Process and production method based restrictions on trade in the EU
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I. INTRODUCTION

States regulate products. They may make access to their market, or favourable rates of taxation, conditional on compliance by products with rules that aim to protect safety, health, morality, the environment and so on. When these rules concern the physical composition of the product, regulating, for example, the ingredients in foodstuffs or the chemicals used in toys, or the recyclability of batteries, Cassis de Dijon, and its legislative and jurisprudential spawn, tell the European lawyer how to approach the resulting barriers to trade.1

However, suppose the national rules are not to do with any aspect of the physical product itself, but rather concern the way it is made. Suppose, for example, that products could not be sold in Sweden if made by child labour, or that meat could not be sold in Ireland if the animals had not been treated compassionately, or that products were taxed more highly in Germany if they were produced in factories reliant on electricity generated by carbon fuels. What would EU law have to say about this? That is the subject of this chapter, and the surprising starting point is that until now EU law does not seem to have said anything very explicit at all. In the case law, the academic commentary, and in Commission policy documents, there is barely any acknowledgment that such rules are an analytically distinct group which may well demand a specific approach from both law and policy.2

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1 Case 120/78, ‘Cassis de Dijon’ [1979] ECR 649. For discussion of the case, see any EU law textbook.
In the World Trade Organisation (WTO), the position is different. There the question of national regulation concerning process and production methods (PPMs) has been fiercely fought over, with the relevant cases arousing ongoing controversy. The issue has arisen most famously in the context of US rules prohibiting the sale of shrimp caught in a turtle-unfriendly way, but there have been a number of cases explicitly addressing the issue of whether physically identical products made differently are ‘like’, for the purposes of the GATT ‘most favoured nation’ and ‘national treatment’ rules, and the exceptions thereto.

States want such PPM rules for a number of reasons. Partly they may want to avoid contributing to environmental or social harm by paying for products made in harmful ways. They may also want to exert influence on other states to change their ways. Thirdly, they may want to ensure that the imposition of strict ethical or environmental production requirements on their own manufacturers does not result in the manufacturers being undercut by foreign products not subject to such demanding rules. They therefore attempt to ‘level the playing-field’ by applying these same rules to imported products. All of these are quite understandable policy reasons, corresponding to normal human reactions to the world around us. Who wants their money to contribute to acts they consider wrongful, and who wants their own ethical production swept away by competition from those of lesser conscience? Understandably, and apparently reasonably, these reactions are sometimes translated to the collective level and made into national

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laws—and such legislative entrenchment of popular ethical preferences is the kind of thing governments and laws are for.

Yet opponents have a formidable array of arguments against such PPM rules. Often it is rich countries demanding that poorer ones protect their forests, or biodiversity, or labour force, and the poorer countries’ reaction is understandably one of irritation. Words like ‘neo-colonialism’ can be bandied around, as the less rich world asserts its right to manage its own environment, resources and population in the way that it sees fit, and rejects what it sees as an attempt to interfere in domestic policy. Indeed, some lawyers have claimed that such PPM rules are ‘extra-territorial’, an attempt to legislate for other jurisdictions, and as such in conflict with principles of public international law. This is a contested point, since the extra-territorial effect occurs only at the moment of import—whereupon it is arguably no longer extra-territorial. A producer who does not wish to import to the PPM-regulating state does not experience its legislation. However, whatever the (sometimes relatively semantic) arguments that can be made here, the underlying sensitivity to such rules, and the policy issues they raise, are genuine and substantive.

The economic perspective is more complicated. A common view is as follows: PPM rules take away some of the advantages that industries located in low-regulation states enjoy, and so may diminish trade, reducing overall welfare. The trade-off between environment or animal or human welfare and increased income is one that depends on many factors, not least wealth; clean and ethical production is arguably a luxury of the rich, and poorer countries may be less inclined to give up income for the sake of other values. Imposing our preferred balance on them denies them the profit resulting from their preferred balance. Since such variation in regulatory choices contributes to variation in production cost and therefore is one of the motors of international trade, an attempt to counteract the variation is, in essence, an attempt to undermine the logic of the trading system.

A more convincing perspective rebuts this: the anti-PPM lobby forgets to place a value on the preferences of the importing state. The members of the population of this state also give up income if they deprive themselves of cheap imports by having PPM rules, and if they do so this is because they presumably place a sufficient value on the matters that the PPM rules protect—the environment, or their own clean conscience. Depriving them of these rules therefore decreases their welfare. This welfare decrease is an externality that is not internalised by the industry in the exporting state, with resulting over-production and loss of total welfare.

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7 See Bartels, ibid.
8 Howse and Regan, above n 3.
9 Ibid.
Yet all of these arguments are in a sense redundant given that laws on trade exist. Whatever the policy considerations, it may be argued that states have made a choice, and entrenched that choice in trade law, so that the question now is simply one of legality. Are PPM rules allowed? In fact, neither WTO law nor EU law is worded in such a way that the issue is self-evident, so that policy considerations enter via the need to interpret. However, the legality question raises its own specific issues about the status and legitimacy of law and adjudicators. Are PPMs something that the judges in international tribunals can properly get involved with, or does that take judges outside their remit and legitimacy?

This chapter began from the observation that it was surprising that all of these issues should be intensely discussed and debated by international lawyers, yet ignored by their EU counterparts. Its aim is primarily to find out and present what EU law says about PPM rules, and then to try to fit those findings into the wider discussion. For one thing, this is simply an interesting legal question, and one that is likely to be increasingly relevant as global warming climbs the political (and legal) agenda. National rules which address the amount of CO$_2$ emitted in the production of goods are archetypal PPM rules, and entirely imaginable in the EU context. Yet with the enlargement of the EU, and a consequent increase in diversity of values and practices, it seems quite plausible that PPM measures concerning animal welfare and biodiversity will also emerge from some states in the coming years and also be challenged as barriers to trade.  

What should we expect the law to say about all of these things?

As well as these internal issues, there is the question of EU and WTO interaction. On the level of ideas, they influence each other, via scholarship and judicial awareness of the practices of other courts. It is worth tracing the EU trajectory to see what parallels and differences there are and what lessons each has for the other. On the more difficult level of law, one may wonder whether EU law has the potential to conflict with WTO rules, with the same goods being subject to PPM measures that the EU permits, while the WTO considers them wrongful barriers to trade. This question will be returned to at the end of the chapter.

The chapter is divided into three sections, corresponding to the legal contexts where PPM regulation is or may be most relevant. The first deals with Articles 28 and 29 EC and the free movement of goods within the EU. The second deals with public procurement, and the question of whether public authorities may include PPM requirements in their purchasing agreements.

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10 For possibilities, see Swinbank, above n 5. These issues have already been raised by UK measures: Case C-5/94, Hedley Lomas [1996] ECR I-2553; and Case C-1/96, Compassion in World Farming [1998] ECR I-1251.

The third addresses Article 90 EC and the rules on discriminatory taxation, asking whether taxation on the basis of PPMs violates the rule that similar products must be taxed similarly. At the end there is an attempt to draw the strings together and see if there is a consistent EU approach to the PPM problem.

