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Free Trade and Environmental Protection in an Integrated Market: A Survey of the Case Law of the United States Supreme Court and the European Court of Justice

Damien Geradin

FREE TRADE AND ENVIRONMENTAL PROTECTION IN AN INTEGRATED MARKET: A SURVEY OF THE CASE LAW OF THE UNITED STATES SUPREME COURT AND THE EUROPEAN COURT OF JUSTICE

DAMIEN GERADIN*

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* Research Assistant, Belgian National Fund for Scientific Research; Research Fellow, Institute for European Legal Studies, University of Liege, Belgium; Member of Wolfson College, Cambridge University, England. The author wishes to express his gratitude to Professors Paul Demaret and James Crawford for their comments and suggestions on earlier drafts of this Article. The author would like to acknowledge the material support that he received from the "PAI," a research grant obtained by Professor Paul Demaret at the University of Liege.

FREE trade and environmental protection are widely recognized objectives. However, their reconciliation is not always easy.[1] In response to the increasing threat posed by environmental problems, the states of the American federation and the member states of the European Community (EC) have enacted environmental statutes whose proliferation is threatening the unity of the relevant integrated market. The unity of these markets can be preserved through the intervention of the federal legislature whose harmonizing role is of great

1. *See* Note, *State Environmental Protection Legislation and the Commerce Clause*, 87 HARV. L. REV. 1762 (1974); Robert E. Dister and Joseph Schlesinger, *State Waste Embargoes Violate the Commerce Clause: City of Philadelphia v. New Jersey*, 8 ECOLOGY L.Q. 371, 373 (1979); B. Jadot, *Observations - Mesures Nationales de Police de L'environnement, Libre Circulation des Marchandises et Proportionnalite*, 3 CAHIERS DE DROIT EUROPEEN 408 (1990).

importance. Courts can also play an important role, as illustrated in this Article: a comparative analysis of the judicial attempts to resolve the tension between the free movement of goods and environmental measures within the American and EC systems.

The United States is a federal entity with an integrated market based on free trade between the states of the federation. The European Community consists of a group of states involved in an integrative process based on free trade across national borders. As we will see, with regard to the free movement of goods, the U.S. Constitution and the EEC Treaty present differences.[2] Moreover, American and EEC environmental policies are at different stages of development.[3] However, in the case of a conflict between free trade and environmental protection, the parallel between the case law of the U.S. Supreme Court and the case law of the European Court of Justice (ECJ) is particularly relevant. Both courts have been confronted with local environmental measures having a significant impact on trade. In order to preserve the unity of the American and the European integrated markets, they have thus been asked to place limits on the ability of states of the Federation or EC Member States to enact environmental legislation. However, it is suggested that the U.S. Supreme Court and the ECJ have generally shown special deference to state and national measures aimed at protecting the environment. In doing so, both courts have acknowledged the broad support of the American and the European public for environmental legislation to be adopted, even if it results in disruption to the functioning of the internal market.

Part I of this Article examines the case law of the U.S. Supreme Court related to the tension between the free movement of goods and environmental protection in the American federal system. In the United States, when Congress legislates in the environmental field, federal law overrides state law (the doctrine of preemption).[4] Conversely, if Congress has not legislated or expressed its intention to reserve the area for its exclusive sphere of competence, a state can adopt a measure designed to protect the environment in so far as the measure does not impermissibly burden interstate trade (the doctrine of the dormant commerce clause).[5]

Part II examines the case law of the ECJ related to the tension between the free movement of goods and environmental protection in the European Community. *Mutatis mutandis*, when the EC has legis-

2. *See infra* notes 188-89 and accompanying text.
3. *See infra* notes 241-51 and accompanying text.
4. *See infra* notes 23-65 and accompanying text.
5. *See infra* notes 66-136 and accompanying text.

lated in an exhaustive way, there is no room for Member State environmental measures to override Community law.[6] However, regardless of whether the Community measures are taken on the basis of Article 100a or 130s of the EEC Treaty, the Member States retain the right to adopt stricter measures under certain circumstances.[7] If the Community has not legislated, the national authorities can take protective measures pursuant to Articles 30, *et seq.* of the Treaty which prohibits quantitative restrictions and measures having equivalent effect, or fit within one of the exemptions mentioned in Article 36 of the Treaty.[8] In addition, under European case law, certain restrictions to the free movement of goods not expressly covered by Article 36 of the Treaty may be considered as being in conformity with Article 30.[9]

Part III is a comparative analysis that identifies the similarities and differences in the approaches taken by the U.S. Supreme Court and the ECJ to reconcile free trade and environmental protection. In addition, Part III considers the relevance of American jurisprudence to the work of the ECJ.

I. Free Trade and Environmental Protection in the United States - A Survey of the Case Law of the U.S. Supreme Court

A. Powers of the States and the Federal Government as Regards Environmental Protection

Given the absence of a reference to the protection of the environment in the U.S. Constitution, powers for environmental protection first belong to the states.[10] The federal government however, has legislated in this area due to a remarkable extension of the Commerce Clause.[11] It is generally admitted that physical transportation of pollu-

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6. *See infra* notes 166-171 and accompanying text.
7. *See infra* notes 195-207 and accompanying text.
8. *See infra* notes 195-199 and accompanying text.
9. *See infra* notes 200-207 and accompanying text.
10. The Tenth Amendment to the U.S. Constitution provides: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."
11. *See generally* Albert J. Rosenthal, *The Federal Power to Protect the Environment: Available Devices to Compel or Induce Desired Conduct*, 45 S. Cal. L. Rev. 397 (1972); Richard B. Stewart, *Pyramids of Sacrifice? Problems of Federalism in Mandating State Implementation of National Environmental Policy*, 86 Yale L.J. 1196 (1977); David S. Bogen, *The Hunting of the Shark: An Inquiry into the Limits of Congressional Power Under the Commerce Clause*, 8 Wake Forest L. Rev. 187 (1971). According to one scholar,

> [t]he reach of the commerce clause has expanded steadily since the New Deal era.

tion across states amounts to interstate commerce.[12] However, even when pollution takes place at a purely intrastate level, one can still find several applicable grounds for federal intervention. For example, Congress can decide to harmonize environmental controls in all states to eliminate any potential competitive advantage enjoyed by firms situated in states with lax environmental controls.[13] Moreover, Congress might come to the conclusion that the negative effects of interstate pollution on human health, natural resources, and industrial processes have "a depressing effect on production and consumption related to interstate markets."[14] Finally, since the Supreme Court's decision in *Wrickard v. Filburn*,[15] one can say that the power of Congress to take environmental regulations extends to intrastate activities that in the aggregate might have a substantial effect on interstate commerce (e.g., emission from a large number of small sources).

Congress has thus been able to enact a series of comprehensive statutes establishing environmental standards and controlling strategies. An example includes the Clean Air Act[16] which provides the basic framework for modern air pollution control. Another comprehensive federal statute is the Clean Water Act[17] whose main objective is "to restore and maintain the chemical, physical and biological integrity of the nation's waters." Some twenty federal statutes attempt to regulate the release of hazardous substances in all environmental media. The most important acts are the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA),[18] the Toxic Substance Control Act (TSCA),[19] the Resource Conservation and Recovery Act (RCRA)[20] and the Comprehensive Environmental Responses, Compensation, and Liability

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> The Supreme Court has stated that the commerce power "is as broad as the economic needs of the nation." One commentator has gone so far as to say that "the outer limit of the power is a question for the political judgement of Congress rather than for the active scrutiny of the judiciary."

Jack R. Nelson, *Palila v. Hawaii Department of Land and Natural Resources: State Governments Fall Prey to the Endangered Species Act of 1973*, 10 ECOLOGY L.Q. 281, 293 (1982). It is, however, important to note that the interpretation of the commerce clause has not been linear. *See generally*, Martha A. Field, Comment, *Garcia v. San Antonio Metropolitan Transit Authority: The Demise of a Misguided Doctrine*, 99 HARV. L. REV. 84 (1985). This instability in the Supreme Court case law is explained by the fact that one touches here upon one of the fundamental balances of the American constitutional system.

12. Stewart, *supra* note 11, at 1222.
13. *Id.*
14. *Id.*
15. 317 U.S. 111, 127-29 (1942).
16. 42 U.S.C. §§ 7401-7671q (Supp. 1991).
17. 33 U.S.C. §§ 1251-1387 (1991).
18. 7 U.S.C. § 1364 (1991).
19. 15 U.S.C. §§ 2601-2671 (1991).
20. 42 U.S.C. §§ 6901-6991i (Supp. 1991).

Act (CERCLA or Superfund)[21]. Also worthy of mention is the Endangered Species Act of 1973;[22] it constructs a comprehensive regime for protecting endangered wildlife.

B. *Limitations Placed on the Power of the States to Take Environmental Measures*

1. *Powers of the States to Take Environmental Measures When the Federation Has Legislated*

When Congress has enacted legislation in a field, a state statute governing a related subject may be preempted.[23] Preemption by the federal government of the states' power to regulate a particular matter, for example the environment,[24] lies at the very center of the distribution between central and state powers in a federal system.[25] The doctrine is "rooted in the juxtaposition of the powers reserved to the states and the supremacy of federal law under the U.S. constitution."[26]

When Congress has decided whether or not a particular state law should survive and be enforced, the outcome is clear. For example, the 1967 Air Quality Act preempted state laws applicable to motor vehicle emissions.[27] However, as an exception, California was allowed to enforce its more restrictive regulations.[28] Because Congress has clearly decided the preemption issue, there has been no need for pre-

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21. 42 U.S.C. §§ 9601-9662 (Supp. 1991).

22. 16 U.S.C. §§ 1531-1544 (Supp. 1991).

23. *See generally* William Cohen, *Congressional Power to Define State Power to Regulate Commerce: Consent and Preemption, in* COURTS AND FREE MARKETS 523 (Terrance Sandalow & Eric Stein eds. 1982); Note, *Pre-emption as a Preferential Ground: A New Canon of Construction*, 12 STAN. L. REV. 208 (1959); LAURENCE TRIBE, AMERICAN CONSTITUTIONAL LAW 479 (1978).

24. For examples of preemption questions in the environmental field, *see, e.g.*, Note, *A Consideration of Federal Preemption in the Context of State and Local Environmental Regulation*, 9 U.C.L.A. J. ENVTL. L. & POL'Y 97 (1990); Note, *FIFRA and Preemption: Can State Common Law and Federal Regulation Co-exist? Papas v. Upjohn Co., 926 F.2d 1019 (11th Cir. 1991)*, 41 WASH. U. J. URB. & CONTEMP. L. 257 (1992); Note, *Environmental Law - Federal Preemption of Local PCB Ordinance Under the Toxic Substances Control Act - Rollins Environmental Services (FS), Inc. v. Parish of St. James*, 35 U. KAN. L. REV. 461 (1987).

25. *See* Laurence H. Tribe, *California Declines the Nuclear Gamble: Is Such a State Choice Preempted?*, 7 ECOLOGY L.Q. 679, 686 (1979).

26. *Id.*

27. Pub. L. No. 88-206, § 208(a), 77 Stat. 392 (1963), *as amended by* Pub. L. No. 90-148, § 2, 81 Stat. 485 (1967). For background information, see Currie, *Motor Vehicle Air Pollution: State Authority and Federal Preemption*, 68 MICH. L. REV. 1083, 1087 (1970).

28. Pub. L. No. 88-206, § 208(b), 77 Stat. 392 (1963), *as amended by* Pub. L. No. 90-148, § 2, 81 Stat. 485 (1967).

emption litigation. The preemption issue would probably have arisen in court if Congress had, in the Air Quality Act, imposed control equipment for new cars without deciding whether or not to preempt more stringent state regulations.[29] In numerous cases, however, Congress has imposed a regulatory scheme while ignoring the status of existing or potential state laws covering the same field. The federal Atomic Energy Act of 1954 (AEA)[30] appeared to be a fertile field for preemption litigation. Indeed, the degree to which Congress had preempted the states from regulating nuclear energy for purposes of protection from radiation hazards was largely left open by the AEA.[31] As a result, courts had to decide whether states have the right to impose more restrictive safety regulations with regard to nuclear energy than those stated in the AEA.[32] Similarly, the issue of preemption was raised in the context of Superfund legislation some years later.[33] In response to the increasing threat posed by hazardous waste problems in the 1970s, many states enacted statutes designed to ensure hazardous waste cleanup. Responding to the same problem, in 1980 Congress enacted the Comprehensive Environmental Responses, Compensation, and Liability Act (CERCLA).[34] The existence of both federal and state statutes regulating hazardous waste clean-up and the ambiguity of CERCLA's preemption provisions fostered some uncertainty regarding the possibility that CERCLA might preempt some parts of the state laws. In the Superfund Amendments and Reauthorization Act of 1986 (SARA), Congress resolved the issue by deciding that States were not preempted from "imposing any additional liability or requirements with respect to the release of hazardous substances within such State."[35]

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29. *See* Cohen, *supra* note 23, at 538.

30. 42 U.S.C. §§ 2011-2286i (1991).

31. Tribe, *supra* note 25, at 694.

32. Northern States Power Co. v. Minnesota, 447 F.2d 1143 (8th. Cir. 1971), *aff'd mem.* 405 U.S. 1035 (1972); Pacific Legal Found. v. State Energy Resources Conservation & Dev. Comm'n, 659 F.2d 903 (9th Cir. 1981).

33. *See* Note, *Federal Preemption of State Hazardous Waste Funds: Exxon v. Hunt*, 13 ECOLOGY L.Q. 535 (1986); Note, *The Preemptive Scope of the Comprehensive Environmental Response, Compensation, Cleanup and Liability Act of 1980: Necessity for an Active State Role*, 34 U. FLA. L. REV. 635, 647-50 (1982); Karen L. Florini, *Issues of Federalism in Hazardous Waste Control: Cooperation or Confusion*, 6 HARV. ENVTL. L. REV. 307, 321-24 (1982); William Funk, *Federal and State Superfunds: Cooperative Federalism or Federal Pre-emption*, 16 ENVTL. L. 1 (1985); Comment, *CERCLA Reauthorization: The Wise demise of §114(c) and Exxon v. Hunt*, 16 ELR 10286 (1986).

34. 42 U.S.C. §§ 9601-9662 (1991).

35. 42 U.S.C. § 9614(a) (1988). Before the 1986 SARA amendments to CERCLA, the statute contained a provision stating that no person be required to contribute to a fund whose purpose was to compensate claims "for any costs of response or damages or claims which may be

It is generally said that preemption occurs when a state hinders the "accomplishment and execution of the full purposes and objectives of an Act of Congress."[36] More precisely, either a conflict between federal and state statutes or a congressional intention to "occupy the field" is needed to place a state statute in an unconstitutional position.[37]

State action is preempted by federal legislation when a valid "Act of Congress fairly interpreted is in actual conflict with the law of the state."[38] Such "actual conflict" is evident when the federal and state enactments are clearly contradictory on their face and compliance with both is a physical "impossibility."[39] In such a case, the federal law is prevalent.[40] However, as the scope of state interference with a federal legislative scheme diminishes, the presence of a conflict becomes progressively more subtle. A more sophisticated form of "actual conflict" arises when the state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of the Congress.[41] For example, state law may be preempted if it discourages conduct which federal law seeks to encourage, or if it encourages conduct whose absence would help in the effectuation of the federal purpose.[42]

The most difficult issues of preemption occur in cases where the question is whether Congress has "occupied the field." Here, typically, Congress has enacted a regulatory scheme with respect to a specific cause of conduct, and state law imposes more severe standards than the federal scheme. In these cases, the federal and state regulatory requirements are not directly contradictory on their face, but the question remains whether Congress "intended" to preempt state regulation of the same conduct. It is generally admitted that Courts will invalidate state laws on preemption grounds only if it is "the clear and

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compensated under this title." Pub. L. No. 96-510, Title 1, § 114(c), 94 Stat. 2795 (1980). This provision had been intended to avoid double-taxing industry on the state and federal levels. *See* Exxon v. Hunt, 475 U.S. 355, 372 (1986). However, SARA repealed this section 114(c) to remove obstacles to the States' efforts to raise money to clean hazardous waste sites. *See* Pub. L. 99-499, § 114(a), Oct. 17, 1986.

