on the evaluation of available scientific evidence or if negotiations on a multilateral agreement fails.

A review of the background of Article XX of the GATT shows that the Article was designed to include environmental interests. Indeed, just about every national regulation in this field seems to relate to either protection of living organisms or the conservation of exhaustible resources. Whether

[210] Mavroidis, p. 87.
[211] Speech to the Assembly of Consumers Association in Europe Conference 18-19 November 1999; http://europa.eu.int/comm/trade/speecharticles/.

Article XX will achieve its intended purpose ultimately depends on how the Parties administer the exceptions against increasingly stricter instruments of enforcement[212] within the WTO. There is always a danger that Article XX may be weakened through interpretation. It seems that the only solution to this very difficult problem is to introduce explicit rules for environmental protection, such as those now found in Community law. International trade law need not be an impediment to national protection of the environment, provided that it is not applied to rigidly. It is in this aspect that the GATT needs renegotiation and clarification.

The efforts of the GATT Panels and the WTO to address environmental policy questions have proved that the issue is highly problematic.[213] However, it is difficult to blame the WTO for trying to deal with these issues, when there is no international environmental regime to share responsibility in this area. This seems to be an institutional "gap". Nevertheless, the goal should be to ensure that environmental protection is build into the trade regime and at the same time respect the principle of free trade when making environmental policies to the greatest extent possible.

Thus, if "greening the GATT" means that the State Parties should take environmental objectives into consideration when administering Article XX, then greening is probably a good idea. But if greening actually means that states should subordinate financial goals to environmental imperatives, then greening is a bad idea, both for the environment and the WTO. It is bad for the environment, since it appears that the WTO does not have the scientific knowledge it takes to determine which environmental measures are appropriate.[214] It is bad for the WTO, since an environmental policy would be too divisive for the structure of the organisation.

The best thing the WTO can do for a more sustainable development is probably to capably determine the legitimacy of non-tariff barriers introduced under the pretext of protecting the environment. There is no possibility for states to use free trade as an "antidote" against a harmed environment. What they can do is to try and identify protectionist policies, which decrease the income of a state and therefore diminish its capacity to use its resources to rehabilitate the environment. This is rather a big challenge for the WTO, since such a task will have to be carried out in the

[212] The Tuna Dolphin case was decided under the old GATT system, where it was not possible to reach the necessary consensus within the GATT Council to adopt the report. This is different under the new Understanding on the Rules and Procedures Governing the Settlement of Disputes" agreed on after the establishment of the WTO, where the legal force of the trade regime has been significantly increased. This makes it more likely that GATT obligations will be enforced.

[213] The problem is illustrated in Schoenbaum, Thomas J., "International Trade and Protection of the Environment: The Continuing Search for Reconciliation", American Journal of International Law 1997.

[214] It should be noted that the Understanding on Settlement of Disputes states in Article 13 that Panels may seek information from any relevant source and consult experts concerning a scientific matter raised by a Party to a dispute.

light of scientific uncertainty, public scrutiny and a rather unpleasant awareness that, short of a miracle, there is no appeal from the irreversible deterioration of our environment.

Bibliography

Books

”Analytical Index: Guide to GATT Law and Practice”, 6th Edition, Geneva 1994

Birnie, Patricia W. and Boyle, Alan E., “International Law and the Environment”, Oxford 1993

Craig, P. and de Burca, G., “EU Law – Text, Cases and Materials”, 2nd Edition, Oxford 1998

Emiliou, Nicholas and O’Keffee, David, “The European Union and World Trade Law – After the GATT Uruguay Round”, Chichester 1996

Esty, Daniel, “Greening the GATT – Trade, Environment and the Future”, Washington D.C. 1995

Ginther, Konrade, Denters, Erik and Waart de, Paul J.I.M., “Sustainable Development and Good Governance”, Dordrecht 1995.’

Jans, Jan H., “European Environmental Law”, 1st Edition, London 1995

Kiss, Alexandre and Shelton, Dinah, “ Manual of European Environmental Law”, 2nd Edition, Cambridge 1997

London, Caroline and Llamas, Michael, “EC Law on the Protection of the Environment and the Free Movement of Goods”, London 1995

Mahmoudi, Said, “EU:s miljörätt”, Stockholm 1999

Pagh, Peter, “EU Miljöret”, Copenhagen 1996

Quitzow, Carl Michael, “Fria varurörelser i den Europeiska gemenskapen – En studie av gränsdragningen mellan gemenskapsangelägenheter och nationella angelägenheter”, Göteborg 1995

Scott, Jane, “EC Environmental Law”, Harlow 1998

Articles

Calster van, Geert, “The World Trade Organisation Committee on Trade and Environment: Exploring the Challenges of the Greening of Free Trade”, European Environmental Law Review February 1996, p. 44-51

Calster van, Geert, “The WTO Shrimp/Turtle Report: Marine Conservation v. GATT Conservatism”, European Environmental Law Review November 1998, p. 307-314

Calster van, Geert, “The WTO Appellate Body in Shrimp Turtle: Picking up the Pieces”, European Environmental Law Review April 1999, p. 111-115

Calster van, Geert and Deketelaere, Kurt, “Amsterdam, the IGC and Greening the EU Treaty”, European Environmental Law Review January 1998, p. 12-25

Charnowitz, Steve, “Exploring the Environmental Exceptions in GATT Article XX”, Journal of World Trade 1991, p. 47-55

Coleman, Martin, “Environmental Barriers to Trade and European Community Law”, European Environmental Law Review December 1993, p. 295-307

Feddersen, Christoph T., “Recent EC Environmental Legislation and its compatibility with WTO rules: Free Trade or Animal Welfare”, European Environmental Law Review July 1998, p. 207-215