As a preliminary, two points about PPM measures need to be noted. The first is that there is a difference between ‘true’ PPM measures and those which use PPM regulation as a proxy for product regulation. For example, a rule regulating the use of pesticides in the production of vegetables is a PPM measure—it addresses the process of vegetable production. Its non-PPM analogue would be a rule limiting the amount of residues found in the vegetables themselves. However, the logic of the pesticide PPM is that using pesticides does have a physical effect on the vegetables themselves—it is simply, perhaps, more convenient and practical to regulate the farming process than test all of the vegetables. A measure of this form is thus really concerned with a physical characteristic of the product. It assumes that there is a physical difference between vegetables grown using pesticides and those without. The PPM is a proxy for a product rule. By contrast, a rule prohibiting the sale of vegetables produced on land that was previously natural forest, or grown by children, contains no assumption that the vegetables resulting are different in any physical way at all. It is a true PPM, aiming to regulate the process of production as such. It is with these measures that this chapter is concerned.

The second point is that it matters what form a PPM measure takes. If one taxes electricity, domestic or imported, according to its method of production, one has an equally applicable measure. By contrast, if one taxes Polish goods more highly because Poland generates most of its electricity from coal, one has a directly discriminatory measure. Public discourse and the suggestions of politicians and commentators in the media often seem to suggest that it is the latter form of measure that is appropriate; let us restrict Brazilian goods to protect the rainforest, or Pakistani goods to protect children. However, in general, and certainly in the EU context, such directly discriminatory measures are simply prohibited, and there is nothing more to say about them. If they have a legitimate goal, then that goal can be achieved without naming particular states—via measures targeting all products made using child labour, or all products resulting from rainforest destruction, irrespective of the state of origin. Such equally applicable measures require justification, but are not a priori prohibited. Some discussion about PPM measures and their legitimacy becomes confused because of a lack of distinction between the two approaches. It is only the equally applicable path which is realistically defensible in law, and

12 Howse and Regan, above n 3.
it is only measures which are on their face equally applicable which are the subject of the following discussion.

II. THE FREE MOVEMENT OF GOODS

Article 28 prohibits quantitative restrictions on the import of goods, or measures of equivalent effect to a quantitative restriction (MEEs). It has been established since Dassonville that any national measure which has the effect of excluding imports from the national market may be seen as an MEE, and since Cassis it is clear that a national measure regulating the physical composition of products or their packaging certainly is an MEE.13 Yet there is a notable paucity of cases concerning production methods. Either states do not have PPM rules which impact on other Member States, or no one has felt any inclination to challenge them.

Logically, one would think that a PPM measure should be treated by the Court of Justice in the same way as a product rule is handled under Cassis. The rationale for insisting that states accept products made according to other Member State norms is two-fold. On the one hand, within a relatively tight and uniform club such as the EU, the starting point should be that all Member States have adequate product regulation, protecting all really important interests sufficiently. Thus, while there may be differences, rejecting foreign products simply for being different is disproportionate. They may not be the same, but they should be fine.14 On the other hand, an absence of such mutual recognition would render the internal market unworkable. If producers have to comply with local product regulation in every country they export to, they will need 27 production lines, and parallel imports from state to state—an important part of the economics of the internal market—will be blocked.15 The only way to create a truly open market, other than harmonisation, is to let the country of production regulate production and demand other Member States accept this.

Both of these considerations apply just as much to PPM measures as they do to traditional product rules. This would mean that, prima facie, states should not apply PPM measures to imports, but that the door is not entirely closed to justification should they have a particularly good reason for doing so, either via the open class of ‘mandatory requirements’ or via the exceptions to Articles 28 and 29 found in Article 30.

However, justifying PPM measures is not quite as simple as justifying the application of product rules. On the one hand, the class of interests often involved—the environment, fundamental rights, animal welfare—are relatively important. Yet, on the other hand, the harm concerned often takes place wholly or partly in another jurisdiction, and so the interests look extra-territorial. A claim that such concern for extra-territorial interests is disproportionate, that the importing state’s interest in the application of the rule does not justify the rule’s trade-restricting effect, would seem promising in many cases. To rebut this, it would be necessary to show that the application of the PPM measure is more than just interference, but reflects a domestic interest too. This may be the case where the production process has global effects—such as the emission of CO2—or where there is a domestic moral aversion to the production process used that is sufficiently strong to justify trade-restrictive measures. There is some support in the case law for the idea that such an approach could succeed.

For example, in PreussenElektra, a German rule was challenged requiring power companies to buy a percentage of their electricity from German wind-farms. The effect was to reduce the possibilities for imported electricity. The fundamental objection to the rule was that it was protectionist, but the Court found it (potentially, subject to agreement by the national court) justifiable on environmental grounds. Reduction in CO2 emissions was both a Community goal and a legitimate national one. From the perspective of an individual state, there is certainly an interest in having less CO2 in the atmosphere, but this interest is served just as well by foreign reduction as domestic reduction. Thus if CO2 reduction is a goal which can justify restrictions on trade, as Preussen suggests, then in principle it is not obvious why it could not justify PPM measures concerned with the manner of electricity generation in other states. The specific objection that this is one state interfering in another state’s domestic choices seems more suited to a role in proportionality assessment, than as a factor rebutting in principle the legitimacy of measures aimed at reducing CO2, irrespective of the location of emissions.

A second case arguably provides some support for trade restrictions based on moral or ethical objections to production processes. In Federconsumatori, a Community regulation on genetically modified organism (GMO) labelling was in issue. The purpose of such labelling is ambiguous, and the relevance of the case here is that the Court specifically rejected the idea that the label was there to protect health interests, or that there remained any risk associated with the GMOs in question. The labelling was simply to ensure that the ‘final consumer is properly informed’.

18 Ibid, para 59.
to be a somewhat delicate balancing act; the foodstuffs in question made from GMOs are identical in all relevant ways to foodstuffs made from non-GMOs, yet we understand that people still wish to know if GMOs are present, in order to be able to choose whether to consume them. This could be interpreted as ‘we say they are just as good, but we know and accept that some people don’t believe us and think there are health or nutritional risks’. It could also be interpreted as ‘the GMO products are just as good, but people may have objections not based on the product quality. They may be against GMOs in principle’. The policy and intention of the legislation is probably a combination of the two. However, it is unlikely that one will hear an official admission of the first approach, since this would either seem to be a legislative bowing to consumer irrationality, or something close to an admission of doubt in their own promises of safety. Thus, in choosing to legislate for compulsory labelling the Community is, at least arguably, conceding that it is legitimate for individuals to make choices on the basis of means of production as such and to entrench the right to such choices in legislation. The difference with a national labelling requirement is that, not being EU-wide, it would amount to a trade barrier, and thus might be disproportionate. However, the GMO case suggests that the goal of informing consumers about means of production, even if those means leave no detectable trace in the final product, is a potentially legitimate one that can justify imposing costs on packaging and marketing.