36. *See* Hines v. Davidowitz, 312 U.S. 52, 67 (1941); Florida Lime & Avocado Growers Inc. v. Paul, 373 U.S. 132, 141 (1963).

37. *See* Florida Lime & Avocado Growers Inc. v. Paul, 373 U.S. at 141. *See also* Note, *The Pre-emption Doctrine: Shifting Perspectives on Federalism and the Burger Court*, 75 COLUM. L. REV. 623, 24 (1975).

38. Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. at 142-43.

39. *See* TRIBE, *supra* note 23, at 481.

40. *Id.*

41. *See* Hines V. Davidowitz, 312 U.S. 52, 67 (1941); Ray v. Atlantic Richfield Co., 435 U.S. 151, 158 (1978).

42. See TRIBE, *supra* 23, at 484.

manifest purpose of Congress" that an area be exclusively federally regulated.[43] This intent does not need to be explicit, and the courts have established standards to determine when a congressional purpose to preempt may be inferred.[44] The congressional purpose may be evidenced in three ways. First, "the scheme of federal regulation may be so pervasive as to make reasonable the inference that Congress left no room for the states to supplement it."[45] Second, "Congress may regulate a field of such dominant federal interest that similar state laws are presumed preempted."[46] Third, an intention to preempt may be inferred when "the state policy may produce a result inconsistent with the objective of a federal statute."[47]

It is significant that considerations extrinsic to the federal legislation at issue may be relevant to the preemptive determination.[48] For example, courts have shown special deference to attempts to ameliorate environmental problems.[49]

In *Huron Portland Cement Co. v. Detroit*,[50] the Supreme Court was concerned with the constitutional validity of certain provisions of the Smoke Abatement Code of the city of Detroit, as applied to ships owned by a manufacturer of cement and operated in interstate commerce. The Court upheld the Detroit Smoke Code even though it effectively prohibited the use of certain types of boilers inspected, approved and licensed by the federal government.[51] The law was valid because the Supreme Court found no overlap between the scope of the federal ship inspection laws (seagoing safety of vessels subject to inspection) and that of the Detroit legislation (elimination of air pollution).[52]

Similarly, in *Silkwood v. Kerr-McGee Corp.*,[53] the Supreme Court upheld a state-authorized award of punitive damages arising out of

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43. *See* Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 146 (1963); Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947).

44. *See* Ray v. Atlantic Richfield Co., 435 U.S. 151, 157 (1978). See also Note, supra note 37, at 625.

45. *See* Pennsylvania R.R. Co. v. Public Service Comm'n, 250 U.S. 566, 569 (1919); Cloverleaf Butter Co. v. Patterson, 315 U.S. 148 (1942).

46. Hines v. Davidowitz, 312 U.S. 52 (1941).

47. Southern Railway Co. v. Railroad Comm'n, 236 U.S. 439 (1915); Charleston & W. Carolina Railway Co. v. Varnville Furniture Co. 237 U.S. 597 (1915).

48. *See* Note, *supra* note 37, at 625.

49. *See* Note, *State Environmental Protection Legislation and the Commerce Clause*, 87 HARV. L. REV. 1762 (1974).

50. 362 U.S. 440 (1960).

51. *Id.* at 441.

52. *Id.* at 445.

53. 464 U.S. 238 (1984); This case has been extensively examined. *See, e.g.*, Comment, *Federal Supremacy Versus Legitimate State Interests in Nuclear Regulation: Pacific Gas & Elec-*

the escape of plutonium from a nuclear plant whose safety measures were in compliance with federal regulations. The Supreme Court rejected the preemption challenge despite the fact that the Court had found in *Pacific Gas & Electric Co. v. State Resources Conservation and Development Comm'n.*,[54] that "'the federal government has occupied the entire field of nuclear safety concerns,'"[55] implying that no state could impose its own more stringent safety regulations on nuclear power plants.

The most permissive decision involving a state regulation aimed at protecting the environment is *Palladio v. Diamond*.[56] In *Palladio*, a district court examined the constitutionality of two New York state laws: the Harris and Mason Acts which prohibited the sale within the state of any items made from any part of an "Alligator, Caiman or Crocodile of the Order Crocodilia."[57] Relying on the analysis of *A.E. Nettleton Co. v. Diamond*,[58] the Court decided that these laws were not preempted by the 1969 Federal Endangered Species Act.[59] The court declared:

> The state's list of endangered species may be broader than the federal list simply because the State Legislature did not see fit to wait until only a handful of species remained before it passed a law affording protection. We cannot overrule the legislature for being cautious. Extinct animals, like lost time, can never be brought back. They are gone forever.[60]

One of the main arguments against the decision is that the nature of the subject matter requires a nationally uniform system, notably because of the important questions of foreign commerce and foreign affairs involved in regulating items of international trade.[61] Indeed,

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tricity and Silkwood, 33 CATH. U. L. REV. 899 (1984); Note, *Broadening the Scope of State Authority to Control the Development of Nuclear Energy*, 33 DE PAUL L. REV. 371 (1984); Note, *Nuclear Plant Construction After Pacific Gas: A Pyrrhic Victory for the States?*, 14 GOLDEN GATE U. L. REV. 359 (1984); Note, *State Power and Preemption in the Nuclear field: Pacific Gas and Electric Co. v. State Energy Resources Conservation and Development Commission*, 26 WASH. U. J. URB. & CONTEMP. L. 139 (1984).

54. 461 U.S. 190 (1983).

55. *Id.* at 212.

56. 321 F. Supp. 630 (S.D.N.Y. 1970), *aff'd* 440 F.2d 1319 (2d Cir. 1971), *cert. denied*, 404 U.S. 983 (1971).

57. Mason Act, N.Y. AGRIC. & MKTS. LAW at 358 a(1) (McKinney supp. 1971).

58. 264 N.E. 2d 118 (1970), *appeal dismissed sub. nom.* Reptile Prods. Ass'n v. Diamond, 401 U.S. 969 (1971).

59. 16 U.S.C. §§ 668 aa-cc (1970)

60. 321 F. Supp. at 633.

61. Comment, *State Prohibition of Sale of Products made from Endangered Species is not Pre-empted by Federal Legislation and does not Violate Federal Foreign Commerce Power*, 85 HARV. L. REV. 852, 856 (1972).

since an essential purpose of the Endangered Species Act is the protection of non-indigenous species, it is particularly important that the program be centrally coordinated with other countries.[62] Furthermore, the U.S. commitment to the General Agreement on Tariffs and Trade (GATT) pleads in favor of centralized determination of the endangered species regulation.[63]

In the cases examined above, with the environmental purpose absent, the state regulations might well have been preempted.[64] Before concluding this first section, it is important to note that a judicial finding that a state environmental law is not preempted means that the state has concurrent power to enact legislation in this area. However, this concurrent power must be exercised "in such a way that the resultant burden on interstate commerce does not conflict with the 'dormant' commerce power of Congress."[65]

2. *Powers of the States to Take Environmental Measures When the Federation Has Not Legislated or Has Not Marked Any Preemptive Intent*

If the Congress has not legislated or marked its intention to reserve for itself this area of law, a state can adopt a measure designed to protect the environment in so far as it does not conflict with the dormant commerce power of Congress.[66] The Commerce Clause gives Congress the power to regulate commerce among the several states.[67] It is an affirmative grant of power. However, acknowledging the framers' intention to create an integrated market and to avoid an "ec-

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62. *Id.*

63. In particular, Article XI of the General Agreement on Tariffs and Trade [hereinafter GATT] provides for the general elimination of Quantitative Restrictions. It is applicable to Quantitative Restrictions on a country's trade with other Contracting Parties, including trade in wildlife. *See generally* Steve Charnovitz, *Exploring the Environmental Exceptions in GATT Article XX*, 25 J. W. Trade L. 37 (1991).

64. *See also* Askew v. The American Waterways Operators, 411 U.S. 325 (1973) (holding that a Florida law imposing strict liability for any damage incurred by the state or private persons as a result of an oil spill in the state's territorial waters from any territorial facility and from any ship destined for or leaving such facility was not preempted by federal law). *But see,* Burbank v. Lockheed Air Terminal, Inc., 411 U.S. 624 (1973); Ray v. Atlantic Richfield Co., 435 U.S. 151 (1978); Allegheny Airlines, Inc. V. Cedarhurst, 132 F. Supp. 871 (E.D.N.Y. 1955), *aff'd*, 238 F.2d 812 (2d Cir. 1956); Northern States Power Co. v. Minnesota, 320 F. Supp. 172 (Minn. 1970), *aff'd* 447 F.2d 1143 (1971).

65. *See* Note, *supra* note 49 at 1772.

66. *See generally* Julian N. Eule, *Laying the Dormant Commerce Clause to Rest*, 91 YALE L.J. 425 (1982); Regan, *The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause*, 84 MICH. L. REV. 1091 (1986); Earl M. Maltz, *How Much Regulation is Too Much - An Examination of Commerce Clause Jurisprudence*, 50 GEO. WASH. L. REV. 47 (1981); Mark Tushnet, *Rethinking the Dormant Commerce Clause*, 1 WIS. L. REV. 125 (1979).

67. U.S. CONST. art. 1, § 8, cl. 3.

onomic balkanization" of the Union, the Supreme Court has found a dormant congressional authority in the commerce clause power.

Over the years, the Court has used a variety of formulations for the commerce clause limitation upon the states,[68] but it has consistently distinguished between outright protectionism and more indirect burdens on the flow of trade. The Commerce Clause case law suggests that a distinction has to be drawn between non-discriminatory and discriminatory state statutes hindering the free flow of trade.[69]

a. *Non-Discriminatory Statutes*

In the past, the Supreme Court used diverse mechanical formulae in order to determine the limits of state powers. This formalistic approach, however, has been abandoned. The Court now tries to balance the legitimate interests of states with the federal objective of free trade among states. For non-discriminatory statutes, the balancing test traditionally applied by the Courts is set forth in *Pike v. Bruce Church*:[70]

> where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. . . . If a legitimate local interest is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interests involved, and on whether it could be promoted as well with lesser impact on interstate activities.[71]

Before the Court will apply this balancing test, it must first find that the statute regulates evenhandedly.[72] Then, according to the test, an evenhanded state statute affecting interstate commerce will be upheld if the regulation is rationally related to a legitimate state end, and the burden imposed on such commerce is not clearly excessive in rela-

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68. *See The Supreme Court, 1977 Term*, 92 HARV. L. REV. 57 n.3 (1978); Dister & Schlesinger, supra note 1, at 373 (1979); Noel T. Dowling, *Interstate Commerce and State Power*, 27 VA. L. REV. 1, 2-6 (1940).

69. Brown-Forman Distillers v. N.Y. Liquor Auth., 476 U.S. 573, 579 (1986); Lewis v. BT Investment Managers, Inc., 447 U.S. 27, 36 (1980).

70. 397 U.S. 137 (1970).

71. *Id.* at 142.

72. *See* Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 472 (1981) ("Minnesota's statute does not effect 'simple protectionism,' but 'regulates evenhandedly' by prohibiting all milk retailers from selling their products in plastic, nonreturnable milk containers, without regard to whether the milk, the containers or the sellers are from outside the state.")

tion to the putative local benefits. These elements deserve further explanation.

Non-economic goals such as the conservation by a state of its land resources, or the protection of the health, safety and welfare of its people, are generally considered legitimate state ends.[73] In contrast, a series of motives have apparently contributed to the judicial invalidation of state enactments regulating interstate commerce. State efforts to protect local economic interests through measures limiting access to local markets by out-of-state competitors have repeatedly been struck down as violating the Commerce Clause.[74] This purpose may be achieved by a variety of measures, including discriminatory license fees or taxes.[75] Another method is to impose the use of a certain type of packaging.[76] In addition, the Supreme Court "has viewed with particular suspicion state statutes requiring business operations to be performed in the home state that could more efficiently be performed elsewhere."[77] This goal may be achieved by a variety of measures such as discriminatory taxes, license fees, or through health inspection measures which impose geographical limits on certain activities.[78]

A state measure whose primary objective is environmental protection will normally be considered as pursuing a legitimate state end. For example, in *Procter & Gamble v. Chicago*,[79] the District Court for the Seventh Circuit recognized that the purpose of a Chicago ordinance that banned the use of detergents containing phosphates was the prevention and elimination of nuisance algae. The Court characterized this objective as "legitimately local and non-discriminatory which means that it may properly be the end towards which local legislation is addressed."[80]

Even if a statute regulates "evenhandedly" and imposes only "incidental" burdens on interstate commerce, courts must nevertheless strike it down if "the burden imposed on such commerce is clearly excessive in relation to the putative local benefits."[81] The extent of the burden that will be tolerated depends "on the nature of the local in-

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73. TRIBE, *supra* note 23, at 415.

74. *Id.* at 414.

75. *See, e.g.*, Bacchus Imports v. Dias, 468 U.S. 263 (1984).

76. *See, e.g.*, Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456 (1981); American Can Co. v. Oregon Liquor Control Comm'n, 517 P.2d 691 (Ore. App. 1973). *See generally* Note, *supra* note 37; Note, *Constitutional Law - Commerce Clause: Local Discrimination in Environmental Protection Regulation*, 55 N.C. L. REV. 461 (1977).

77. TRIBE, *supra* note 23, at 426.

78. *See, e.g.*, Memphis Steam Laundry Cleaner, Inc. v. Stone, 342 U.S. 389, 394-95 (1952).

79. 509 F.2d 69 (7th Cir.), *cert. denied*, 421 U.S. 978 (1975).

80. *Id.* at 980.

81. Dean Milk Co. v. City of Madison, 340 U.S. 349 (1951).

terest involved, and on whether it could be promoted as well as with a lesser impact on interstate activities."[82]

A good illustration of this test is given in *Minnesota v. Clover Leaf Creamery Co.*[83] In that case, the Supreme Court examined the validity of a Minnesota statute banning the retail sale of milk in plastic nonreturnable, nonrefillable containers, but permitting such sale in other nonreturnable, nonrefillable containers, such as cardboard milk cartons. After recalling the *Pike v. Bruce Church* test, the Supreme Court emphasized that "since the statute does not discriminate between interstate and intrastate commerce, the controlling question is whether the incidental burden imposed on interstate commerce by the Minnesota act is 'clearly excessive to the local putative benefits.'"[84] The Supreme Court gave a negative answer to this question. It noted "even granting that the out-of-state plastic industry is burdened relatively more heavily than the Minnesota pulpwood industry . . . this burden is not 'clearly excessive' in light of the substantial state interest in promoting energy conservation and other natural resources and in easing solid waste disposal problems."[85] The Court found "these local benefits ample to support Minnesota's decision under the Commerce Clause."[86] In addition, the Supreme Court found that "no approach with a lesser impact on interstate activities was available." Indeed, according to the Court, the several alternative statutory schemes suggested by the respondents were "either more burdensome on commerce than the Act (as, for example banning all nonreturnables) or less likely to be effective (as, for example, providing incentives for recycling)."[87]

b. *Discriminatory Statutes*

It would be incorrect to characterize *Pike v. Bruce Church* as providing a unitary test applicable in all Commerce Clause cases.[88] The judicial level of scrutiny will vary depending upon a number of factors, the most critical of these being the Court's perception as to whether a particular state discriminates in favor of in-state interests.[89] Commerce Clause case law suggests that a further distinction has to

82. Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970).
83. 449 U.S. 456 (1981).
84. *Id.* at 472.
85. *Id.*
86. *Id.* at 473.
87. *Id.*
88. *See* Maltz, *supra* note 66, at 49 .
89. *Id.* at 50.

be made between facially neutral statutes and facially discriminatory statutes.