Goldenman, Gretta, “Transboundary Transfers of Dangerous Goods” from “European Environmental Law – A Comparative Perspective”, London 1996, p. 341-363

Krämer, Ludvig, “Environmental Protection and Article 30 of the EEC Treaty”, Common Market Law Review 1993, p. 111-143

Mavrodis, Petros C., “Trade and Environment after the Shrimps-Turtles Litigation”, Journal of World Trade February 2000, p. 73-87

Rauscher, Michael, “International Economic Integration and the Environment” from “The Greening of World Trade Issues”, Hartfordshire 1992, p. 173-190

Schoenbaum, Thomas J., “International Trade and Protection of the Environment: The Continuing Search for Reconciliation”, American Journal of International Law 1997, p. 268-313

“Unilateralism in International Law: Its Role and Limits: A US-European Symposium” (Part 2) in European Journal of International Law No.2 2000

Decision by the European Parliament

Decision nr 2179/98/EC of the 24 September 1998 (OJ L275, 10/10/1998 p, 0001-0013)

Reports

Nordström, Håkan and Vaughn, Scott, WTO Secreteriat, “Trade and Environment”, October 1999

Prepatory Works

Ds 1990:76 “Romfördragets Artikel 30 – Om EG-rättens sk Cassis de Dijon-princip

GATT, BISD, I/50 containing the prepatory works of Article XX subparagraph b and g of the GATT

Internet Sites

http://europa.eu.int
http://www.wto.org

Table of Cases

European Court of Justice

Cases

Case 7/68 Commission v. Italy [1968] ECR 633
Case 8/74 Procureur du Roi v. Benoit and Gustave Dassonville [1974] ECR 4607
Case 46/76 W.J.G. Bauhuis v. Netherlands State [1977] ECR 5
Case 231/78 Commission v. United Kingdom [1979] ECR 1447
Case 120/78 Rewe-Zentral AG v. Bundesmonopolverwaltung für Branntwein [1979] ECR 649
Case 148/78 Pubblico Ministero v. Tullio Ratti [1979] ECR 1629
Case 113/80 Commission v. Ireland [1981] ECR 1625
Case 272/80 Criminal Proceedings against Frans-Nederlandse Maatschappij voor Biologische Producten BV [1981] ECR 3277
Case 245/81 Edeka Zentrale AG v. Federal Republique of Germany [1982] ECR 2745
Case 172/82 Syndicat National des Fabricants Raffineurs d'Huile de Graissage and Others v. Groupment d'Interêt Economique "Interhuiles" and Others [1983] ECR 555
Case 174/82 Officier van Justitie v. Sandoz BV [1983] ECR 2445
Case 94/83 Criminal Proceedings against Albert Heijn BV [1984] ECR 3263
Case 240/83 Procureur de la Republique v. Association Defense de Brûleurs d'Huiles Usagées [1985] ECR 531
Case 54/85 Ministère public v. Xavier Mirepoix [1986] ECR 1067
Case 118/86 Openbaar Ministerie v. Nertsvoederfabriek Nederland BV [1987] ECR 3883
Case 302/86 Commission v. Denmark [1988] ECR 4607
Case 380787 Enichem Base and Others v. Comune di Cinisello Balsamo [1989] ECR 2491
Case 125/88 Criminal Proceedings against H.F.M. Nijman [1989] ECR 3533
Case C-169/89 Criminal proceedings against Gourmetterie van den Burg [1990] ECR I-2143
Case C-2/90 Commission v. Belgium [1992] ECR I-4431
Joined Cases C-267/91 and C-268/91 Criminal Proceedings against Bernard Keck and Daniel Mithouard [1993] ECR I-6097
Case C-37/92 Criminal Proceedings against José Vanacker and Andrée Lesage [1993] ECR I-4947
Case C-131/93 Commission v. Germany [1994] ECR I-3303
Case C-412/93 Société d'Importation Edouard Leclerc-Siplec v. TFI Publicité SA and M6 Publicité SA [1995] ECR I-179

Case C-67/97 Criminal Proceedings against Ditlev Bluhme [1998] ECR I-8033
Case C-162/97 Criminal Proceedings against Gunnar Nilsson and Others [1998] ECR I-7477
Case C-319/97 Criminal Proceedings against Antoine Kortas [1999] ECR I-3143
Case C-473/98 Kemikalieinspektionen v. Toolex Alpha, judgement of 11 July 2000

Opinions of the Advocate General

Opinion of Advocate General Sir Gordon Slynn delivered on 24 May 1988
Opinion of Mr Advocate General Van Gerven delivered on 20 March 1990
Opinion of Advocate General Jacobs delivered on 29 January 1992

GATT/WTO Panels

“United States – Prohibition of Imports of Tuna and Tuna Products from Canada”, GATT Doc. 29S/91 (1982)
“United States – Imports of Certain Automotive Spring Assemblies”, GATT, BISD, 30S (1983)
“Canada – Measures Affecting Exports of Unprocessed Herring and Salmon”, GATT, BISD, 35S (1988)
“Thailand – Restrictions on Importation of and Internal Taxes on Cigarettes”, GATT Doc. DS10/R (1990)
“United States – Restriction on Import of Tuna”, GATT Doc. DS21/R (1991) (Tuna Dolphin I)
“United States – Restriction on Import of Tuna”, GATT Doc. DS29/R (1994) (Tuna Dolphin II)
“United States – Standards for Reformulated and Conventional Gasoline”, WT/DS2/AB/R (1996)
”United States - Import Prohibition of Certain Shrimp and Shrimp Products”, WT/DS58/R (1998)
“United States – Import Prohibition of Certain Shrimp and shrimp Products”, WT/DS58/AB/R (1998)