A way in which states can ensure consumers are informed without running into Cassis de Dijon problems is suggested in Sapod Audic. Here, the Court had to deal, amongst other issues, with a requirement that information on the recyclability of packaging be provided to consumers at the point of sale. This, it stated unsurprisingly, would be a selling arrangement, and thus outside Community law provided it did not have a discriminatory effect. It follows that if states were to require sellers to inform consumers at the point of sale about, for example, the amount of fossil fuel used in production of goods or the conditions under which animals were kept, this would not comprise an obstacle to trade, unlike a requirement that the information be physically present on the product or its packaging. A proviso might be that in some cases such information could be very difficult to come by, even by the producer. There could be a proportionality-based limit as to how detailed such information could be, and how far down the

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19 See G Davies, ‘Morality clauses and decision making in situations of scientific uncertainty: the case of GMOs’ (2007) 6 World Trade Review 249.
20 Case C-159/00, Sapod Audic [2002] ECR I-5031.
chain it might go—should it include energy used in producing imported sub-components, for example?22

Article 29 provides more directly relevant case law. This article prohibits quantitative restrictions on exports within the EU, or measures of equivalent effect. Here there have been cases on export of waste oils, which was restricted in the name of the environment.23 Such oils are dangerous and require careful disposal. The restricting states were thus apparently trying to protect the local environment in the intended state of export, rather than their own environment. They lost, but not on the principle. Rather, the Court found that they had not adequately shown that the state of export was unable to deal with the oils adequately—that there was a genuine environmental risk justifying the action. The cases do therefore appear to acknowledge local foreign harm as a legitimate cause for concern, and for trade-restrictive measures when necessary. We do have a right to be concerned about problems internal to our neighbours, and even potentially to restrict trade to protect them.24 This is even though the environmental problem in question, unlike CO2, has no cross-border effects, so that concern cannot be understood in terms of narrow self-interest. One could instead posit a form of Union solidarity, an indirect horizontal reading of Article 10 EC, requiring states to take each others’ interests into account, and the corollary that they should be concerned about the impact on foreign environments of the export of their waste.25

Two other Article 29 cases concern animal welfare and attempts by the UK to restrict the export of calves likely to be reared or slaughtered in inhumane ways. In Hedley Lomas, the Advocate General rejected the right of states to take PPM-based measures.26 He claimed, citing Dassonville, that they were only entitled to restrict trade to protect their own domestic interests. Since the harm to the animals would occur in another state, there was no basis for the export restriction in the Article 30 ‘health of animals’ exception.

He was partly missing the point. The UK Government and population—it was claimed—felt the treatment awaiting the animals to be immoral. If they allowed the animals to be exported, they would be implicated in such immoral action; it seems conventional to argue that one is morally contaminated if one assists, or even passively goes along with, immoral acts.27

22 On the risks of protective measures which may unduly burden those who import components, see Case 153/78, Commission v Germany [1979] ECR 2555.
25 Ibid.
27 See Davies, above n 19.
There was, therefore, a purely domestic public morality interest in not permitting such exports. The Advocate General in *Compassion in World Farming* took this approach, denying that the health of animals could be relied upon, but suggesting that the proper and legitimate Treaty exception was the Article 30 reference to public morality.28

In both cases, the UK lost because the relevant aspects of animal welfare were the subject of harmonisation measures. It is established, admittedly not without controversies, that once a matter is harmonised, compliance with that harmonised standard must command EU-wide recognition. Precisely the point of such harmonisation is to take away legitimisation for obstructions to trade. In *Hedley Lomas*, the UK claimed that the state did not in fact comply with the harmonised standard, but the Court found that states are not entitled unilaterally to police compliance with Community law. In both cases, however, the Court began the relevant part of the judgment by affirming that the Treaty allows for exceptions to trade to protect the life and health of animals, before going on to find that where harmonisation has occurred the position changes. The fact that the harm to the animals was outside the exporting state’s jurisdiction was not mentioned. Was this because it was not relevant—that is to say PPM-based measures are not excluded—or was it because the Court found it logical to begin with discussion of the harmonisation and, since this disposed of the case, never needed to consider further points? One would expect that if extra-territorial harm cannot be the basis of recourse to Article 30, this would be so fundamental to the case that it would have deserved a mention. At the very least, it seems clear that there was no firm view in the Court that PPM measures could never be taken; the judgments would have been such an appropriate opportunity to state this that silence can only be read to that effect.

Similar comments can be made about *Gourmetterie van den Burg*, an Article 28 case where the Netherlands prohibited the sale of birds from endangered species, even where caught abroad and where the species was not present in the Netherlands.29 This was a rule primarily aimed at protecting fauna in other Member States, arguably also justifiable on global environmental and moral grounds. The Dutch rule fell because the matter was the subject of exhaustive harmonisation, but the Court did not express any view that the use of Article 30 for such primarily out-of-state interests was wrongful in principle—although it is worth noting that the Advocate General felt that the Dutch rule was very likely to be disproportionate.30

A particular issue raised by the free movement of goods is the relationship between public and private measures. The general principle is that Articles 28 and 29 apply to public measures, and private measures are only

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29 *Gourmetterie van den Burg*, above n 24.
30 See Scott, above n 2, for discussion.
caught under very specific circumstances—usually where there is delegated responsibility for regulation, de facto control by a private body over an area of economic activity or where the private body is in fact under the control of the state.\(^{31}\) Outside these categories, private parties are required to respect the fundamental freedoms of the Treaty only if they have, as a matter of fact, sufficient power to ‘neutralise’ the exercise of those freedoms by another party, and even this proposition is recent and controversial.\(^{32}\) Thus, if pressure groups wish to campaign for ethical, sustainable or environmental production, and offer standards and benchmarks and stickers indicating compliance, then the free movement of goods has little to say about this or to object to it. Producers can choose whether to apply for the approval as a marketing attribute, to ignore it or to offer their own label or declaration of virtue.

The difficulty arises where the boundary between public and private becomes blurred, which is increasingly the case in precisely this sort of context.\(^{33}\) States reluctant to run into trade law problems may well be happy to support private schemes, either with subsidies or by granting (quasi-)official approval. It is worth noting AGM here, in which a state was held liable for violation of Article 28 simply because of a statement by an official which disparaged the quality of products from another state.\(^{34}\) It is not enough not to run PPM schemes from a ministry; states need to make sure that they do not leave their fingerprints anywhere if they want to avoid sharing responsibility, and possibly liability.\(^{35}\)

Whenever a private, voluntary, labelling scheme is operated it is, therefore, necessary to ask two questions. The first is whether, if run by a state, this would be in violation of Article 28 or 29. This may be avoidable in principle, but there is a great need to be careful that factual criteria are applied in a way respecting diversity. There can be no unique, national way of respecting the environment, imposed on others. Rather, there must be objective, defensible standards, an openness to different ways of meeting them, and


\(^{32}\) Case C-438/05, ITWF v Viking, judgment of 11 December 2007, paras 57–62.


very good evidence of harm where it is claimed. The second question, if the answer to the first is positive, is whether state support, influence or even control can be identified. In that case, there should be some nervousness. Although the case law on public involvement in private obstacles is scarce and developing, and has not much to say about the specifically PPM context, the underlying policy includes an aversion to states avoiding their own obligations by acting via others.36