1. *Facially Neutral Statutes*

The first illustration of the balancing approach adopted by the Supreme Court in the context of a facially neutral statute was articulated forty years ago in *Dean Milk Co. v. Madison*.[90] In *Dean Milk*, the Court struck down an ordinance of Madison, Wisconsin, that made it unlawful to sell any milk as pasteurized unless it had been processed and bottled at an approved pasteurization plant within a radius of five miles from the central square of Madison. The statute was neutral on its face: it was applicable to all milk produced in the city of Madison, or elsewhere. The test adopted by the *Dean Milk* Court can be found in the following passage:

> In thus erecting an economic barrier protecting a major local industry against competition from without the state, Madison plainly discriminates against interstate commerce. This it cannot do, even in the exercise of the unquestioned power to protect the health and safety of its people, if reasonable nondiscriminatory alternatives, adequate to conserve legitimate local interests, are available.[91]

As a result of the *Dean Milk* test, a facially neutral statute which has a discriminatory impact can be upheld only if the statute furthers a legitimate state goal and there is no reasonable nondiscriminatory alternatives.[92]

2. *Facially Discriminatory Statutes*

At this stage of the analysis the Court has produced two formulations of "protectionist balancing."[93] The first formulation ("weak" protectionist effect balancing) appears in *Pike v. Bruce Church*; the second formulation ("strict" protectionist effect balancing) that is less favorable to the state appears in *Dean Milk v. Madison*. If the second test already seems strict, the Court has taken an even tougher approach with regard to facially discriminatory statutes.[94] For these sta-

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90. 340 U.S. 349 (1951).

91. *Id.* at 354.

92. This approach has been reaffirmed by the Supreme Court in *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333 (1977).

93. We borrow here the expressions "protectionist effect balancing," "weak protectionist effect balancing," and "strict protectionist effect balancing" from Regan, *supra* note 66, at 1106.

94. Maltz, *supra* note 66, at 50.

tutes, the level of judicial scrutiny is very high.[95] For example, in *Philadelphia v. New Jersey*,[96] the Supreme Court struck down a New Jersey statute prohibiting the import of most solid or liquid waste which originated or was collected outside the territorial limit of the state.[97] In considering the Commerce Clause implications of the New Jersey statute, the Court first rejected the notion that waste is not an item of commerce. As the Court stated, "all objects of interstate trade merit [C]ommerce [C]lause protection; none is excluded at the outset."[98] The Court also refused to resolve the parties' debate as to the true purpose of the legislation. The Court conceded that either argument (environmental protection or reduction of disposable costs for New Jersey residents) would legitimately support the statute.[99] However, in the Court's view, the goals of the legislation were irrelevant to the analysis of the legislation's constitutionality because "the evil of protectionism can reside in legislative means as well as legislative ends."[100] The Court assumed that New Jersey could accomplish this goal "by slowing the flow of all waste into the scarce landfills, even though interstate commerce would incidentally be affected."[101] The

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95. *Id.*

96. 437 U.S. 617 (1978). On the case and its implications, see Note, *The Commerce Clause and Interstate Waste Disposal: New Jersey's Options After the Philadelphia Decision*, 11 RUT.-CAM L.J. 31 (1979); Note, *Garbage, the Police Power, and the Commerce Clause: City of Philadelphia v. New Jersey*, 8 CAP. U. L. REV. 613 (1979); Note, *Waste Embargo Held a Violation of Commerce Clause: Philadelphia v. New Jersey*, 11 CONN. L. REV. 292 (1979); Note, *Hazardous Waste in Interstate Commerce: Minimizing the Problem After City of Philadelphia v. New Jersey*, 24 VAL. U. L. REV. 77 (1989); Steven M. Johnson, *Beyond City of Philadelphia v. New Jersey*, 95 DICK. L. REV. 131 (1990); David Panper, Comment, *Recycling Philadelphia v. New Jersey: The Dormant Commerce Clause, Postindustrial "Natural" Resources, and the Solid Waste Crisis*, 137 U. PA. L. REV. 1309 (1989).

97. It is important to note that in *Philadelphia v. New Jersey*, the Supreme Court suggested that its ruling might not apply in cases in which the state or local governments act as a market participant rather than a regulator (the "market participant doctrine"). 437 U.S. at 618 n.6. As a result, since *Philadelphia v. New Jersey*, federal and state decisions have held that state, county or municipal landfills may discriminate against or even prohibit out-of-state waste without violating the dormant commerce clause. *See, e.g.*, Swin Resource Sys. v. Lycoming County, 883 F.2d 245 (3d Cir. 1989), *cert. denied*, 110 S. Ct. 1127 (1990); Lefrancois v. Rhode Island, 669 F. Supp. 1204 (R.I. 1987); Evergreen Waste Sys. v. Metropolitan Serv. Dist., 643 F. Supp. 127 (Or. 1986), *aff'd on other grounds*, 820 F.2d 1482 (9th Cir. 1987); Shayne Bros., Inc. v. Dist. of Columbia, 592 F. Supp. 1128 (D.C. 1984); County Comm'rs v. Stevens, 299 Md 203, 473 A.2d 12 (1984). On the market participant doctrine, see generally Thomas K. Anson and P. M. Schenkkan, *Federalism, the Dormant Commerce Clause, and State-Owned Resources*, 59 TEX. L. REV. 71 (1980), William A. Campbell, *State Ownership of Hazardous Waste Disposal Sites: A Technique for Excluding Out-of-State Wastes?*, 14 ENVTL. L. 177 (1983). Given that state and local governments own or operate approximately eighty percent of the nation's landfills, *Philadelphia v. New Jersey* has lost some of its practical importance.

98. 437 U.S. at 622.

99. *Id.* at 626.

100. *Id.*

101. *Id.*

state, however, could not accomplish its objectives by means which discriminated against "articles of commerce coming from outside the state unless there is some reason, apart from their origin, to treat them differently."[102] There was neither argument or evidence that out-of-state garbage was more noxious than the domestic variety, and thus New Jersey's law was treated as typical protectionist legislation, subject to a "virtually per se rule of invalidity."[103]

Yet, *Philadelphia v. New Jersey* suggests that discrimination on the face may not always be fatal. As stated above, such discrimination may be permissible if there is some reason, apart from origin, to treat out-of-state articles differently from domestic articles. Moreover, a more satisfactory[104] and less stringent approach than the per se rule of invalidity was later adopted by the Supreme Court in *Hughes v. Oklahoma*.[105] In *Hughes*, the Supreme Court was questioned on the validity of an Oklahoma law prohibiting out-of-state shipments of minnows from Oklahoma waters. The Court held that the Oklahoma statute discriminated on its face against interstate commerce.[106] However, at times the Court had characterized such restrictions as virtually invalid per se regardless of the state's purpose. The Supreme Court concluded that "at a minimum such facial discrimination invokes the strictest scrutiny of any purported legitimate local purpose and of absence of nondiscriminatory alternatives."[107] By requiring examination of local purposes and nondiscriminatory alternatives, *Hughes* suggests that non-evenhanded environmental statutes may be analyzed under the standards set forth in *Dean Milk* and *Hunt*, both of which considered statutes that discriminated in their "practical effect." This ap-

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102. *Id.*

103. *Id.* at 624. *See also* Lewis v. BT Inv. Managers, Inc., 447 U.S. 27, 37 (1980); Brown-Forman Distillers Corp. v. New York State Liquor Auth., 476 U.S. 573, 579 (1986); New Energy Co. of Indiana v. Limbach, 486 U.S. 269, 274 (1988); Healy v. Bear Energy, Inc., 491 U.S. 324, 340 (1989).

104. *Id.* at 66:

> The Dean milk approach has two advantages over the Court's invalidation of the law solely because it employed discriminatory means. First, it focuses attention on the relevant factors in an analysis of protectionism - the legislative ends and the means by which they are accomplished. Second, it allows for greater responsiveness to those situation where discrimination may be the only possible alternative for achieving a legitimate goal. If the Court in Philadelphia sought to articulate a test of universal applicability, thus it would have been better to take the Dean Milk approach. It is stringent enough to invalidate all truly protectionist legislation, yet sufficiently flexible to permit discrimination where it is necessary to achieve a legitimate state end.

105. 441 U.S. 322 (1979).

106. *Id.* at 377.

107. *Id.*

proach was confirmed in *Maine v. Taylor*,[108] where the Supreme Court upheld a law prohibiting the importation of live baitfish after requiring Maine to show that its statute served a legitimate local purpose that could not be served by less discriminatory means.

In addition to isolating the factors taken into account by the Supreme Court when it balances the legitimate local interests with the federal interest of free trade among states, it is possible to underline a number of more general elements influencing the Supreme Court's decisions dealing with the constitutional validity of state regulations affecting interstate commerce.[109] For example, state "social" regulations aimed at furthering public health or safety, or at restraining fraudulent or otherwise unfair trade practices, are less likely to be perceived as "undue burdens" on interstate commerce than are state regulations whose objective is to maximize the profit of local businesses. The same remark can be made with regard to environmentally related state statutes. The courts have afforded greater deference to environmental statutes than to legislation promoting other legitimate state power goals.

For example, courts have looked with particular favor upon evenhanded state statutes aimed at environmental protection.[110] In *Minnesota v. Clover Leaf Creamery Co.*,[111] the Supreme Court upheld a Minnesota law banning plastic nonreturnable containers in order to promote resource conservation, ease the solid waste disposal problem, and conserve energy. Applying the *Pike* balancing test, the Supreme Court found the law valid even though the legislation had the effect of penalizing the out-of-state plastic industry and giving a competitive advantage to the Minnesota pulpwood industry.

However, when it has been considered too severe, such a balancing test has not been applied by courts in the examination of evenhanded state environmental statutes.[112] In *Huron Portland Cement Co. v. Detroit*,[113] the Supreme Court upheld a nondiscriminatory environmental regulation that burdened interstate commerce without engaging in the balancing analysis that is usually done in such cases. After having declared that the Detroit Smoke Abatement Code was not preempted by federal law, the Court went straight to the conclusion and noted that "the claim that the Detroit ordinance, quite apart from the effect of

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108. 477 U.S. 131 (1986). *See also* Sporhase v. Nebraska, 458 U.S. 941, 958 (1982); New Energy Co. of Indiana v. Limbach, 486 U.S. 269, 274 (1988).

109. TRIBE, *supra* note 23, at 436.

110. *See* Dister & Schlesinger, *supra* note 1, at 376.

111. 449 U.S. 456 (1981).

112. *See The Supreme Court, 1977 Term*, 92 HARV. L. REV. 57 n.31.

113. 362 U.S. 440 (1960).

federal legislation, imposes as to the appellant's ships an undue burden on interstate commerce needs no extended discussion."[114]

In *American Can Co. v. Oregon Liquor Control Comm'n*,[115] the statute in question required a deposit on all soft drinks and beer bottles, and banned the sale of these beverages in pull-top cans. After first examining the purpose and the consequences of the Oregon Minimum Deposit Act, the Court refused to go through the motions of a judicial weighing process. The court declared that

> the blight of the landscape, the appropriation of lands for solid waste disposal, and the injury to children's feet caused by pull-top cans discarded in the sands of our ocean shores are concerns not divisible by the same units of measurement as is economic loss to elements of the beverage industry and we are unable to weigh them, one against the other.[116]

The same reluctance to use the *Pike* balancing test was noticeable in *Procter & Gamble v. Chicago*,[117] where the court stated

> [i]t is our view, that if the burden on interstate commerce is slight, and the area of legislation is one that is properly of local concern, the means chosen to accomplish this end should be deemed reasonably effective unless the party attacking the legislation demonstrates the contrary by clear and convincing proof. If it is determined that this presumption should be applied, no further balancing need be undertaken. The end has already been deemed legitimate and the burden on interstate commerce slight. If the legislation is a reasonable means to that end it is constitutional.[118]

In these three cases, courts in fact applied a more lenient "rational relation test" than the *Pike* balancing test. Indeed, had the *Pike* test been applied, these enactments, which had significant effects on interstate commerce, may not have survived.

By contrast, the Supreme Court has taken a tougher approach with regard to discriminatory environmental statutes. As illustrated in *Philadelphia v. New Jersey*,[119] if a state environmental law is in reality "simple economic protectionism," the Court has applied a "virtually per se rule of invalidity." The U.S. Supreme Court maintained the

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114. *Id.* at 448.
115. 517 P.2d 691 (1972).
116. *Id.* at 697.
117. 509 F.2d 69 (7th Cir.), *cert. denied* 421 U.S. 978 (1975).
118. *Id.* at 76.
119. 437 U.S. 617 (1978).

strict approach adopted in *Philadelphia v. New Jersey* with regard to state measures discriminating against out-of-state waste in two recent decisions.

First, the issue of out-of-state waste came back before the Court in *Fort Gratiot Sanitary Landfill, Inc. v. Michigan Department of Natural Resources.*[120] In *Fort Gratiot* the statute at issue was the waste import restrictions of Michigan's Solid Waste Management Act (SWMA) which provides that solid waste generated in another county, state, or country cannot be accepted for disposal in the receiving county's plan. The Court started its reasoning by saying that *Philadelphia v. New Jersey* provided the framework for its analysis of the case.[121] For the Court, a state statute clearly discriminating against interstate commerce was therefore unconstitutional "unless the discrimination (was) demonstrably justified by a valid factor unrelated to economic protectionism."[122] The waste restrictions enacted by Michigan could not satisfy this test. Indeed, they authorized each of the eighty-three Michigan counties to "isolate itself from the national economy."[123]

Respondents in the case attempted, however, to distinguish the case from *Philadelphia v. New Jersey* in that Michigan waste import restrictions, on their face, did not discriminate against interstate commerce, or in effect, because the restriction treated waste from other Michigan counties no differently than waste from other states.[124] Applying the more lenient *Pike* test, the respondents claimed that the Michigan statute regulated evenhandedly to effectuate legitimate local interests, and it should be upheld because the burden on interstate commerce was not clearly excessive in relation to the local benefits. The Court disagreed stating that "neither the fact that the Michigan statute purports to regulate intercounty commerce in waste nor the fact that some Michigan counties accept out-of-state waste provided an adequate basis for distinguishing this case from *Philadelphia v. New Jersey*."[125]

The respondents also argued that this case was different from *Philadelphia v. New Jersey* because the SWMA constituted a comprehensive health and safety regulation rather than "economic protectionism" of the state's limited landfill capacity. Indeed, even assuming that the other provisions of the SWMA could fairly be so

120. 112 S. Ct. 2019 (1992).
121. *Id.* at 2023.
122. *Id.* at 2024.
123. *Id.*
124. *Id.*
125. *Id.* at 2025.

characterized, the same assumption could not be made with respect to the waste import restrictions themselves. Applying the *Dean Milk* test, the Court estimated that because the provisions unambiguously discriminated against interstate commerce, the state bore the burden of proving that they further health and safety concerns which cannot adequately be served by nondiscriminatory alternatives. Respondents did not meet this burden. The State provided no valid health or safety reason for limiting the amount of waste that a landfill operator may accept from outside the state, and not the amount the operator may accept from inside the state.[126] Moreover, Michigan could have attained its objective without discriminating between in and out-of-state waste.[127] For example, it could have limited the amount of waste that landfill operators may accept every year. The Court's decision in *Maine v. Taylor* likewise offered no respite to respondents since they did not provide "any legitimate reason for allowing the petitioner to accept waste from inside the county but not waste from outside the county."[128]