III. PUBLIC PROCUREMENT

Governments are generally the largest purchasers of goods and services. Being political authorities, accountable to a population who may care about a range of issues, they have reasons to make purchasing decisions that are conditional on ethical or environmentally friendly production.37 Yet public procurement is regulated by directives that tightly constrain the purchasing freedom of public authorities, and for good reason: the tendency to prefer local or known suppliers is very strong, and undermining this protectionism demands a regulatory regime that forces decisions to be based on open and objective criteria, that are not designed in a way that de facto favours national suppliers.38

The relevant directive, 2004/18, mentions in a number of places that environmental considerations may be taken into account in tendering. However, it does not make clear whether these include considerations relating to the manufacturing process. The current state of the law is captured by the requirement that award criteria must be ‘linked to the subject-matter of the contract’, a phrase found in the directive and made central to a number of discussions by the Commission and to the judgments discussed below.39 However, what does it mean? The Commission’s interpretation is summed up in its ‘Buying Green Guide’, which states:

[S]ince all technical specifications should bear a link to the subject matter of the contract, you can only include those requirements which are related to the manufacturing of the product and contribute to its characteristics, without necessarily being visible. You can for example ask for electricity produced from renewable energy sources, although green electricity is not physically different from electricity

36 See especially Commission v Ireland and Apple and Pear Development Council, above n 31.
produced from conventional energy sources, and makes the lights work in exactly the same way. However, the nature and value of the end product has been modified by the process and production method used.40

It is clear that the ‘characteristics’ of the product, in the eyes of the Commission, are more than its physical characteristics. Matters which affect the way we value a product are part of its characteristics, even if not physically measurable. The fact that consumers see, or might see, green electricity as different from brown electricity, and will, or might, pay differently for it, makes it a different product. This echoes the orthodox competition approach, where product market definition is determined by consumer preferences.41

The Court appears to be following a similar path. In Concordia Bus, it asserted the importance of environmental considerations and CO₂ reduction, and the legitimacy of factoring them into public procurement, albeit in a non-PPM context.42 Then, in EVN, it was required to consider a national purchase of electricity conditional upon the supplier generating it from renewable sources.43 It found, with no ado, that this was linked to the subject matter of the contract and not precluded by the Community legislation in force.

It looks as if PPM purchasing is uncontroversial in principle, but this leaves unclear how far a national authority can go. If it can demand green electricity, can it also demand goods made in factories using green electricity? Can it demand that bought-in components of those goods also be made using green electricity? Can the same requirements be made concerning, for example, biodiversity—a demand that goods not be made using crops grown on land that was formerly natural forest, or not be made using pesticides that are harmful to insect life, or much more complicated but equally important requirements which can no doubt be formulated, aimed at ensuring that purchased goods are not made in ways that do serious harm to planet, animals or plants? As a matter of principle, it is difficult to see any coherent place to stop. If, as ethical beings, we are to be allowed to care about the effects of our decisions on the world, even bits of it we do not own, then it would be arbitrary to distinguish between different mechanisms of effect.

Practicality may provide better reasons for drawing a line. At some point the informational requirements imposed on suppliers could become


41 See Kysar, above n 2, analysing such an approach as a conflation of market and citizen values.


unreasonably burdensome. Do they have to check the behaviour of their suppliers, who may be located in far-flung corners of the world? If one takes the issue at hand seriously, they should, but given that the fluidity and ease of trade and purchasing is also worth valuing, and valued in the law, at some point a balance will have to be made. In *EVN* and *PreussenElektra*, it was very relevant to the discussion of green electricity that a Community system existed for the certification of electricity, so that it was reasonably practical to establish how a supplier was doing their generating.\(^{44}\)

A particular issue here is whether a PPM measure becomes discriminatory. Of course, direct discrimination, for example by imposing the requirement only on foreign suppliers, is prohibited, but if the measure has a greater exclusionary effect than can be justified by its goals, then it will be indirectly discriminatory.\(^{45}\) That may occur if, for example, the rejected production method is prohibited in the state of purchase. Say Denmark considers farming in a particular way, using pesticide X and stripping out hedgerows, to be particularly harmful to biodiversity and prohibits it. An ethical public authority in Denmark wishes to purchase agricultural goods, and requires that they not be produced in this harmful way. They are, of course, essentially requiring that foreign suppliers conform to Danish norms, which will quickly result in a claim of protectionism. An important point to note here is the difference between a measure serving an acknowledged Community goal—CO\(_2\) reduction—and one serving a goal that only that particular Member State seems very concerned about.\(^{46}\) The former, of course, is more likely to be recognised by the Court. However, deciding which category a measure belongs to is not necessarily easy; is this an idiosyncratic Danish obsession with small fields and hedges, which other states should not to be subjected to if they have chosen other policies, or a national pursuit of the Community-acknowledged goal of preserving biodiversity? In any case, the measure will inevitably tend to favour Danish suppliers, who are already adapted to such a regime. This is not in itself a reason for rejecting the requirement; nothing in *EVN* supports the idea that if Austria, the purchasing state, had legislation in place ensuring that its own electricity was particularly green, this would undermine its choice to purchase green electricity from elsewhere.\(^{47}\) The question is simply whether the PPM requirement is sensible and justifiable, but that it impacts on a greater proportion of foreign companies is a reason for particularly hard scrutiny.

\(^{44}\) See also cases above at n 21.


\(^{46}\) Reliance on a Community goal can cut both ways. It means that the state is prima facie expected to adopt the Community’s chosen policy approach to the problem, and has the burden of justifying any locally specific derogation from this; see Joined Cases T-366/03 & 235/04, *Land Oberösterreich v Republic of Austria* [2005] ECR II-4005.

\(^{47}\) See text subsequent to n 51 below.
Very strict requirements imposed all the way down the manufacturing chain might tend to disadvantage suppliers who receive parts from far-flung subcontractors, in favour of those doing all their production themselves, if only as a result of the difficulty of obtaining information. This could easily be protectionist, as for example it discourages a local supplier from outsourcing aspects of production to other states, since this will make it harder to provide the process guarantees.  

IV. DISCRIMINATORY TAXATION

The context wherein PPM issues are likely to arise to the greatest extent is that of Article 90, the prohibition on discriminatory taxation. This requires in its first paragraph that imported products bear no taxation in excess of that borne by ‘similar’ domestic products. There is a considerable, and non-accidental, resemblance to the GATT requirement that imports be taxed to no greater degree than ‘like’ domestic products, and indeed a certain literature on whether the two rules are interpreted to mean the same thing.  

The second paragraph of Article 90 prohibits taxation on products which have a protective effect. This complements the first paragraph to prevent protectionist taxation which somehow escapes the similarity rule. The second paragraph encapsulates the policy of Article 90, while the first paragraph presents the most widely appropriate practical rule for pursuing that policy.

PPM-based bans on certain products, falling under Article 28, are, as was discussed above, vulnerable to claims of disproportionality. A state wishing to react to production methods may find it more attractive and easier to defend legally to use taxation as their tool of choice, imposing a higher tax rate on goods made in the non-preferred way. A central aspect of whether this is permitted under Article 90, first paragraph, would then seem to be the question of whether physically identical products made differently are similar to each other.