The same day as *Fort Gratiot* was considered, the Court considered another Commerce Clause challenge case in *Chemical Waste Management, Inc. v. Hunt*.[129] At issue was the constitutionality of an Alabama act which imposed, *inter alia*, a fee on hazardous waste disposed at in-state commercial facilities and an additional fee if hazardous wastes were generated outside the state. Recalling *Philadelphia v. New Jersey* and *Fort Gratiot*, the Court reasoned "no state may attempt to isolate itself from a problem common to several states by raising barriers to the free flow of interstate trade."[130] In the case at issue, the act's additional fee facially discriminated against hazardous waste generated in states other than Alabama, and it plainly discouraged the full operation of petitioner's facility. For the Court, such a burdensome tax imposed on interstate commerce alone is generally forbidden, and is typically struck down without further inquiry.[131]

Trying to escape a per se rule of invalidity, the respondents, however, argued that the additional fee served legitimate local purposes related to its citizens' health and safety. Applying the *Dean Milk* test, the Court estimated that "[b]ecause the additional fee discriminates both on its face and in practical effect, the burden falls on the state 'to justify it both in terms of the local benefits flowing from the stat-

126. *Id.* at 2027.
127. *Id.*
128. *Id.* at 2028.
129. 112 S. Ct. 2009 (1992).
130. *Id.* at 2012.
131. *Id.* at 2014.

ute and the unavailability of nondiscriminatory alternatives adequate to preserve the local interest at stake.'"[132] For the Court, no explanation emerged as to why Alabama targeted only interstate waste to meet its environmental objective. In other words, it failed to carry the burden of showing that "the discrimination is demonstrably justified by a valid factor unrelated to economic protectionism."[133] Moreover, the Court judged that less discriminatory alternatives, such as the generally applicable per-term additional fee on all hazardous waste disposed of within the state, were available to reduce the volume of waste entering Alabama.[134]

The Court estimated that its decisions regarding quarantine laws did not warrant a different decision. Indeed, the additional fee might not be deemed a quarantine law because Alabama permits both the generation and landfilling of hazardous waste within its borders and the importation of additional hazardous waste. Moreover, the quarantine laws upheld by the Court "did not discriminate against interstate commerce as such, but simply prevented traffic in noxious articles, whatever their origin."[135] The Court's decision in *Maine v. Taylor* could also not be used to distinguish *Philadelphia v. New Jersey*, because in this case the hazardous waste was the same regardless of its point of origin, and adequate means other than overt discrimination could have met Alabama's concern.[136]

II. Free Trade and Environmental Protection in the EC - A Survey of the Case Law of the European Court of Justice

A. Powers of the Community and the Member States as Regards Environmental Protection

With regard to the question of the competence of the EC and the Member States to take environmental action, a distinction can usefully be drawn between three distinct phases. The first phase covers the period prior to the amendments made to the Treaty of Rome by the Single European Act. A brief examination of this period will give us the necessary background for a better understanding of the modifications brought about by the Single European Act. The second phase covers the period from 1987 onwards, following the entry into force

132. *Id.*
133. *Id.* at 2015.
134. *Id.*
135. *Id.* at 2016.
136. *Id.* at 2018.

of this Act. Finally, the third phase will cover the period following the entry into force of the Treaty on Political Union (Maastricht treaty) signed in Maastricht in December 1991. This Treaty has not yet been ratified. Its entry into force will introduce important amendments to the Treaty with regard to the competence of the Community and the Member States to act in the environmental field.

1. The Period Prior to the Single European Act

When it was signed in 1957, the Treaty of Rome had no express provisions relating to environmental protection. Indeed, it did not even contain the word "environment." This omission is explained by the fact that in the years during which the Treaty of Rome was being drafted, protection of the environment was not considered to be important. However, against an early background of relative prosperity, it was soon felt that economic expansion should also result in improvements in the quality of life, including a better environment. In the absence of a specific treaty provision for the implementation of an environmental policy, two provisions originally created for economic purposes,[137] articles 100[138] and 235,[139] were employed as the legal basis for initial EEC environmental legislation.

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137. A parallel can be drawn here between the use of "economic provisions" by the U.S. federal government (commerce clause) and the EC (Article 100) to take environmental measures. D. McGrory, *Air Pollution Legislation in the United States and the EC*, 15 EUR. L. REV. 299, 311 (1990). This shows the affinity between economic integration and environmental policy in integrated markets. As pointed out by one scholar,

> [t]he underlying argument [for the use of Article 100 as a basis for environmental action] was that a uniform environmental policy was necessary in a common market if industry and commerce were to compete on equal terms. Failure to agree on common policies would open the door to divergent national environmental measures, leading to unequal production costs and a consequent distortion of competition. Such measures might also amount to non-tariff barriers to trade, in the form of measures having an equivalent effect to quantitative restrictions.

Owen Lomas, *Environmental Protection, Economic Conflict and the EC*, 33 MCGILL. L.J. 506, 511 (1988).

The most practical result of the limitations inherent in Article 100 (and subsidiarily 235) was the emphasis of original Community action on environmental problems related to trade and industry. In the United States, the economic incentive for environmental action has not been as strong as in the EC. Indeed, federal environmental policies in the United States arose after a profound economic and political integration had already occurred. As pointed out by two authors,

> [b]ecause far-reaching economic and political economic integration had already occurred by the time environmental issues become important, the dominant motivation of federal environmental initiatives has been to correct weak, inadequate state regulation resulting from economic rivalry and inability to realize scale economies rather than to remove barriers to trade or promote integration.

Eckard Rehbinder & Richard Stewart, *Legal Integration in Federal Systems: EC Environmental*

Article 100 provides for the harmonization of national laws which affect the functioning of the Common Market. The view that environmental measures can be based on Article 100 has been implicitly acknowledged by the ECJ.[140] Article 100, however, provides an "incomplete base for environmental action."[141] Indeed, a clear economic nexus with the functioning of the common market is necessary for the use of this article for environmental action. Environmental action in the pre-Single European Act period was also sometimes based on Article 235 of the Treaty of Rome. Article 235 empowers the Council to take action which "should prove necessary to attain, in the course of the operation of the Common Market, one objective of the Community." If the wording of Article 235 requires that its use is linked with the operation of the Common Market, the link required apparently does not need to be as close as that required by Article 100. A flexible interpretation of Article 235 thus permitted the Community to take environmental action in matters not directly related to the harmonization of national rules having an influence on the Com-

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Law, 33 AM. J. COMP. L. 371, 431 (1985)

Despite the use of a rather similar legal base, U.S. federal environmental policy has thus not suffered from the same limitations than the EC in its environmental action. This is also partly explained by the fact that the federal government enjoys important powers which the EC lacks.

138. Article 100 states:

The Council shall, acting unanimously on a proposal from the Commission, issue directives for the approximation of such provisions laid down by law, regulation or administrative action in Member States as directly affect the establishment or the functioning of the common market.

The European Parliament and the Economic and Social Committee shall be consulted in the case of directives whose implementation would, in one or more Member States, involve the amendment of legislation.

139. Article 235 states:

If action by the Community should prove necessary to attain, in the course of the operation of the common market, one of the objectives of the Community and this Treaty has not provided the necessary powers, the Council shall, acting unanimously on a proposal from the Commission and after consulting the European Parliament, take the appropriate measures.

140. In Case 91/79, Commission v. Italy, 1980 E.C.R. 1099, 1106 and Case 92/79, Commission v. Italy, 1980 E.C.R. 1115, 1122 the Court held that Article 100 was a sufficient legal basis for the directive on the biodegradability of detergents and the sulphur content of liquid fuels respectively. In dictum, the Court stated that

> it is by no means ruled out that provisions on the environment may be based upon Article 100 of the Treaty. Provisions which are made necessary by considerations relating to the environment and health may be a burden upon the undertakings to which they apply and if there is no harmonization of the national provisions on the matter, competition may be appreciably distorted.

For some examples of measures based on Article 100, see Council Directive 76/769, 1976 O.J. (L262) 201, on the approximation of the laws, regulations and administrative provisions of Member States relating to restrictions on the marketing and use of certain dangerous substances and preparations, and Council Directive 79/117, 1979 O.J. (L33) 36, prohibiting the placing on the market and the use of plant protection products containing certain active substances.

141. Van der Meersch, *The Single European Act and the Environmental Policy of the EC*, 12 EUR. L. REV. 407, 410 (1987).

mon Market.[142] In a pragmatic approach, action taken by the EC has often been based on both Articles 100 and 235.[143]

An important difference between Article 100 and Article 235 is that the latter does not limit Community action to the issuance of directives, but permits action by any of the legal instruments listed in Article 189 of the Treaty, including regulations directly applicable in all Member States. The fundamental characteristic, however, is that in both cases decision-making requires unanimity of the parts of the Council members and not a simple or qualified majority. This has had the dramatic effect of compelling the Community to negotiate agreements based on the lowest common denominator to forestall a total impasse. This fundamental inconvenience, combined with the lack of a proper legal base for environmental action, motivated the amendments made to the EEC Treaty by the Single European Act.[144]

2. *The Period Following the Single European Act*

The inadequate legal foundation of EC environmental action has been rectified by the Single European Act (SEA). Two categories of the new SEA provisions are, *prima facie*, susceptible to constitute legal bases for Community action in this area.

a. *Articles 130r, 130s and 130t*

The environment, independent of its connection with the internal market, is the subject of a special title of the Treaty of Rome (Title VII, including Articles 130r, 130s and 130t). In particular, Article 130s provides that environmental action may be taken by the Council if the decision is unanimous and after consultation with the European Parliament. Article 130s has to be seen in the context of the principle of subsidiarity, which requires that policy actions should be taken at the

142. *See, e.g.*, Council Directive 79/409, 1982 O.J. (L 230) 1 (conservation of wild birds); Council Decision 81/462, 1981 O.J. (L 171) 1 (conclusion of the Convention on Long-Range Transboundary Air Pollution).

143. *See, e.g.*, Council Directive 82/501, 1982 O.J. (L 230) 1 (major accident hazards of certain industrial activities); Council Directive 85/337, 1985 O.J. (L 175) 40 (assessment of the effects of certain public and private projects on the environment); Council Directive 78/319, 1978 O.J. (L 84) 43 (toxic and dangerous waste); Council Directive 75/439, 1975 (L 194) 23 (disposal of waste oils); Council Directive 82/883, 1982 O.J. (L 378) 1 (procedures for the surveillance and monitoring of the environments concerned by waste from the titanium dioxide industry).

144. Although the use of Articles 100 and 235 is not *a priori* to be excluded, their relevance for environmental action has been greatly reduced now; following the modifications brought about by the Single European Act, the EEC Treaty contains two categories of provisions (Article 100a and Articles 130r, 130s and 130t) for environmental action.

lowest appropriate level. This is explicitly recognized in the Treaty as a principle of environmental policy.

The first sentence of Article 130r(4) states that the Community shall take action relating to the environment only to the extent to which the objectives of Community environmental policy can be better attained at the Community level than at the level of individual Member States. The drafting of the first sentence of Article 130r(4), however, may pose difficult problems of interpretation.

Should this sentence be viewed as a rule of law with the primary function of distributing competences between the Community and the Member States or simply as a political guideline for Community institutions?[145] The first option poses a series of problems.[146] Indeed, "better" implies "a value judgement which is unquantifiable and defies legal abstract definition."[147] The preferable view, on balance, is that the first sentence of Article 130r(4) should be regarded primarily as a political guideline on which the Community should base its political and legislative action.[148] Article 130t reflects the same political interests as Article 130r(4). It simply provides that the environmental protection measures adopted under Article 130s shall not preclude any Member State from maintaining or introducing its own more stringent measures. The measures, however must not be incompatible with other articles of the SEA.

b. *Article 100a*

Concern for environmental protection is also present in the chapter on the internal market. Article 100a(1) grants the Council, acting by a qualified majority on a proposal from the Commission in cooperation with the European Parliament, the power to adopt measures for the approximation of national laws to achieve the internal market. This undoubtedly includes measures related to environmental protection. If this were not the case, Article 100a(3) would not make sense. Article 100a(3) provides that in respect of proposals concerning, *inter alia*, environmental protection, the Commission shall take "as a base a high level of environmental protection." In practice, Article 100a has a significant impact on Community environmental protection policy. What makes Article 100a a powerful instrument for environmental action is that, unlike Article 130s, proposals brought under Article 100a

145. For a general discussion of thus problem, see L. KRAMER, EEC TREATY AND ENVIRONMENTAL PROTECTION 71 (1990).

146. *Id.* at 72.

147. *Id.*

148. *Id.* at 75.

may be adopted by a qualified majority of the Council. This facilitates the decision-making process, and it allows the Community to take faster steps in its environmental action.

c. *The dividing line between Article 130s and Article 100a*

(1) *No dividing line in the Treaty*

One of the difficulties brought about by the Single European Act is that it requires the establishment of a dividing line between Article 100a and Article 130s. However, it does not provide any distinguishing criterion. The question of the scope of Article 100a and Article 130s is not only of a formal character. It has great practical implications, especially from a procedural point of view. On the one hand, Article 100a provides for Council decisions to be taken on the basis of a qualified majority and the use of the cooperation procedure. On the other hand, Article 130s requires a unanimous decision after consultation with the European Parliament. Thus, the choice of legal basis has considerable influence on the procedural formation of a legal act, and it therefore may greatly influence its content.[149]

The delimitation of the respective field of application of Article 100a and Article 130s does not always pose a problem.[150] For example, it seems clear that measures establishing common product standards should be taken under Article 100a.[151] Before the coming into force of the Single European Act, these measures were taken under Article 100.[152] Similarly, there is no doubt as the applicability of Article 130s as a legal basis for environmental protection measures which do not imply the harmonization of rules having an influence on the internal market.[153] In the period prior to the Single European Act, these meas-

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149. See the opinion of Advocate General Tesauro in Case C-300/89, § 2, June 11, 1991 (unreported opinion).

150. *Id.* at § 9.

151. *See, e.g.*, Council Directive 88/77, 1988 O.J. (L 36) 33 (approximation of the laws of the Member States relating to the measures to be taken against the emission of gaseous pollutants from diesel engines for use in vehicles); Council Directive No. 88/181, 1988 O.J. (L 81) 71 (amending Directive 84/538 on the approximation of the laws of the Member states relating to the permissible sound power level of lawnmowers).

152. *See, e.g.*, Council Directive 75/116, 1975 O.J. (L 307) 22 (approximation of the laws of the Member States relating to the sulphur content of certain liquid fuels); Council Directive 84/538, 1984 O.J. (L 300) 171 (approximation of the laws of the Member States relating to the permissible sound power level of lawnmowers).

153. *See, e.g.*, Council Regulation 3322/88, 1988 O.J. (L 297) 1 (certain chlorofluorocarbons and halons which deplete the ozone layer); Council Decision 88/540, 1988 O.J. (L 297) 8 (conclusion of the Vienna Convention for the Protection of the Ozone Layer and the Montreal Protocol on substances that deplete the ozone layer).

ures were adopted under Article 235.[154] However, the delimitation of the respective field of application of Article 100a and Article 130s presents difficulty with regard to the harmonization regimes of different national regulations of industrial processes.[155] Before the coming into force of the Single European Act, these regimes were taken on the basis of both Articles 100 and 235 of the Treaty.[156]

(2) *The Titanium Dioxide Decision*

In the *Titanium Dioxide* case,[157] the ECJ was confronted with one of these borderline cases. The Commission was asking the Court to annul a Council directive on procedures formalizing the programs for the reduction and eventual elimination of pollution caused by waste from the titanium dioxide industry.[158] The Commission argued that the Council directive should be annulled because it was based on Article 130s, whereas it should have been based on Article 100a. With respect to the legal basis of the directive, the Council and the Commission were offering conflicting theories.[159] It was necessary for the Council to understand the general objective of the Community Act to define the correct legal bases because the Act pursued different goals at the same time and authorized by different provisions of the SEA. From the Council's point of view, the general objective was to suppress the pollution produced by waste coming from the fabrication of titanium dioxide. The Commission also made reference to the concept of "center of gravity," but it understood it in the sense of "content" or "object" of the act. In this case, the Commission's "object" was the improvement in the conditions of competition in the titanium dioxide industry.