The Court consistently finds that similarity rests almost entirely on two characteristics, physical composition and consumer substitutability.  

The latter of these can, at first glance, easily encompass PPM factors insofar as


50 Eg Case 45/73, Reue v HZA Landau [1976] ECR 181; Case 168/78, Commission v France [1980] ECR 347; Case C-106/84, Commission v Denmark [1986] ECR 833; and Case C-302/00, Commission v France [2002] ECR I-2053. The cases show that Community customs classifications can sometimes play a minor evidential role in deciding whether products are similar.
consumers consider these relevant. If consumers care about CO₂, and are prepared to be influenced in purchasing decisions by it, then clearly it is relevant to substitutability.

This, however, reduces tax policy to a reflection of existing preferences. If the public do not already choose, in general, to buy ethical products, then it would seem that they obviously consider the ethical and non-ethical to be substitutes. Any PPM tax regime would then be contrary to Article 90. If, on the other hand, the public already distinguish between products on the basis of production methods, then a tax distinction would be legal, but superfluous.

The second paragraph of Article 90 applies where products are not similar, but nevertheless to some extent in competition, and prohibits taxation with a protective effect. Assuming PPMs are sufficient to distinguish products from each other, it will come into play. It is, however, less of a problem than the first paragraph, for the reasons outlined below.

As a matter of fact, industries are more likely to adapt to their local tax environment than to a foreign one. Thus, if taxation takes account of production factors then there is a greater chance that local industry will adapt to come into the low tax category than foreign producers will, even if the scheme is formally origin-neutral. To this extent, there is a good chance that domestic products will more often bear the lighter tax burden and a PPM—or any other—tax distinction will have a contingent protective effect. However, the cases make clear that the Court does not consider this enough to violate the second paragraph. In principle, there is no reason why a foreign producer could not also adapt, and if the taxing state is a major export market then perhaps it will. The Court does not find that the second paragraph is violated by tax distinctions unless either there is some necessary reason why domestic producers will find it easier to benefit from the low band, or the state is unable to show that the bands correspond to objective and non-discriminatory policy goals. In the absence of such justification, the de facto tax advantage which domestic producers seem to be enjoying can no longer be excused, and there is, moreover, usually reason to suspect a protectionist motive. The most extreme example is where there is no domestic production falling into the higher band, or only domestic production in the lower band. Here, the Court looks particularly carefully

51 Case 168/78, Commission v France, ibid; and Case 169/78, Commission v Italy [1980] ECR 385.
at the distinction, and states have tended to lose. Nevertheless, the tone of the judgments, the one or two exceptions, and logic, all combine to suggest that the best reading of the cases as a whole is that such disparities are not per se prohibited, but simply attract a very heavy burden of justification to prove that they are not protectionist. In principle, the situation where there is no domestic production in the higher band, or no imports in the lower one, is one end of a sliding scale rather than something qualitatively distinct.

A preliminary analysis of the general principles of Article 90 therefore suggests that PPM-based tax distinctions can easily be constructed to avoid violating the second paragraph, but are very likely to violate the first. However, there are a number of cases on PPMs and Article 90, and they tell a quite different story. The Court has consistently found that PPM-based tax distinctions are, in principle, acceptable even under the first paragraph.

The most cited case is Chemical, which concerned industrial alcohol. This could be produced by both natural and synthetic processes, the former being apparently environmentally preferable. The final products were identical, indistinguishable. The Court found an Italian tax advantage granted to naturally-produced alcohol to be compatible with Article 90:

Community law does not restrict the freedom of each Member State to lay down tax arrangements which differentiate between certain products on the basis of objective criteria, such as the nature of the raw materials used or the production process employed. Such differentiation is compatible with Community law if it pursues economic policy objectives which are themselves compatible with the requirements of the Treaty.

The quotation is unambiguous and supported by other cases, both preceding and subsequent. Two deserve a particular mention: Outokumpu Oy and Bobie. The first of these concerned a tax advantage granted to electricity produced by renewable means, and the second a tax advantage on the sale of beer produced in small breweries, defined as those producing less than a certain amount per year. In both cases, the rules were found contrary to the Treaty, but not because they were based on production method. Rather, the Court objected to the fact that the tax advantages were

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56 See above n 52.
58 Ibid, para 14.
granted only to domestic complying products, and not to imports. Thus, states may use production to make tax distinctions, but they must, as the Italian state correctly did in Chemial, make their rules origin-neutral, so that complying imports receive the same benefits. This would seem to be an obvious interpretation of Article 90, fitting very naturally with its text, and hardly objectionable. There are few things that Community law objects to more profoundly than formal legal distinctions between the national and the foreign. And yet the rulings do cause some problems.

An initial problem is a legal one, and results from a statement found in several cases, including in Outokumpu Oy. Here, the Court said:

As regards the compatibility of such a duty with Article [90] of the Treaty, it is settled case-law, first, that in its present state of development Community law does not restrict the freedom of each Member State to establish a tax system which differentiates between certain products, even products which are similar within the meaning of the first paragraph of Article [90] of the Treaty, on the basis of objective criteria, such as the nature of the raw materials used or the production processes employed (emphasis added).60

This is similar to the extract from Chemial, but adds an important extra element; the Court in Outokumpu Oy states that even tax distinctions between products which are ‘similar within the meaning of the first paragraph’ are permitted. By contrast, the Chemial judgment is a model of studied ambiguity on this rather difficult doctrinal point, leaving open the question of whether tax distinctions were permissible because of a lack of similarity, or despite similarity.

Outokumpu Oy does not, however, decide whether PPM differences would or could make products non-similar. This might be the case, for example, if consumer preferences are so strong that the goods occupy different markets. One may, however, question how often this is the case. How price sensitive are the markets for green electricity or sustainable wood? However, in any case, it will no longer be necessary to explore this avenue; even if PPM factors do not make products non-similar, Outokumpu Oy says that different taxation is permitted. The question is how this can logically be the case, without falling back on the rather lazy conclusion that the Court prefers good policy to good law and has abandoned the text of Article 90.

The most plausible way of reconciling Outokumpu Oy with the Treaty is via the words ‘in excess’. The first paragraph requires foreign products to bear no taxation ‘in excess’ of that borne by similar domestic products.

However, this apparently straightforward phrase belies the complexity of measuring taxation. Tax can be levied on the basis of obvious abstract criteria such as value or price or volume, or more product-specific ones such as alcohol content or engine size, both of which the Court has implicitly accepted as legitimate in the eyes of the Treaty.\(^61\) The range of reasonable possibilities is often large. However, if two products bear equal tax burdens measured by one of these criteria, they will probably not do so measured by another, and vice versa. Yet if actual tax burdens may be assessed against hypothetical criteria, Article 90 will become unworkable: ‘my car bears the same tax as your car because cars are taxed on value and they have the same value, but if cars were taxed on the basis of weight then my car would be taxed less than your car, therefore on the basis of weight my car actually is taxed more heavily, therefore there is a violation of Article 90 …’. The ‘in excess’ rule can clearly only be applied to the tax criteria actually used, which must then be equal for foreign and domestic products. However, this is not enough; one could construct formally equal rules which in fact benefit domestic products much more. There must be a test for the legitimacy of the chosen criteria.

The most obvious way of accommodating the above thoughts in an interpretation of Article 90 is to read the first paragraph as asking whether tax criteria applied to similar products discriminate, directly or indirectly. This would amount to a formal question—are tax criteria origin-neutral—and a substantive one—are tax criteria so constructed that while formally origin-neutral in fact domestic products can inherently benefit more easily from advantages, or do so in fact to an extent that is disproportionate and not justified by the nature of the tax policy?

However, if this is correct, then there would seem no obvious reason why PPM factors could not be part of the tax system, provided they are origin-neutral and not so constructed that domestic products disproportionately or inherently benefit more than similar imports. In other words, PPM factors can be just as much a basis for taxation as content factors or price; ‘in excess’ is neutral on this point. States are free to choose any rational criteria, provided they do not discriminate. This must be the rationale for the PPM-tolerant cases.

Thus, the fact that a foreign bottle of wine is taxed more heavily than the domestic competitor next to it on the shelf may be justified by the fact that the foreign bottle is bigger, or more expensive, or has more alcohol, or has more sugar, or is more attractive to teenagers, or is made by an industrial process, provided that such factors are being relied upon as part of a tax

policy pursing legitimate goals according to objective and non-discriminatory factors.

This interpretation fits with the Court’s most recent formulation. It ‘globalises’ Article 90, providing a single conceptual framework for similar products and non-similar products that are in competition.\textsuperscript{62}

First of all, although it is settled case-law that, as it now stands, Community law does not restrict the freedom of each Member State to establish a tax system which differentiates between certain products, even products which are similar within the meaning of the first paragraph of Article 90 EC, on the basis of objective criteria, such differentiation is compatible with Community law, however, only if it pursues objectives which are themselves compatible with the requirements of the Treaty and its secondary legislation, and if the detailed rules are such as to avoid any form of discrimination, direct or indirect, against imports from other Member States or any form of protection of competing domestic products.\textsuperscript{63}

The conclusion is that PPM-based tax distinctions can be justified using ‘in excess’ in a way that fits the cases. More importantly, Article 90 has been consistently read in a way that focuses on a uniform tax structure for the domestic and foreign, and minimises intrusion into substantive national tax policy choices about the content of that structure, even where it contains PPM-based tax distinctions.

This result is broadly to be welcomed, but can lead to some surprising and not entirely comfortable situations. One concerns the possibility of ‘double taxation’. In general, products are subject to sale/marketing/transaction taxes only once—in the state where they are marketed. However, where those taxes are based on the way in which the goods were produced, the producers may well have been subject to taxation based on the same factors in the state of production. State of production A may tax producers according to their environmental harm, while state of sale B may then tax the products according to that same harm. It would not be surprising if claims were made of ‘double taxation’ and unfairness.

In fact, this is a problem that occurs even with non-PPM taxation, and results simply from different tax structures. In all states, producers are taxed on their profits, and in other ways, and in all states there are product taxes of various sorts. All taxes are integrated into prices, so a consumer buying goods pays both product and producer taxes. If the goods are domestic, it will not matter to the consumer how the system is structured, and whether the additional cost resulting from taxation is brought about through producer or product taxes. However, if goods are produced in state A with low producer taxes and high product taxes, and sold in state B

\textsuperscript{62} The word is from A Easson, ‘Fiscal discrimination; new perspectives on Article 95 of the EEC Treaty’ (1981) 18 CML Rev 521.

\textsuperscript{63} Case C-221/06, Stadtgemeinde Frohnleiten, judgment of 8 November 2007, para 56.
with high producer taxes and low product taxes, the consumer in B ends up paying B’s low product tax and A’s low producer tax, thus getting a much better price than either if he or she chose domestic products, or if he or she was a consumer in A buying products exported from B. Such is life. As long as tax is not harmonised, such disparities will exist. PPM taxation, by explicitly taxing something occurring in another state, the costs of which one expects to be integrated into the tax system of that state, simply makes the issue more apparent.

In any case, the PPM-taxing state and the production state, even if they both apparently levy taxes linked to the environmental costs of production, are collecting to cover different costs; if tax authorities are rational, then the state of production levies a tax which in some sense it believes corresponds to its own harm, while the state of sale levies a tax which in some sense corresponds to the harm. It is the premise of most PPM-taxation that events occurring in other states are our legitimate interest and in some sense can cause us harm, and this is the justification for the taxation. Whether that harm is concrete or moral, the result of weather and environment changes, or the distress of implication in wrongful acts, does not affect this principle.

However, this justification does fall apart if the event in the state of production really does not cause harm in the state of sale and is, on any reasonable view, none of their business. This problematic situation has occurred in a number of cases where states were using their tax system to support artisanal or regional production of alcoholic drinks. The issues it raises are well approached through the facts of Bobie, and contrasting them with other typical PPM measures, such as those based on CO₂ emissions or human rights requirements. These latter both concern a legitimate interest of the state; the state wishes to combat global warming and it does not wish to contribute to violations of rights. It is easy to understand the motivation for such tax rules. However, to take the facts in Bobie, what is the German state’s interest in Belgian breweries remaining small? A state may wish to stimulate and protect artisanal production in its own jurisdiction, for various social reasons associated with the quality of life and of products. However, it has no equivalent interest in the nature of production in other states. Nor can it claim that large breweries are such an offence or abomination that it can legitimately abhor them wherever they lie. At least it cannot do so without becoming rather precious.

Thus, applying a global environmental or rights-based PPM to imports is a logical part of the policy that the tax differential aims to pursue. However, applying a PPM concerning a purely local interest to imports from other

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states has no compelling logic. Indeed, it is particularly problematic insofar as it may conflict with entirely legitimate policies in the exporting state. Perhaps the Belgian Government wishes to stimulate the consolidation of small, uneconomic breweries. It will hardly be happy to see this being punished by extra tax burdens on exports to Germany, when this serves no legitimate German interest. Surely the law here has lost its way?

The German Government in *Bobie* should really have pursued its preference for artisanal breweries by providing assistance directly to the breweries, instead of using sales tax on the beer as a proxy. The real policy behind the distinction is to influence the production processes of domestic industry by changing the competitive relationship between different domestic production methods.\(^\text{65}\) Sales tax, as a method of achieving this goal, is imperfect. It not only has unwanted side-effects—it affects the relationship between domestic and foreign industry, discussed below—but it is also partly ineffective; what about domestic exporters? They are unaffected by the tax policy, yet the side-effects of their production methods are presumably the same as those who sell domestically. State aid avoids the second problem and minimises the first since it can be linked to the particular benefits or harm of the production process, rather than sales volume as such. It would be a more appropriate policy tool. However, had the state pursued this path openly it would have run into problems with Article 87, the prohibition on state aid, which is very strictly formulated and permits of few exceptions. Article 90 being more forgiving, they made a legally understandable choice to take that path.