The Court went beyond these approaches. The Court stated that with regard to both its objective and content, the directive was concerned inextricably with both environmental protection and the disparities in the conditions of competition.[160] However, being unable to

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154. *See, e.g.*, Council Decision No 82/459, 1982 O.J. (L 210) 1 (establishing a reciprocal exchange of information and data from networks and individual stations measuring air pollution within the Member States).

155. Opinion of Advocate General Tesauro, *supra* note 149, at § 9.

156. *See, e.g.*, Council Directive 83/513, 1983 O.J. (L291) 1 (limit values and quality objectives for cadmium discharges); Council Directive 84/360, 1984 O.J. (L 188) 20 (combatting of air pollution from industrial plants).

157. Case 300/89, Commission v. Council (unreported decision).

158. Council Directive 89/249, 1989 O.J. (L 201) 56.

159. *See* opinion of Advocate General Tesauro, *supra* note 149, at § 3.

160. Case 300/89, *supra* note 157, at § 14.

reconcile the different voting rules and procedures of each provision,[161] the Court of Justice opted for Article 100a alone.

The *Titanium Dioxide* decision is likely to have far-reaching implications for EC environmental policy. Its principal consequence is that every time Article 100a is applicable in a given situation, it must be applied. Article 100a would thus become the legal basis for all borderline cases, and Article 130s would only be used for all the measures which do not imply the harmonization of national regulations related to product or process standards and which do not govern the free movement of goods or the condition of competition inside the Common Market.

Some authors have severely criticized this extensive application of Article 100a.[162] The author does not agree. An extensive application of Article 100a corresponds to the amendments to the Treaty of Rome resulting from the Single European Act.[163] Article 100a requires a decision taken by a qualified majority and the use of the cooperation procedure.[164] Both requirements are major improvements brought about by the Single European Act. The qualified majority procedure has the objective of speeding up the integration process, whereas the cooperation procedure aims, as pointed out by the Court of Justice, at improving the democratic influence in the elaboration of Community acts. A restrictive interpretation of Article 100a would thus have the result of depriving the EC of the benefits of these two major innovations.

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161. Article 130s requires a unanimous decision of the Council after consultation of the European Parliament. Article 100a requires a decision of a qualified majority and the use of the cooperation procedure. Before the Single European Act, the tendency was to use both Articles 100 and 235 as a legal basis for borderline cases. This presented the advantage that these articles can be combined.

162. *See* Scott Crosby, *The Single Market and the Rule of Law*, 16 EUR. L. REV. 451 (1991).

163. Opinion of Advocate General Tesauro, *supra* note 149, at § 13.

164. It is worth mentioning that the European Parliament has taken a very environmentally conscious attitude over the last few years. The Council Directive, 1990 O.J. (L 120) 1, on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities gives an illustration of this attitude. At first sight, this directive which is aimed at establishing the minimum rules needed to ensure freedom of transmission of broadcasting, appears to have nothing to do with environmental protection. However, with regard to advertising, as a result of a last minute amendment from the European Parliament the Directive now provides in Article 12 that "television advertising shall not . . . encourage behavior prejudicial to the protection of the environment." This establishes the possibility that, once the directive has been implemented in national laws, legal proceedings could be brought before the national courts in order to prohibit advertising encouraging the purchase of petrol or cars which might be considered as damaging to the environment. *See also* Philippe Sands, *EC Environmental Legislation Law: The ECJ and Common-Interest Groups*, 53 MODERN L. REV. 685, 691 (1990).

3. *Period Following the Entry into Force of the Treaty on Political Union*

The entry into force of the Treaty on Political Union (Maastricht treaty) will introduce important amendments with regard to the competence of the Community and the Member States to take environmental measures.

a. *Articles 130r, 130s and 130t*

Article 130s will be substantially modified by the Maastricht treaty. The Article provides in its first paragraph that environmental action is to be taken by the Council acting in accordance with the procedure referred to in Article 189c. Article 189C incorporates the present text of Article 149(2) of the Treaty of Rome, *i.e.* the cooperation procedure. This constitutes a very important step forward because it means that the Council will be acting by a qualified majority in environmental matters. However, by way of derogation from Article 130s(1), Article 130s(2) of the Maastricht treaty provides that a certain number of measures must still be decided unanimously by the Council. These measures are (i) provisions primarily of a fiscal nature; (ii) measures concerning town and country planning, land use with the exception of waste management, and measures of a general nature; and (iii) measures significantly affecting a Member State's choice between energy sources and the general structure of its energy supply. The second sentence of this second paragraph provides that the Council may, unanimously, on a proposal from the Commission and after consulting the European Parliament, define those matters referred to in the first sentence on which decisions are to be taken at a qualified majority.

Depending in part on the interpretation given to the exceptions mentioned in Article 130s(2), the principle of qualified majority voting as established in Article 130s(1) of the Maastricht treaty will give a practical aspect to the principle of subsidiarity. When a decision is taken by a qualified majority, Community legislation may be passed against the will of a Member State. The Maastricht treaty will transfer the principle of subsidiarity from Article 130r(4), an Article whose scope is limited to environmental matters, to the second sentence of the new Article 3b which has a general scope, in that it covers all the matters over which the Community and the Member States have concurrent jurisdiction.

Article 3b specifies more thoroughly than Article 130r(4) the way in which the principle of subsidiarity has to be understood. The second sentence of Article 3b states

> [i]n the areas which do not fall within its exclusive jurisdiction, the Community shall take action, in accordance with the principle of

> subsidiarity, only and insofar as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale and effects of the proposed action, be better achieved by the Community.

The principle of subsidiarity, as defined in Article 3b of the Maastricht treaty, will still have to be seen as a political guidance on which the Community shall base its action rather than as a competence-sharing clause. Finally, it is noteworthy that Article 130t of the Treaty of Rome will not be modified by the Maastricht treaty.

b. *Article 100a*

Article 100a of the Maastricht treaty provides that when the Council adopts measures for the approximation of national laws to complete the internal market, it will have to act in accordance with the procedure referred to in Article 189b. Article 189b reinforces the powers of the European Parliament in the decision-making process. It will introduce a co-decision procedure where, when opposed to an Act, the European Parliament will be able to reject it by an absolute majority of its component members.

c. *Dividing line between Article 100a and Article 130s*

The SEA does not provide for a dividing line between Article 130s and Article 100a. However, as we have seen, the Treaty on Political Union will modify these Articles. Regardless of the exceptions mentioned in Article 130s(2), Article 130s allows a decision by a qualified majority, with the use of the cooperation procedure (at the moment, Article 130s requires unanimity). By way of contrast, Article 100a allows a decision by a qualified majority with the use of the co-decision procedure (presently, Article 100a requires a decision on a qualified majority and the use of the cooperation procedure). One issue is whether these modifications will have an influence on the *Titanium Dioxide* case law. In the author's opinion, the *Titanium Dioxide* case law remains consistent with these modifications. Indeed, the democratic element, *i.e.* the importance of the role of the European Parliament, present at the very center of the *Titanium Dioxide* decision should motivate the Court, when confronted with borderline cases after the entry into force of the Maastricht treaty, to continue to favor the use of Article 100a (co-decision procedure) over Article 100s (cooperation procedure).

B. *Limitations Placed on the Power of the Member States to Take Environmental Measures*

Again, it is necessary to distinguish between the period prior to the Single European Act and the period following the Single European Act. No sub-section will be devoted to the period following the entry into force of the Maastricht treaty because Articles 130t and 100a(4) will not be modified by this Treaty.

1. Powers of the Member States to Take Environmental Measures When the Community Has Legislated

a. *The Period Prior to the Single European Act*

As we have seen above, the Council adopted a substantial number of measures regulating the environment long before the Single European Act clearly recognized the competence of the EC to act in the environmental field. In the meantime, Member States themselves continued to take, at an accelerated pace, measures to protect the environment. This raises questions of preemption parallel to those examined in the context of the American federal system.[165]

It is a basic rule of Community law that Community provisions, which are directly effective, take priority over provisions of national law, even when these provisions came after the Community provisions.[166] This rule of supremacy can be traced in the principle of "effet utile" in the interpretation of Community law. In its judgement in *Costa v. ENEL*,[167] the Court of Justice underlined that the essence of the Common Market is a uniform application of the relevant rules of Community law in every Member State. It is thus clear that when a Member State's environmental measure is in conflict with an EC measure covering the same matter, the former is preempted by the latter.

Moreover, the interposition of an EC measure of harmonization has the effect of prohibiting Member States from affecting more strin-

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165. *See supra* notes 23-65 and accompanying text.

166. Case 11/70, Internationale Handelsgesellschaft mbH v. Einfur-und Vorratsstelle fur Getreide und Futtermittel, 1970 E.C.R 1125, 1134.

167. Case 6/64, Flaminio Costa v. Enel, 1964 E.C.R 585, 594. See also Case 106/77, Administrazione della Finanze dello Stato v. Simmenthal S.p.A., 1978 E.C.R. 629, 643 stating that any recognition that national legislative measures which encroach upon the field within which the Community exercises its legislative power or which are otherwise incompatible with the provisions of Community had any legal effect would amount to a corresponding denial of the effectiveness of obligations undertaken unconditionally and irrevocably by Member States pursuant to the Treaty and would thus imperil the very foundation of the Community.

gent standards on the basis of the "police powers" recognized in Article 36 or the *Cassis de Dijon* ruling,[168] provided that the Community measure gives unconditional assurance that its stated objective will in any event be achieved.[169] In a series of cases, the ECJ had to determine if a Community legislation was exhaustive or left space for further action by Member States.[170] Preemption questions, however, are often solved in advance by the EC legislator because most directives contain provisions clarifying whether they merely impose minimum standards, or whether their effect is to deprive Member States of the power to take tougher regulations ("occupation of the field").[171] These preemption provisions can nevertheless lead to difficulties of interpretation on occasion.

For example, in *Van den Burg*,[172] the issue involved a prohibition, applicable in the Netherlands, on the importation and storing of red grouse, shot and killed in the United Kingdom without any breach of U.K. law. The issue to be decided was whether this prohibition could be regarded as a prohibition justified under Article 36 of the Treaty on the grounds of the protection of health and life of animals. Protection of wild birds was a matter already covered in EC law by Council Directive 79/409 on the conservation of wild birds. The Court began

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168. *See infra* notes 202-209 and accompanying text.

169. See Case 72/83, Campus Oil Ltd. v. Minister for Industry and Energy, 1984 E.C.R. 2727, 2749, where the Court stated that

> [r]ecourse to Article 36 is no longer justified if Community rules provide for the necessary measures to ensure protection of the interests set out in that article. National measures such as those provided for in the 1982 Order cannot therefore be justified unless supplies of petroleum products to the Member State concerned are not sufficiently guaranteed by the measures taken for that purpose by the Community institutions.

170. Case 46/75, W.J.G. Bauhuis v. Netherlands, 1977 E.C.R. 5; Case 5/77 Tedeschi v. Denkavit Commerciale, 1977 E.C.R. 1555; Case 251/78, Firma Denkavit Futtermittel GmbH v. Minister fur Ernahtung Landwirtschaft und Forsten des Landes Nordrhein-Westfalen, 1979 E.C.R. 3369; Case 227/82, Criminal Proceedings against Leendert Van Bennekom, 1983 E.C.R. 3883.

171. For an example of provisions preempting further Member State action, see Articles 3 and 8 of Council Directive 73/173, 1973 O.J. (L 189) 7 (classification, packaging and labelling of dangerous substances). For examples of provisions leaving the Member States free to take more stringent measures, see Article 9 of Council Directive 87/217, 1987 O.J. (L 85) 40 (prevention and reduction of environmental pollution by asbestos); Article 5 of Council Directive 85/203, 1985 O.J. (L 87) 1 (air quality standards for nitrogen dioxide); Article 1 of Council Directive 83/477, 1983 O.J. (L 263) 25 (protection of workers from the risks related to exposure to asbestos at work); Article 19 of Council Directive 80/68, 1980 O.J. (L 20) 43 (protection of groundwater against pollution from certain dangerous substances); Article 9 of Council Directive 78/659, 1978 O.J. (L 222) 1 (quality of fresh waters needing protection or improvement in order to support fish life); Article 12 of Council Directive 78/176, 1978 O.J. (L 54) 19 (waste from the titanium dioxide industry).

172. Case 169/89, Criminal Proceedings against Gourmetterie Van den Burg, 1990 E.C.R 2143.

by recalling that "a directive providing for full harmonization of national legislation deprives a Member State of recourse to that article."[173] It went on to state that

> [a]s regards the degree of harmonization brought about by Directive 79/409, it should be noted that, although the bird in question may, in accordance with Article 6(2) and (3) of the directive, be hunted within the Member State in which it occurs, the fact remains that Article 14 authorizes the Member States to introduce stricter protective measures than those provided for under the directive. The directive has therefore regulated exhaustively the Member States' powers with regard to conservation of wild birds.

The next step for the Court was thus to define the scope of the powers conferred on Member States by Article 14 of the Directive.[174] After an analysis of the principal criteria on which the Community legislature had relied, the Court concluded that the Member States were only authorized, pursuant to Article 14, to introduce stricter measures for the greater protection of migratory birds and seriously endangered species.[175] The red grouse were not one of these species, and thus, the Dutch prohibition could not be justified under Article 36 of the Treaty.[176]

b. *The Period Following the Single European Act*

The Single European Act considerably modified the principles at play. In addition to clearly recognizing the competence of the EC to act in the environmental field, the Single European Act established new provisions allowing Member States to take more severe measures than the Community rules.

(1) *Article 130t*

Article 130t states that "[t]he protective measures adopted in common pursuant to Article 130s shall not prevent any Member State

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173. *Id.* at 2163.

174. *Id.*

175. *Id.*

176. *Id.* at 2164. The attentive reader will certainly notice the parallel between Van den Burg and Palladio, Inc. v. Diamond, 321 F. Supp. 630 (S.D.N.Y. 1970), *aff'd* 440 F.2d 1319 (2d Cir. 1971), *cert. denied* 404 U.S. 983 (1971). *See supra* notes 56-65 and accompanying text. The difference of outcome between the two decisions can be partly explained by the different lines of reasoning adopted by the courts. The U.S. federal court applied a "factual" approach insisting on the importance of wildlife protection, whereas the ECJ used a "formalistic" reasoning essentially focusing on the aspect of uniformity in EC law.

from maintaining or introducing more stringent measures compatible with this Treaty." Article 130t does not bring about any major change in the EC environmental sphere. It essentially institutionalizes a principle which is already found in many EC environmental directives, wherein the standards prescribed by the Community constitute only a minimum requirement with which to be complied.[177] Moreover, Article 130t has a limited field of application; it applies only if the Community has enacted rules on the basis of Article 130s. As a result, Article 130t cannot be used where the Community has adopted environmental legislation on the basis of Article 100a. Any other conclusion would render Article 100a(4) meaningless. Finally, Article 130t clearly indicates that the more stringent protective measures adopted by Member States have to be compatible with the Treaty. In particular, they must not hide barriers to free trade across EC Member States.