Some might object that the state aid path ‘distorts’ competition, because it denies imports a benefit that domestic products receive. However, those imports do not contribute to domestic welfare in the way that local artisanal brewers apparently do. If there is a specific reason why small breweries are desirable and a reason why the market will fail to deliver this, then the most rational response is to permit states to take the necessary corrective action. Whether this is justifiable depends broadly on whether the domestic interest in support outweighs the disadvantage to importers or to European integration. This is precisely the policy question embodied by the rules on state aid. Requiring states to export their local policies instead of justifying them is a misunderstanding of what those polices are really about. Thus, in fact, if we look at both *Bobie* and *Chemial*, and assume that a tax distinction applying to both domestic and imported products accurately reflects the government policy, then we must assume that Germany and Italy respectively had chosen to stimulate certain local social and environmental policies in all their trading partners, irrespective of whether these were in conflict with

the local policies in those states, and despite having no apparent interest in the relevant issues outside their jurisdiction. This is not the objective and justified economic policy which the Court speaks of in the *Chemial* citation above. On the contrary, the objective and justifiable policy in both cases—although *Chemial* is perhaps arguable both ways on this point—was one that was territory specific. Applying the reasoning of *Chemial*, if not its result, the states should have been prohibited from extending their tax distinction to imports; it amounts to an irrational distinction between different categories of imports, which while not specifically prohibited by Article 90 is likely to violate Article 12, the prohibition on discrimination on grounds of nationality.66

Yet what are the alternatives? There are four approaches possible to tax distinctions based on purely local side effects of the production method.

(i) Tax all imports at the higher rate. This could be justified under the first paragraph of Article 90 by saying the local side-effects of production are relevant to similarity, and domestic producers contribute in a positive social or environmental way that foreign producers do not. However, it would fall foul of the second paragraph, since it would obviously have a protective effect. As a matter of policy, it would also have the significant disadvantage of encouraging states to construct ‘holier-than-thou’ tax systems which embody worthy goals to a greater extent than the state or its population actually care about them, because distinctions based on such goals would be such a convenient form of protection. This would be inefficient and harmful to European integration. Further, it would be open to importers to argue, quite rationally, that if they are to be burdened with higher tax because they do not bring the advantages of, for example, local artisanal production, then they should also enjoy tax breaks because they do not bring the disadvantages of local production, such as pollution. This would require a breakdown of tax into component elements in a way that is quite impossible in a world where tax rates are not set on such a technocratic basis. In any case, this option is legally impermissible.

(ii) Tax all imports at the lower rate. This would raise no Article 90 problems. The question of similarity is no longer relevant, since there is no prohibition on taxing similar domestic goods more highly, and protective effect is also no longer an issue. However, it would mean that any such tax distinction would be harmful for domestic production as a whole, since the benefits would be divided between some domestic producers and all importing foreign producers. It might

66 This point is returned to below: it can be of WTO relevance. See section V below.
well cause a flight of production abroad. This would be a heavy political price to pay. It would run into problems in states with a domestic legal prohibition on discrimination; if local side-effects of production are legitimately relevant to tax, then domestic and imported goods are never similar, making parity of taxation between some domestic goods and all imported goods irrational discrimination against other domestic goods. If production side-effects are not legitimately relevant to tax, then the domestic distinction is unjustified. However, the fundamental problem with this option is not legal but substantive: it makes the domestic distinction politically untenable. States will often choose to abolish the distinction altogether, rather than be forced to disadvantage their own producers.

(iii) Extend the distinction to imports. This breaks the link between the chosen policy goal and the tax rate, as argued above, making tax arbitrary. It suggests that production side-effects are relevant to Article 90 (since some imports are taxed more highly than some physically indistinguishable domestic goods), and yet does not translate this coherently into policy, since with local side-effects it follows that the place of production must then also be relevant.

(iv) Prohibit domestic tax distinctions based on purely local side-effects of production. This would fit with good policy. As argued above, purely local tools should be used for purely local issues—state aid. However, tax distinctions are more transparent than state aid, which is viewed as a slippery slope. Practical policy considerations might justify a Community preference for taxation rather than aid as a tool of PPM influence. It is also true that distinguishing between purely local side-effects and more global issues could become very difficult. Do states have a legitimate interest in not contributing to local environmental or even social or cultural harm in other states? Perhaps the German Government in Bobie really did not want to be implicated in the death of artisanal Belgian breweries?

In choosing option (iii), the Court is making a number of choices. First, it is deciding that states should be allowed to make such policy-based tax distinctions domestically. This is not based on any economic analysis, but is a reflection of the fact that within the current Community legal framework tax is perhaps the least bad tool for such social and environmental goals. Secondly, it is deciding that if such distinctions are to operate domestically, then states must be permitted to tax imports in a way which does not undermine that domestic policy. Requiring them to tax all imports at the low rate would be taking away with one hand what the other has given. However, permitting them to tax at the high rate would be going further than necessary. The proportionate approach is to simply extend the distinction to imports. From an evidential point of view, extending the
distinction to imports is an effective way of demonstrating that a genuine policy goal other than protection is being pursued; by granting tax breaks to imported products that bring none of the associated benefits states are effectively doing penance—showing that they are prepared to pay for their tax system.

V. EXPLAINING THE COMMUNITY APPROACH

This chapter began with a desire to examine apparent Community silence on an issue that WTO lawyers have identified as important to international trade. I expected to find that the silence reflected the fact that such restrictions simply were not tolerated in the Community context. If the WTO has difficulty with them, then it seemed at first glance that a homogenous and demanding club such as the EU, with its expectations of mutual recognition, and its ease with inroads into national sovereignty, should a fortiori be inclined to prohibit measures which could be such a slippery slope to protectionism. Not only this, but in the EU, harmonising legislation is a realistic solution to most PPM-tensions, making unilateral state measures even harder to defend.

Yet the Court of Justice and the Commission appear to be generous towards unilateral state measures based on PPMs. More than this, they appear either to be unaware of the conceptual distinction between trade restrictions based on product features and production methods, or to consider that distinction unimportant. At any rate, it is barely mentioned. PPMs have simply been a legal non-issue. By contrast, the relevant cases are filled with the classical Community law measurement tools, applied in classical ways: objectivity, justifiability, here and there proportionality. The court looks for bad intent or irrationality and goes no further.

The following explanation is suggested for this EU approach, based on three factors: the breadth of EU law, its institutional legitimacy and the dynamics of the relationship between PPM measures and harmonisation.

First, the EU regulates more than trade. It has policies concerning the environment, social issues, human rights, animal welfare and many other areas. Moreover, in the Treaty, for example its Article 6 ‘integration principle’, in numerous policy documents and in a long line of cases, it is conventional that these policies are not separated from each other by blue sky. In contrast, they are to be integrated, harmonised, rendered consistent. The theme throughout Community law is that of balance of interests. The balance is often strictly made, and Member States must prove their case for a restriction on trade, but the general approach of the Community to conflicts of interests is to concede the validity of both views and make a proportionality assessment. The very scope and power of the Community makes Member States sensitive on sovereignty matters, as the institutions
understand. Member State interests will rarely be dismissed in principle, but rather on the particular facts.