(2) *Article 100a(4)*

A differently worded safeguard clause will apply when the environmental measure is taken in the framework of achieving the internal market. Article 100a(4) provides:

> If, after the adoption of an harmonization measure by the Council acting by a qualified majority, a Member State deems it necessary to apply national provisions on grounds of major needs referred to in Article 36, or relating to protection of the environment or the working environment, it shall notify the Commission of these provisions.
>
> The Commission shall confirm the provisions involved after having verified that they are not a means of arbitrary discrimination or a disguised restriction on trade between Member States.
>
> By way of derogation from the procedure laid down in Articles 169 and 170, the Commission or any Member State may bring the matter directly before the Court of Justice if it considers that another Member State is making improper use of the powers provided in this Article.

This new clause, which specifically mentions environmental protection as one of the admissible grounds for derogation to harmonization measures taken on the basis of Article 100a, has given rise to consider-

177. *See supra* note 171 and accompanying text.

able controversy.[178] In particular, one controversy concerns its possible use by Member States as an instrument of protectionism. One of the major criticisms springs from the fact that Article 100a(4) appears to act against the preemption theory discussed above. Indeed, contrary to the constant ruling of the ECJ,[179] Member States, in spite of the existence of a harmonization measure based on Article 100a, still have the right to rely on Article 36 to safeguard what they consider to be their "major needs."

A series of problems also arises from the poor drafting of the provision. For example, it is not apparent from Article 100a(4) whether a Member State may introduce new national provisions, or whether it can only maintain provisions which were already in force before the harmonization measure took effect. This lack of precision has led to controversy between authors. For example, Kramer argues that "the maintenance of existing stricter national measures is permitted in the case of majority decisions, but not the introduction of new measures of this nature."[180] Flynn suggests that "Article 100a(4) by no means rules out the possibility of a Member State wishing to raise its standard after the adoption of a measure."[181] The first opinion is probably closer to the reality.

Article 100a(4), however, includes a certain number of limitations. First, it only applies to the harmonization measures covered by Article 100a, and those adopted by a qualified majority. It does not apply when the Council has taken a unanimous decision. Secondly, only national provisions which are "justified" on the grounds referred to in paragraph 4 may be applied. However, these provisions must also satisfy the criteria deriving from the Court of Justice ruling on Article 36 and "mandatory requirements."[182] Obviously, only measures compatible with the principles of the Treaty can be sustained under Article 100a(4). Thirdly, the Commission must confirm that these national safeguard measures are not a means of arbitrary discrimination nor a disguised restriction of trade between Member States. In the event of a persistent disagreement between the Commission and a dissenting

178. *See* C.D. Ehlermann, *The Internal Market Following the Single European Act*, 24 COMMON MKT. L. REV. 361, 381; James Flynn, *How Will Article 100A(4) Work? A Comparison With Article 93*, 24 COMMON MKT. L. REV. 689 (1987); Ludwig Kramer, *The Single European Act and Environmental Protection: Reflections on Several New Provisions in Community Law*, 24 COMMON MKT. L. REV. 659, 678 (1987); Pierre Pescatore, *Some Critical Remarks on the Single European Act*, 24 COMMON MKT. L. REV. 9, 12 (1987).

179. *See supra* note 168 and accompanying text.

180. Kramer, *supra* note 178, at 681.

181. Flynn, *supra* note 178, at 696.

182. *See infra* notes 195-199 and accompanying text.

Member State, the Court will decide on the validity of the safeguard measures taken by the Member State.

An example of the use of Article 100a(4) by a Member State arose in the context of Council Directive 91/173[183] which amended Directive 76/769.[184] The object of Directive 91/173, adopted in March 1991, was to harmonize the laws of the Member States with regard to the restrictions on the use of pentachlorophenol (PCP), a substance mainly used for the preservation of wood which presents adverse effects to humans and the environment. As a rule, Directive 91/173 banned the use of PCP with some exceptions.[185] In August 1991, Germany asked to apply Article 100a(4) to preserve a total ban of PCP on the German territory, despite the less stringent EC standards.[186] In June 1992, the Commission decided that the German regulation was not discriminatory as it was applied without distinction to both German and imported products and that Article 100a(4) was applicable.[187]

2. *Powers of the States to Take Environmental Measures When the Community Has Not Legislated*

As noted by Michel Waelbroeck and Donald Kommers, "[t]he complicated web of dormant [C]ommerce [C]lause jurisprudence in the United States has been spun from the implications of the brief constitutional command conferring upon Congress the power to regulate commerce among Member States."[188] In contrast, the EEC treaty contains a variety of provisions designed to prohibit impediments to intra-community trade.[189] The central provision with regard to import restrictions is Article 30 which prohibits all measures having equiva-

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183. 1991 O.J. (L 85) 34.

184. 1976 O.J. (L 262) 201.

185. Directive 91/173 bans the use of PCP with four derogations: wood preservation, impregnation of fibers and heavy-duty textiles, as a synthesizing agent in industrial processes, in "in situ" treatment of buildings of artistic or cultural interest.

186. *WWF: Ecology Group Says PCP Regulations Need Tightening Up*, EUROPE ENVIRONMENT, June 6, 1992, at 13.

187. *Id.*

188. Donald Kommers & Michael Waelbroeck, *Legal Integration and the Free Movement of Goods: The American and the European Experience*, *in* INTEGRATION THROUGH LAW 165 (Mauro Cappelletti, et. al. eds. 1985).

189. Measures capable of restricting interstate trade are covered as to custom duties and charges having equivalent effect by Articles 9 and 12-17; as to quantitative restrictions and measures having equivalent effect by Articles 30-36; as to the free movement for natural and legal persons by Articles 48-58; as to the freedom to provide services by Articles 59-66; as to state aids by Articles 92-94 and as to discriminatory taxation by Articles 95-98.

lent effect on imports.[190] The concept of measures having equivalent effect on imports has been interpreted by the Court of Justice in its leading judgment *Procureur du Roi v. Dassonville.* The Court interpreted the concept to cover "all trading rules enacted by Member States which are capable of hindering, actually or potentially, directly or indirectly, intra-Community trade."[191] From this statement, one must look to the effects of a measure and not to its aim in deciding whether it falls under Article 30.[192] Consequently, in theory, any environmental measure, making the import of goods from other Member States more difficult or costly than the disposal of domestic production, falls under the Court's definition.[193] However, the prohibition is not absolute. The Member States can use two categories of exceptions: one derived from Article 36 of the Treaty, and the other derived from the *Cassis de Dijon* case law (the "rule of reason").[194] In the first place, we have to ask to what extent unilateral environmental measures can be based on these exceptions. Then we will focus on the principle of proportionality which has to be satisfied for the use of either of these exceptions.

a. *Article 36*

Assuming that certain conditions are met, Article 36 allows Member States to adopt measures hindering the free movement of goods for the purpose of protecting a series of non-economic values such as public policy or public security and the protection of human health, animals, and plants.[195] The Court has made clear that Article 36 must

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190. Article 30 states "[q]uantitative restrictions on imports and all measures having equivalent effect shall, without prejudice to the following provisions, be prohibited between Member States." For some general literature on Article 30, see Peter Oliver, FREE MOVEMENT OF GOODS IN THE EEC (1982); LAURENCE GORMLEY, PROHIBITING RESTRICTIONS ON TRADE WITHIN THE EEC (1985).

191. Case 8/74, Procureur du Roi v. Dassonville, 1974 E.C.R. 837, 852. As a result of the broad aspect of the Dassonville definition, many provisions, actions, or administrative practices are caught by measures having an equivalent effect of maximum or minimum prices and legislation on the origins, packaging, composition or designation of goods. *See generally* P.T.G. KAPTEYN & P. VERLOREN VAN THEMAAT, INTRODUCTION TO THE LAW OF THE EUROPEAN COMMUNITIES 387 (2nd ed. 1990).

192. Oliver, *Measures of Equivalent Effect A Reappraisal,* 19 COMMON MKT. L. REV. 217, 223 (1982).

193. *See, e.g.*, Case 302/86, Commission v. Denmark 1989 E.C.R. 4607.

194. *See* Kapteyn & Verloren van Themaat, *supra* note 191, at 387.

195. Article 36 states

> the provisions of Articles 30 to 34 shall not preclude prohibitions or restrictions on imports,exports or goods in transit justified on grounds of public morality, public policy or public security; the protection of health and life of humans, animal or

be strictly interpreted and that it does not extend to justifications not mentioned in the article.[196] Environmental protection does not appear in Article 36. However, environmental protection measures are frequently designed to protect some of the values listed in Article 36.[197] For example, it is clear that a Member State can justify under Article 36 an environmental protection measure which aims at protecting the life of humans. Article 36 could thus be used as a basis to justify measures aimed at controlling or limiting trade in dangerous substances for human beings. Moreover, environmental objectives can be sometimes related to the protection of animals or plants. Article 36 could thus justify regulations prohibiting trade in endangered animal or vegetable species.

For example, in *Van den Burg*,[198] the Dutch government tried to use Article 36 to justify a measure prohibiting the importation and keeping of red grouse in the Netherlands. For Advocate General Van Gerven, as for the Commission, there was no doubt that the aim of improving bird stocks may be regarded as falling within the legal interests referred to in Article 36, namely the protection of human health and animals. The Court of Justice, however, did not make reference to Article 36 in its decision. Indeed, as we have seen above, the Court decided to base its decision on the issue of preemption. Finally, despite their general character, it seems to be more difficult to use the concepts of "public policy" or "public security" to justify environmental protection measures.[199]

b. *The Rule of Reason*

The rule of reason is a "creation of caselaw."[200] In the famous *Cassis de Dijon* case the Court phrased the rule of reason in the following words:

> [o]bstacles to movement within the Community resulting in disparities between the national laws relating to the marketing of the products in question must be accepted in so far as those provisions may be recognized as being necessary in order to satisfy mandatory

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plants; the protection of national treasures possessing artistic, historic or archaeological value; or the protection of industrial and commercial property. Such prohibitions or restrictions shall not, however, constitute a means of arbitrary discrimination or a disguised restriction on trade.

196. Case 95/81, Commission v. Italian Republic, 1982 E.C.R. 2187.

197. Kramer, *supra* note 178, at 34; Jadot, *supra* note 1, at 412.

198. Case 169/89, Criminal Proceedings against Van den Burg, 1990 E.C.R. 2143.

199. Jadot, *supra* note 1, at 412.

200. Kapteyn & Verloren van Themaat, *supra* note 191, at 387.

> requirements relating in particular to the effectiveness of fiscal supervision, the protection of health, the fairness of commercial transactions and the defence of the consumer.[201]

Thus, it appears that the *Cassis de Dijon* judgement recognizes that Member States may, when applying measures which apply equally to domestic and imported products, restrict imports for motives other than those specifically recognized by Article 36. The central question is therefore whether environmental protection measures fall within the principle enunciated by the ECJ in the *Cassis de Dijon* case. In 1980, the EC Commission underlined the importance of environmental protection as a potential limitation on the rule contained in Article 30 of the treaty.[202] This was also accepted by the ECJ in the *Waste Oils* case[203] which was the first case to tackle the problem of the tension between the free movement of goods and environmental protection measures in the EC.

In *Waste Oils*, the Court was asked not to evaluate the validity of a Member State environmental measure, but to determine if Council Directive No 75/439/EEC of 16 June 1975, on the disposal of waste oils was in conformity with the principles of freedom of trade, the free movement of goods and free competition. Particularly at issue were the provisions of the directive which envisaged the possibility of exclusive zones being assigned to waste oil collectors, the prior approval of undertakings responsible for the disposal, and the possibility of indemnities being granted to undertakings. The Court began by recalling that "[t]he principles of free movement of goods and freedom of competition, together with freedom of trade as a fundamental right,

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201. Case 120/78, Rewe-Zentral AG v. Bundesmonopoverwaltung fur Branntwei, 1979 E.C.R. 649, 662. *See also* Case 216/84, Commission v. French Republic, 1988 E.C.R. 809; Case 298/87, Proceedings for compulsory reconstruction against Smanor, SA, 1988 E.C.R. 4489; Case 302/86, Commission v. Denmark, 1988 E.C.R. 4607. Case 178/84, Commission v. Federal Republic of Germany, 1987 E.C.R. 1227; Case 179/85, Commission v. Federal Republic of Germany, 1986 E.C.R. 3879; Case 182/84, Criminal Proceedings against Miro BV, 1985 E.C.R. 3731; Case 94/82, Criminal Proceedings against De Kikvorsch Groothandel-Import-Export BV, 1983 E.C.R. 947; Case 286/81, Criminal Proceedings against Oosthoek's Uitgeversmaatschappij BV, 1982 E.C.R. 4575; Case 220/81, Criminal Proceedings against Timothy Frederick Robertson and others, 1982 E.C.R. 2349; Case 261/81, Walter Rau Lebensmittelwerke v. De Smedt PvbA, 1982 E.C.R. 3961; Case 130/80, Criminal proceedings against Fabriek voor Hoogwaardige Voedingsprodukten Kelderman BV, 1981 E.C.R. 527; Case 193/80, Commission v. Italian Republic, 1981 E.C.R. 3019; Case 788/79, Criminal Proceedings against Gilli and Andres, 1980 E.C.R. 2071; Case 27/80, Criminal Proceedings against Antoon Adriaan Fietje, 1980 E.C.R. 3839.

202. Communication from the Commission concerning the consequences of the judgement given by the Court of Justice on 20 February 1979 in Case 120/78 (*Cassis de Dijon*), 1980 O.J. (C 256) 2.

203. Case 240/83, Procureur de la Republique v. Association de Defense des Bruleurs d'huiles Usagees, 1984 E.C.R. 531.

are general principles of Community law."[204] However, the Court insisted that

> [t]he principle of freedom of trade is not to be viewed in absolute terms but is subject to certain limits justified by the objectives of general interest pursued by the Community provided that the rights in question are not substantially impaired . . . There is no reason to conclude that the Directive has exceeded these limits. The Directive must be seen in the perspective of environmental protection, which is one of the Community's essential objectives.[205]

The *Waste Oils* decision may be considered a landmark. It may be inferred that national measures taken for environmental protection reasons are capable of constituting "mandatory requirements" recognized in *Cassis de Dijon* as limiting the application of Article 30 of the Treaty in the absence of Community rules.[206] As we will see, this has since been confirmed in the *Danish Bottle* case.[207]

c. *The Principle of Proportionality*

Measures justifiable under Article 36 or the rule of reason must satisfy at least one common condition: they must respect the principle of proportionality. Before examining the contribution of the *Danish Bottle* case, we will first study the principle of proportionality as developed in the case law of the ECJ.

1. The Principle of Proportionality in the Case Law of the ECJ

According to the case law of the Court of Justice, measures justifiable under the "rule of reason" or under Article 36 of the EC Treaty must be reasonable and, in particular, are subject to the proportionality test. They must not restrict trade between Member States any more than is absolutely necessary for the attainment of their legitimate purpose and they must be the least restrictive method of attaining that purpose.

The *Gilli* case[208] offers a good illustration of the requirement of necessity. In that case, the Court found the prohibitions enacted by Italy on the sale of vinegar, other than wine vinegar, were not justified be-

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204. *Id.* at 548.

205. *Id.* at 549.

206. *See* the opinion of Advocate General Gordon Slynn in Case 302/86, Commission v. Kingdom of Denmark, 1988 E.C.R. 4607, 4622.

207. *Id.* at 4630.

208. Case 788/79, Criminal proceedings against Gilli and Andres, 1980 E.C.R. 2071.

cause these kinds of vinegar were not damaging to human health. The Court indicated that "[t]here is no factor justifying any restriction on the importation of the product in question from the point of view either of the protection of public health or of the fairness of commercial transactions or of the defence of the consumer."[209] The Italian measure was struck down because it was not possible to find a causal connection between the unilateral national measures (ban on vinegar other than wine), and the objectives pursued (protection of public health and the fairness of commercial transactions).

In determining whether a measure is "necessary" to the objective pursued, the Court often takes into account the extent of the burden which the measure imposes on trade between Member States. For example, in the *German Meat Preparation* case,[210] the Court decided that a German legal provision, prohibiting the sale of meat products from meat which had not been produced in the country of processing, was not necessary to protect public health. Although the measure did not prevent the import of products from another Member State (as long as these products were made from meat coming from that Member State), the Court insisted on the fact that the hindrance resulting from the measure was out of proportion to the objective pursued (*i.e.* protection of public health).

The *De Peiper* case[211] provides a good illustration of the criterion of least restrictive alternative. In that case, a Dutch legal provision required parallel importers of pharmaceutical products to submit to the national health authorities certain documents which could be obtained only from the manufacturers of the products or their appointed distributor. The effect of this provision was to make all parallel imports of pharmaceutical products dependent on the good will of the manufacturer or of the official distributor. The Court considered that such a regulation did not fall within the exception provided in Article 36. The Court reasoned that because public health could be protected as effectively by a less restrictive measure, such as a collaboration between the Dutch authorities and those of the Member States in which the pharmaceutical products in question were produced.

Also, in the *Rau* case,[212] the Court of Justice had to decide whether the application of legislation, which did not allow margarine imported from another Member State to be sold unless packaged in cube-

209. *Id.* at 2078.

210. Case 153/78, Commission v. Federal Republic of Germany, 1979 E.C.R. 2555.

211. Case 104/75, Adriaan de Peijper, managing director of Centrafarm BV, 1976 E.C.R. 613.

212. Case 261/81, Walter Rau Lebensmittelwerke v. De Smedt PvbA, 1982 E.C.R. 3961.

shaped blocks, constituted a measure of equivalent effect within the meaning of Article 30. The Belgian government was contending that the requirement of cubic form was necessary to prevent confusion between butter and margarine. However, the Court struck down the measure, and stated "consumers may in fact be protected just as effectively by other measures, for example by rules on labelling, which hinder the free movement less."[213]

2. *The Principle of Proportionality in the Context of Member States' Environmental Measures*

The *Danish Bottle* case[214] was the first occasion given to the Court of Justice to apply the principle of proportionality in the context of a Member State's environmental measure. In that case, the Commission challenged a Danish law of July 2, 1981. Danish law introduced a system under which all containers for beer and soft drinks had to be returnable. The main feature of the system was that manufacturers had to market beer and soft drinks in reusable containers. The containers had to be approved by the National Agency for the Protection of the Environment (NAPE), which was entitled to refuse approval of new kinds of containers if they did not meet a series of conditions. Following protests from producers of beverages and containers in other Member States, the Commission urged the Danish Government to change the law. As a consequence of the Commission intervention, in 1984, the Danish Government amended the 1981 law "in such way that, provided that a deposit-and-return system [was] established, non-approved containers, apart from any form of metal container, [could] be used for quantities not exceeding 3000/hl a year per producer and for drinks which [were] sold by foreign producers in order to test the market."[215] The Commission was not satisfied with the 1984 amendment. In 1986, the Commission brought Article 169 proceedings to have both the compulsory deposit-and-return system and the NAPE approval system declared incompatible with Article 30 of the EC Treaty.

In his opinion, Advocate General Slynn supported the Commission's case and found both the compulsory return-and-deposit system and the NAPE approval system to be in breach of the EEC Treaty.[216]

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213. *Id.* at 3973.

214. Case 302/86, Commission v. Kingdom of Denmark, 1988 E.C.R. 4607. For a general comment see Jadot, *supra* note 1 at 84. *See also* Pascale Kromarek, *Environmental Protection and the Free Movement of Goods: the Danish Bottles Case*, 2 J. ENVTL. L. 89 (1990).

215. 1988 E.C.R. at 4629.

216. *Id.* at 4626.

He found that the Danish measures had a discriminatory effect. As a result, it was not possible for Denmark to rely on the principle stated in *Cassis de Dijon*,[217] even if environmental protection could be considered a mandatory requirement. In addition, even if the Danish measures could be considered as indistinctly applicable, the Danish measures were not proportionate to achieve the legitimate environmental aim. For Advocate General Slynn, "[t]here has to be a balancing of interests between the free movement of goods and environmental protection, even if in achieving the balance the high standard of environmental protection sought has to be reduced. The level of environmental protection must be at a reasonable level."[218] Applying this formula to the Danish measures, Advocate General Slynn stated he was "not satisfied the various methods outlined in the Council Directive . . . [were] incapable of achieving a reasonable standard which impinges less on the provisions of Article 30."[219]

The ECJ did not follow the Advocate General's opinion, and held the deposit-and-return system to be compatible with Article 30, but the NAPE approval system to be incompatible with the same Article. With regard to the deposit-and-return system, the Court found that it was "an indispensable element of a system intended to ensure the reuse of containers and therefore . . . necessary to achieve the aims pursued by the contested rules. That being so, the restrictions which it imposes on the free movement of goods cannot be regarded as disproportionate."[220] However, regarding the NAPE approval system, the Court found that by restricting the quantity of beer and soft drinks which could be marketed by a single producer in non-approved containers to 3000/hl per year, Denmark had failed to fulfil its obligations under Article 30 of the Treaty. According to the Court:

> [t]he system for returning non-approved containers is capable of protecting the environment and, as far as imports are concerned, affects only limited quantities of beverage compared with the quantity of beverages consumed in Denmark owing to the restrictive effect which the requirement has on imports. In these circumstances, a restriction of quantity of products which may be marketed is disproportionate to the objective pursued.[221]

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217. *Id.* at 4625.
218. *Id.* at 4626.
219. *Id.*
220. *Id.* at 4630.
221. *Id.* at 4632.

The Court's reasoning presents some interesting elements. It is noteworthy that the Court did not raise the issue of discrimination.[222] The Court focused exclusively on the principle of proportionality. This is surprising especially when we consider that "mandatory requirements may only be invoked in the case of national rules which apply without discrimination to both domestic and imported products,"[223] and that the Court looks "behind the face of measures to see if this is really the case."[224]

In the *Danish Bottle* Case, even though on the surface the measures were indiscriminately applicable to Danish and non-Danish manufacturers, the Danish measures applied a heavier burden on the latter. The Court should have seriously questioned the applicability of the *Cassis de Dijon* formula. Moreover, the analysis by the Court of the proportionality of the Danish measures is ambiguous. Indeed, when the Court analyzed the deposit-and-return system, it confronted the particular Danish objective of reutilization of empty bottles which guarantees a very high level of environmental protection.[225] This implies that the Court takes for granted the level of protection chosen by the Member State (even if this level is very high) and thus only assesses whether the restrictions resulting from the measures are disproportionate to the aims adopted by the State.

By contrast when the Court examined the approval system, it was not confronted with the particular objective of reutilization, but with the general objective of environmental protection. The Court then estimated this general objective can be satisfied by the deposit-and-return system.[226] This suggests the Court in practice has followed the opinion of Advocate General Slynn that the level of protection must be situated at a reasonable level.

d. *The Belgian Waste Case*

The *Belgian Waste* case[227] gave the ECJ a chance to clarify its interpretation of Articles 30 and 36 of the Treaty with regard to Member

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222. *See* Jadot, *supra* note 1, at 424.

223. Case 788/79, Criminal proceedings against Gilli and Andres, 1980 E.C.R. 2071; Case 177/83, Theodore Kohl KG v. Ringelhan & Rennet SA and Ringelhan Einrichtungs GmbH, 1984 E.C.R. 3651; Case 207/83, Commission v. United Kingdom, 1985 E.C.R. 1201; Case 16/83, Criminal proceedings against Prantl, 1984 E.C.R. 1299.

224. Kapteyn & Verloren van Themaat, *supra* note 191, at 389.

225. Case 302/86, Commission v. Denmark, 1988 E.C.R. 4607, 4630. *See generally* Damien Geradin, Note, *Case C-2/90, Commission v. Belgium, Judgment of the ECJ of 9 July 1992*, 19 EUR. L. REV. 145 (1993).

226. *Id.* at 4632.

227. Case 2/90, Commission v. Belgium, ECJ, July 9, 1992 (unpublished opinion).

States' environmental measures. In the case, the Commission challenged a Decree of the Walloon Regional Executive whose effect was to impose a global ban on the importation of all waste products into Wallonia, subject only to the exceptions contained in the Decree and to the possibility of further derogations.[228] It argued that the prohibitions of the Walloon Decree were contrary to the scheme and objectives of Directives 75/442 and 84/361. The directives were essentially designed to ensure the free movement of waste products while protecting health and the environment. These prohibitions were also contrary to Articles 30 and 36 of the Treaty of Rome.

In his opinion, Advocate General Jacobs estimated that a breach of Directive 75/442 was not established. The directive contained no substantive provision specifically concerned with interstate trade in waste products. Advocate General Jacobs reached a different conclusion with regard to Directive 84/361. Indeed, he estimated that "[t]he fact that the directive has opted for a system of prior notification . . . of itself excludes the possibility of adopting an alternative system of control such as a general prohibition on imports, subject to the possibility of derogations."[229]

With regard to the violation of Article 30, Advocate General Jacobs estimated that the Treaty provisions on free movement of goods apply to all types of waste products, even those which cannot be recycled or re-used. As a result, the Walloon Decree had to be seen as a measure of equivalent effect. In that regard, Advocate General Jacobs found it irrelevant that the ban also extends to waste from other Belgian regions.

He then examined the question of whether or not reliance on Article 36 was possible.[230] He concluded that Directive 75/442, which con-

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228. Article 1 §1, as amended by Article 130 of the Decree of 23 July 1987, prohibits the storage, tipping or dumping of waste from a foreign country in authorized depots, stores and tips in Wallonia, except in depots annexed to an installation for the destruction, neutralization and disposal of toxic waste. Under Article 2, derogations from Article 1 may be granted by the Walloon Regional Executive for a limited period not exceeding 2 years and must be justified by a reference to serious and exceptional circumstances. Under Article 3, the storage, tipping or dumping of waste from the other Belgian regions, namely Flanders and Brussels, is also prohibited, but exceptions may be made in accordance with agreements to be made with those other regions.

229. Case 2/90, Commission v. Belgium.

230. *Id.* at 19. Specifically, Advocate General Jacobs stated:

> As the Court indicated, where in application of Article 100 of the Treaty, Community directives provide for the harmonization of measures necessary to ensure the protection of animal and human health and establish Community procedures to check that they are observed, recourse to Article 36 is no longer justified and the appropriate checks must be carried out and the measures of protection adopted within the framework outlined by the harmonizing directive.

tains only a framework for the supervision of waste disposal, did not displace Article 36.[231] However, Directive 84/361, which establishes a detailed, uniform system of supervision and control of the transfrontier shipment of dangerous waste, excluded reliance on Article 36.[232] Advocate General Jacobs estimated that in any event Belgium could not rely on Article 36 to restrict imports of non-dangerous waste. A different conclusion would be contrary to the well-established case law of the ECJ which has concluded that Article 36 must be interpreted restrictively.[233] Nor would it be possible for Belgium to rely on the "mandatory requirements" exceptions to Article 30, which include environmental protection.[234] Those exceptions can be invoked only for evenhanded measures and not for discriminatory measures, similar to the Walloon Region prohibition.

Advocate General Jacobs' conclusion was that Belgium could, in principle, rely on Article 36 only with regard to the categories of dangerous waste excluded from the scope of Directive 84/361. A global ban on imports from other Member States was therefore clearly neither necessary nor proportionate to avert any danger to public health which might be posed by those products.[235]

The Court of Justice only partly followed Advocate General Jacobs' opinion. The Court estimated that for general waste the Walloon region could maintain its current legislation in the name of environmental protection. With regard to dangerous waste, the Court estimated that the Walloon region should have applied Directive 84/361 relating to the surveillance and control within the Community of cross-border transfers of dangerous waste.

To reach these conclusions, the Court started its reasoning by rejecting the Commission argument that the 1975 Directive did not authorize Wallonia to impose a full ban on waste dumping. As already underlined by Advocate General Jacobs, none of the provisions in the 1975 Directive specifically aim at waste exchanges between Member States.[236]

The Court concluded that the 1984 Directive sets up a complete system for the control of dangerous waste based on prior compulsory and detailed notification on the part of the waste producer. The Court

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231. *Id.*
232. *Id.*
233. *Id.* at 20.
234. *Id.*
235. *Id.* at 21.
236. Case 2/90, Commission v. Belgium, ECJ, (unreported decision).

stated "[t]his system does not leave . . . any possibility for Member States to globally ban these movements."[237]

Because dangerous waste is covered by Directive 84/361, the question of compatibility of the Belgian measure with Article 30 had only to be posed with regard to non-dangerous waste. The Court of Justice first replied to the question of knowing whether such waste constituted goods. The Belgian government noted the distinction between waste that can be recycled and that which cannot be re-used. Waste which cannot be used again, it stated, has no intrinsic commercial value. It cannot be sold. It does not, therefore, come under the provisions of the Treaty on the free movement of goods.

The Court rejected the argument that "[w]aste, which can be recycled or not, should be considered as a product, the free movement of which . . . should not in principle be hindered."[238] It explained that the distinction between waste that is recyclable and waste which is not recyclable "is founded on uncertain elements, likely to change with time, in relation to technical progress."[239] In addition, "the recyclable and non-recyclable nature of waste also depends upon the cost of recycling and . . . on the profitability of the way in which it will be reused, so that the relevant assessment is necessarily subjective and depends on unstable factors."[240]

Additionally, the Court accepted the argument put forward by the Belgian government that environmental protection merits "an exceptional and temporary safeguard measure against an influx into Wallonia of waste originating in bordering countries."[241] The Court noted that the accumulation of wastes "even before they reach levels that will present dangers to health, constitutes a danger for the environment, especially when considering the limited capacity of each region or locality to receive them."[242]

Finally, the Court rejected the latest Commission "counter argument" that environmental protection could not be used as an argument in this case because such justification should be applied to all waste, and waste produced in Wallonia is not less harmful than other waste. The Court replied that the specific nature of the waste is to be taken into account if one is to comply with the principle established for environmental action in Article 130r(2) of the Treaty. The Court stated

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237. *Id.* at 20 (unofficial translation).
238. *Id.* at 28.
239. *Id.* at 27.
240. *Id.*
241. *Id.*
242. *Id.* at 30.

> [i]t is the responsibility of each region, commune or other local entity to take the appropriate measures necessary to assure the reception, treatment and elimination of its own waste; these must then be eliminated as close as possible to the site of their production, for the purpose of limiting their transport as much as possible.[243]

The Court further added that "[t]his principle conforms with the principle of self-sufficiency and proximity set out in the Basel Convention of 22 March 1989, on the control of trans-frontier shipments of dangerous waste and their elimination, to which the Community is a signatory."[244]

The judgement of the Court of Justice in the Belgian Waste case must be seen as a landmark. This is indeed the first time that the Court of Justice used the exception contained in the *Cassis de Dijon* case law to uphold a trade restriction facially discriminating against imports.[245] The Court went much further than in the *Danish Bottle* case, where the Danish measures organized a deposit-and-return system for bottles that bore more heavily on imported products than on domestic ones, but did not discriminate between them.

The length of the proceedings illustrates that the Court of Justice was not confronted with an easy matter. The issue of waste, and in particular the transfer of waste, is currently a difficult political issue. There is growing frustration in the population of the Member States in seeing quality of life diminished by invasions of foreign waste. It is this frustration that the Court of Justice acknowledged by upholding the Walloon restrictions.