This is particularly so since the EU has a more developed concept of the shared interest than is found in the international trade context. In a number of cases, Member States defending PPM measures effectively said ‘look, this is not just us; the policy we are pursuing is a Community policy too’, usually referring to something environmental. This does not lead to automatic success, but it effectively forces the institutions and other states to concede the legitimacy and importance of the goal. Moreover, where states have agreed to pool efforts in a certain policy area it may be unsurprising if they are prepared to tolerate interference in each others’ affairs. It is part of the essence of the European integration project that states are concerned with each other’s internal matters, and the extra-territoriality objection to PPMs, although not without any force, loses some sting in the EU context.

Secondly, the EU has an institutional structure which has accumulated enough legitimacy to be able to adjudicate on PPMs. Doing this entails ruling on their substance—assessing the proportionality of measures, their effectiveness and the authenticity of stated goals. All of this is controversial when an international tribunal is involved, but the Court of Justice has jumped these hurdles long ago. Grumbles may continue about the breadth of its supervision and its interventions in all areas of national policy, but it is no longer novel, and is in practice accepted. The ‘terms of submission’ to the EU are somewhat more encompassing than those in international trade agreements.

Thirdly, the relationship between unilateral Member State PPM-based trade restrictions and harmonisation may not be what it seems. These look at first glance like polar opposites on the policy scale, and the fact that the Community has mechanisms for removing problematic national legal differences suggests that these mechanisms should enjoy primacy. If a state fundamentally objects to production methods used elsewhere, it should make that case to the Commission. If its interest is legitimate and other states share its view, then the issue can be harmonised. If other states do not agree, then it is more difficult for the Member State to justify unilateral action. Within a trading system where states have undertaken to be open to each other, concerns accepted by partner states carry more weight than those they do not acknowledge or share.

However, it seems quite plausible that unilateral action is not so much an alternative to harmonisation as a precursor to it. It identifies an issue about which at least some states or people feel strongly, and which creates trade problems. Whereas it might be difficult for the Commission alone to convince states of the necessity of action, if some states begin obstructing trade this helps to make the case.67 What a state really does when it implements a

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67 An example of this dynamic, for which I am grateful to Catherine Barnard, is the Food Supplements Directive (2002/46/EC), which came into being following a number of cases against Member States concerning national rules on vitamins in food. See Case C-154/04,
national PPM-based measure is put an issue on the Community agenda, in a way that cannot be ignored. The Commission, which is ever on the lookout for ways to complete the legal framework of the market, may well be grateful to assertive states. They look like they are obstructing Community policies, but they are also driving them.

Yet even if these arguments succeed in presenting the Community position as sensible and understandable on its own terms, some problems remain, notably where compatibility with the WTO is concerned. One should consider how different stances on PPMs might affect the relationship between the two organisations.

The most obvious problem within the Community concerns third-country goods in free circulation. It is a basic principle of the internal market that once goods are lawfully in circulation in one Member State—which essentially means that customs formalities have been completed and they may be bought and sold domestically as if they were domestic goods—they become ‘Community goods’ for the purposes of free movement and taxation.\(^{68}\) If goods are imported from the Netherlands to Belgium, Belgian laws taxing them or regulating them must apply equally whether those goods were made in the Netherlands or originally made in China and imported to the Netherlands, and, in assessing the legality of those Belgian laws, the ultimate origin of the goods will be irrelevant. Lawful presence on a Member State market cleanses goods of their history.

This means, for example, that, following Bobie, the tax distinction based on brewery size applies to all beer imported to Germany from another Member State, even if it was originally brewed outside the EU. Therefore, if the importer for Northern Europe is in Denmark and that is where the goods enter the EU market, then they enter Germany as, for the purposes of EU law, Danish. This presents certain practical problems. It may be tricky for the German Government to know how big Belgian or Czech breweries are, but knowing which tax band to apply to Chinese or Venezuelan beer could be a real challenge. The authorities will have to find out how much that brewery produces. Similarly, if alcohol originally produced in Mexico is imported into Italy from France, the Italian authorities will have to find out how it was produced.

Nor can a Member State simply sidestep the issue by agreeing that, where it is difficult to get to the root of things, they will simply grant the low tax rate. This may seem like a gold-plated approach, ensuring no one objects,

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\(^{68}\) Art 23(2) EC; Art 24 EC; and Case 193/85, Cooperative Co-Frutta [1987] ECR 2085, paras 24–30. Compare the position where products are directly imported from outside the EU: Case 148/77, Hansen [1978] ECR 1787.
but it ignores the interests of other importers. If the Venezuelan brewery gets the low rate because it is just too difficult to get to establish the facts, the Chinese brewery may well object.

Moreover, the WTO may well prohibit the application of the distinction to imports. The GATT also requires like products to be treated alike, and the ‘most-favoured nation’ rule prohibits distinctions between similar products from different states. It is far from obvious that a difference in brewery size or method of alcohol production would be sufficient to distinguish goods for the purposes of these rules. If a state directly distinguished between international imports on such a basis, it would quite possibly infringe the GATT.

Disputes between Member States of the EU over imports and taxation fall under the exclusive jurisdiction of the Court of Justice and EU law, so that it is unlikely that Belgium could call the GATT in aid against Germany. However, Germany might conceivably be forced by the WTO to grant its low tax rate to all imports originating outside the EU. Yet EU law prohibits distinctions between, for example, Venezuelan beer coming via Italy—which is to be seen as Italian—and beer made in and imported from, for example, Belgium. Thus, a consequence of granting the low rate to beer made outside the EU is that the low rate must be granted to all imports. At this point, the domestic distinction will probably be abandoned for fear of sacrificing domestic production on the altar of the worthy cause.

There is no hard conflict between EU and WTO law here, since both permit or require a low rate for all imports. This path satisfies everyone—except the domestic authority. However, it is odd, and unsatisfactory, that they take different approaches. Certainly, the EU’s line of cases encouraging and supporting the development of domestic PPM tax distinctions and their application to imports seems idiosyncratic, even short-sighted, if this path is fundamentally in conflict with WTO rules and therefore finally turns out to be a legal dead-end. The WTO may take away what the EU gives, reflecting a substantive policy disagreement on PPM taxation that is waiting for the right litigants to bring it to the courts.

VI. CONCLUSION

The notable feature of the EU approach to PPMs is a considerable case law, with a body of emerging principles, without any explicit awareness that PPMs are in fact distinctive. There is much to be said for this. Trade restrictions are about defending legitimate interests and preferences, and it may be much more efficient and transparent to ask only whether an interest is legitimate, and not be concerned about classifying it first, into a product

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69 See the references in nn 3 and 5 above.
rule, a PPM, a physical harm or a moral one. It is not the form of the measure that is really the point, but the substance of the concern.

Yet, there are distinctive legal problems raised by PPMs, and it seems unlikely that the Community’s blissful avoidance, if perhaps not ignorance, will survive the rise of environmentalism and global warming-related laws. Apart from all its other effects, CO$_2$ is likely to drive legal thought about how states relate to each other and in what ways they can legitimately embody their policy disagreements in law.