The reasoning used by the ECJ to attain that result might, however, be criticized. As we have seen, the Court first justified the argument that the Walloon Decree fulfilled mandatory requirements by saying that wastes were articles of a particular nature. The same argument was used by the Court with regard to the question of discrimination. The Court estimated that the issue must be looked at in the context of the subject matter in question, and that account should be taken of the particular nature of waste. Hence, given the difference between waste produced in one area or another, and the connection with the place where they were produced, the Walloon restrictions were not to be seen as discriminatory.

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243. *Id.* at 34.

244. *Id.* at 35.

245. *See* P. Demaret, *Trade-Related Environmental Measures (TREMS) in the External Relations of the EC, in* THE EC'S COMMERCIAL POLICY AFTER 1992: THE LEGAL DIMENSION (M. Maresceau ed., forthcoming 1993).

The particular nature of the waste appears, however, as rather a weak justification. It does not have the precision necessary to ensure legal certainty, and therefore it opens the door to potential abuse. The principle of correction at source, as included in Article 130r(2) of the Treaty, and the principles of proximity and self-sufficiency, developed in the Basel Convention, offer little additional support to the ECJ. Indeed, the Court mentioned these principles without questioning in any way their compatibility with the Maastricht treaty.

Finally, we note that the Court of Justice evaded the question of proportionality. One may ask if it would not have been possible for the Walloon Region to protect its land from a waste invasion through a less burdensome measure on interstate commerce, such as increasing its standards for waste disposal.

III. *Comparative Analysis*

The U.S. Constitution and the EC Treaty present similarities and differences with regard to the free movement of goods. In the EC treaty, there is no grant of power to the Community similar to the general power conferred on the Congress by the Commerce Clause. In fact, the Treaty of Rome

> starts the other way round: instead of a grant of power to the Community which would by the same token limit to a certain extent the power of the Member States, it provides for express prohibitions for the Member States to introduce import and export duties or to set up quantitative restrictions of whatever nature with regard to trade between Member States[246]

Thus, one may question whether the two situations are comparable.[247] The answer is that they are because the context is very similar. In both cases, the major incentive for creating a union was the need for an internal market stretching over the territories of all the states involved in the unitary process.

As a result of this common object, the jurisprudence of the two courts has developed in very similar ways. There are important similarities in the principles both courts have developed for placing restrictions on state legislation that would impede the free movement of goods. Similarly, there are many parallels in the methods that the

246. Koen Lenaerts, *Constitutionalism and the Many Faces of Federalism*, 38 AM. J. COMP. L. 205, 261 (1990).

247. *See* Mackenzie Stuart, *Problems of the EC — Transatlantic Parallels*, 36 INT'L & COMP. L. Q. 183, 188 (1987).

courts employ for determining the limits of state power.[248] Both courts have demonstrated a strong antagonism to protectionist policies. Legislation which facially discriminates against goods from other states has been found invalid, except in rare circumstances. Not surprisingly, the Supreme Court and the ECJ have had greater difficulty fashioning principles to deal with measures which do not discriminate on their face but have a discriminatory effect on non-domestic goods. The prevalent method of analysis employed by both courts is striking a balance between the competing sources of power within the federation.[249] The ECJ has adopted a balancing test very similar to the analytical framework adopted by the Supreme Court in *Pike v. Bruce Church, Inc.*[250]

If we narrow our analysis to the environmental cases, the parallel between the case law of the U.S. Supreme Court and the ECJ is particularly relevant. Of course, American and EC environmental policies are at different stages of development.[251] Differences in institutional and political contexts have also profoundly influenced the evolution of environmental policy in the two systems.

Environmental policy in the United States is more extensive than in the EC. There are several reasons for this.[252] First, the centralization of environmental policy in the United States has been greatly facilitated by the federal law-making structure which includes a nationally elected President, direct representation in Congress, and a federal bu-

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248. Stein, *On Divided-power Systems: Adventures in Comparative Law*, L.I.E.I. 1983/1, 27, 29.

249. *Id.*

250. *Compare* the prevailing law in the U.S., where it is stated

> [w]here the statute regulates evenhandedly to effectuate a *legitimate local public interest*, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits . . . If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interests involved, and on whether it could be promoted as well *with a lesser impact on interstate activities.*

Pike v. Bruce Church, 397 U.S. 137, 142 (1970) (emphasis added), *with* EC law:

> in the absence of common rules relating to the marketing of the products in question, obstacles to free movement within the Community resulting from disparities between national laws must be accepted in so far as such rules, *applicable to domestic and imported products* without distinction, may be recognized as being necessary in order to satisfy *mandatory requirements* recognized by Community law. Such rules must also be proportionate to the aim in view. If a Member State has a choice between various measures for achieving the same aim, it should choose *the means which least restricts the free movement of goods.*

Case 302/86, Commission v. Denmark, 1988 E.C.R. 4607, 4629 (emphasis added).

251. *See generally* Rehbinder & Stewart, *supra* note 137, at 431-32.

252. *Id.*

reaucracy with direct enforcement powers. Second, the U.S. government enjoys very important advantages, such as the ownership of one-third of the nation's land and formidable taxing and spending powers. Finally, the U.S. government has always employed a form of majority rule for environmental action.

The EC has not been as fortunate. Environmental law-making mainly consists of directives that are binding, but which have to be implemented by the twelve Member States. They are bound to do so. However, some of them have shown a clear lack of enthusiasm in the implementation process.[253] Moreover, the EC, unlike the United States, is not an owner of land and has almost no taxing power at the Community level. In addition, decision making, in the context of environmental action, has been based on unanimity in the Council of Ministers. However, Article 100a, as broadly interpreted by the ECJ in the *Titanium Dioxide* case, will permit the Council to take most environmental measures at a qualified majority.[254] The Drafters of the Single European Act, helped by the ECJ, have thus allowed the Community to take a clear step in the direction of a federal environmental policy.

If one has to admit that U.S. and EC environmental policies have reached a different stage of development, the problem with which the U.S. Supreme Court and the ECJ have been confronted is very similar. In both the United States and Europe, fear has been expressed over the development of local environmental measures as instruments of economic isolationism. Moreover, the environmental measures used by the component states present common characteristics. For example, U.S. courts were confronted at least twice with situations equivalent to that described in the *Danish Bottle* case.[255] As in the *Danish Bottle* case, in *Minnesota v. Clover Leaf Creamery Co.*[256] and *American Can Co. v. Oregon Liquor Control Commission*,[257] U.S. courts had to examine the conformity with constitutional law of national or local environmentally-related packaging regulations which had a significant impact on trade. Also, the U.S. Supreme Court twice had to examine issues similar to those at question in the *Belgian Waste* case.[258] As in the *Belgian Waste* case, in *Philadelphia v. New Jersey*[259]

253. See ANNEXE C AU HUITIEME RAPPORT AU PARLEMENT EUROPEEN SUR LE CONTROLE DE L'APPLICATION DU DROIT COMMUNAUTAIRE, CONTROLE DE L'APPLICATION DES DIRECTIVES ENVIRONMENTALES PAR LES ETATS MEMBERS, at 258-324.

254. *See supra* notes 157-163 and accompanying text.

255. Case 302/86, Commission v. Denmark, 1988 E.C.R. 4607.

256. 449 U.S. 456 (1981).

257. 517 P.2d 691 (1973).

258. Case 2/90, Commission v. Belgium (unpublished opinion).

259. 437 U.S. 617 (1978).

and *Fort Gratiot Sanitary Landfill, Inc. v. Michigan Department of Natural Resources*,[260] the U.S. Supreme Court was concerned with the constitutional validity of state statutes prohibiting the imports of out-of-state waste on their territory.

In the environmental field, U.S. courts have demonstrated considerable flexibility and creativity in promoting both legal integration and the legitimate interests of federalism. As illustrated in *Philadelphia v. New Jersey*,[261] the Supreme Court remains vigorously "interventionist" where the effect of local legislation is to "balkanize" the U.S. economy in a serious fashion.[262] Speaking for the Court in *Philadelphia v. New Jersey*, Justice Stewart emphasized that "[w]hat is crucial is the attempt by one State to isolate itself from a problem common to many by erecting a barrier against the movement of interstate trade."[263]

The Supreme Court has shown particular sensitivity to local interests with regard to state legislation designed to protect the environment.[264] Generally, the Supreme Court tends to interpret narrowly the doctrine of preemption in "areas of policy where high levels of environmental protection are politically desirable."[265] The case of *Huron Portland Cement Co. v. Detroit*[266] provides a clear example of a case where, had the environmental purpose been absent, the state regulation might well have been found to be preempted. Moreover, as illustrated in *Minnesota v. Clover Leaf Creamery Co.*,[267] when using its balancing approach, the Court has traditionally deferred to state measures with an environmental policy goal, even when the measures have a significant impact on interstate commerce.[268] Finally, *Huron Portland Cement Co. v. Detroit*,[269] *American Can Co. v. Oregon Liquor Control Commission*[270] and *Procter & Gamble v. Chicago*[271] are examples where the U.S. Supreme Court or lower federal courts upheld evenhanded environmental statutes without engaging in the balancing analysis that is usually used in these types of cases. In such

260. 112 S. Ct. 2019 (1992).
261. 437 U.S. 617 (1978).
262. Kommers & Waelbroeck, *supra* note 188, at 221.
263. 437 U.S. at 628.
264. Kommers & Waelbroeck, *supra* note 188, at 222.
265. *Id.*
266. 362 U.S. 440 (1960).
267. 449 U.S. 456 (1981).
268. Kommers & Waelbroeck, *supra* note 188, at 222.
269. 362 U.S. 440 (1960).
270. 517 P.2d 691 (1971).
271. 509 F.2d 69 (7th Cir.), *cert. denied* 421 U.S. 978 (1975).

cases the courts have applied a more indulgent "rational relation" test rather than a balancing test.

In its case law, the ECJ has equally shown a strong opposition to measures having the effect of "balkanizing" the European economy.[272] Thanks to its broad interpretation of the concept of "equivalent effect," it has been able to achieve a high level of integration in Europe. This broad interpretation must also be applied to Member States' measures aiming to protect the environment. However, in the *Waste Oils* case,[273] the Court of Justice has indicated that environmental protection could be one of the mandatory requirements mentioned in the *Cassis de Dijon* formula. It thus gave the Court the opportunity to apply the rule of reason to national environmental measures hindering trade. The Court took this opportunity when it upheld a Danish deposit-and-return system despite the fact this system disadvantages the foreign producers on the Danish market.[274] In doing so, the Court gave a clear indication that, in the absence of specific Community rules relating to environmental protection, it will permit Member States' environmental legislation which has a significant impact on trade between Member States, provided the measures really aim at the protection of the environment, and their effect on trade is not disproportionate to the objective pursued.

As we have noted, the ECJ did not raise the issue of discrimination in its decision. The Court was content with a superficial analysis of the proportionality of the measure at issue.[275] Thus, it seems that in the Danish case, the ECJ echoed the more indulgent approach adopted by the U.S. Supreme Court in a series of cases.[276]

The ECJ made one further step in the *Belgian Waste* case. Indeed, as we have seen, this is the first time that the Court legitimized under the rule of reason, a trade restriction facially discriminating against imports. This case presents the additional interest of raising parallels with *Philadelphia v. New Jersey*,[277] decided by the U.S. Supreme Court 15 years ago, as well as *Fort Gratiot*[278] and *Chemical Waste*[279] decided by the Court on June 9, 1992. Of these cases, *Fort Gratiot* is

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272. Kommers & Waelbroeck, *supra* note 188, at 222.

273. Case 240/83, Procureur de l' Republique v. Association de défense des bruleurs d'huiles Usagées, 1985 E.C.R. 531.

274. Case 302/86, Commission v. Kingdom of Denmark, 1988 E.C.R. 4607.

275. *Id.* at 4630-31.

276. *See supra* notes 214-226 and accompanying text.

277. 437 U.S. 617 (1978). *See supra* notes 96-103 and accompanying text.

278. Fort Gratiot Sanitary Landfill, Inc. v. Michigan Dept. of Natural Resources, 112 S. Ct. 2019 (1992). *See supra* notes 120-128 and accompanying text.

279. Chemical Waste Management, Inc. v. Hunt, 112 S. Ct. 2009 (1992). *See supra* notes 129-136 and accompanying text.

certainly the one raising issues closest to those of the *Belgian Waste* case. In both cases, the regulations in question did not only bear on the importation of waste from other (member) States, but also on other administrative entities of the (member) State (other regions in the *Belgian Waste* case, other counties in the *Fort Gratiot* case).

If these cases raised similar issues, the decisions ended up being very different. The question of discrimination was at the very center of both decisions. On this point, the language in *Fort Gratiot* can be contrasted with the language in the *Belgian Waste* case. Indeed, in *Fort Gratiot*, it was obvious to the Court that "[i]n view of the fact that Michigan has not identified any reason, apart from its origin, why solid waste coming from outside the county should be treated differently from solid waste within the county, the foregoing reasoning would appear to control the disposition of the case."[280]

In contrast, the ECJ held that, given the differences between waste produced in one area and another and their connection with the place where they were produced, the Belgian regional law was not to be seen as discriminatory. One can see here that for the Supreme Court, the restriction is discriminatory because it was supposedly based on no reasons other than origin. The reasoning of the ECJ was just the opposite in that the origin of waste was seen as a valid justification in itself. What was a cause of condemnation in the U.S. Court was a cause of justification in the ECJ.

The outcome of these two cases was of course determined by these different findings.[281] Applying the *Dean Milk* test, the *Fort Gratiot* Court estimated that because the Waste Import Restrictions "unambiguously discriminate against interstate commerce, the State bears the burden of proving that they further health and safety concerns that cannot be adequately served by nondiscriminatory alternatives."[282] Michigan was, however, found not to have met this burden because it could have attained "that objective without discriminating between in- and out-of-state waste. Michigan could, for example, limit the amount of waste that landfill operators may accept each year."[283] In contrast, the ECJ found that the Walloon region restric-

280. 112 S. Ct. 2019, 2024 (1992).

281. Indeed, if the U.S. Supreme Court had found that the Michigan restrictions were nondiscriminatory, the Court would have applied the more lenient *Pike* test, presuming the validity of the state legislation at question. *See supra* note 250 and accompanying text. Conversely, if the ECJ had found the Walloon Region restrictions discriminatory, it would not have been possible for it to apply the "mandatory requirements" exception to Article 36. *See supra* notes 195-199 and accompanying text.

282. 112 S. Ct. 2019, 2027 (1992).

283. *Id.*

tions could be justified as mandatory requirements, and therefore were compatible with the Treaty.

The *Belgian Waste* decision raises difficult questions. As we have seen, the principles of "proximity" and "self-sufficiency" were taken for granted by the ECJ. Perhaps, the Court should have questioned these principles. Indeed, if some see them as being an essential component of a good waste management policy in the EC, others estimate that the imposition of these principles is "likely to distort commerce, interfere with economies of scale, divert wastes to less protective facilities, have a mischievous effect on efforts by responsible companies to internalize or otherwise closely control management of their hazardous waste."[284] The same authors conclude that "restrictions on trans-jurisdictional shipment of waste cannot substitute for sound, workable, and environmentally protective standards regulating the siting, design and operation of waste management facilities."[285]

The results of the *Belgian Waste* case also pose a fundamental question of "how environmental protection fits within the achievement of the goal of completing the Single Market."[286] One of the main reasons for amending the Treaty of Rome by the Single European Act was the desire to create a single market throughout the EC. This objective would be ensured through the harmonization of standards all over the EC. The *Belgian Waste* case allows for different standards across a range of activities. Therefore, it threatens the harmonization process and, by the same token, the completion of the single market. Conversely, one can say the U.S. Supreme Court, in its transfer of waste cases, did not recognize the realities of the "waste crisis," and its disastrous effects on some states and their populations.[287]

More generally, the hesitations of both the U.S. Supreme Court and the ECJ in these waste cases show how difficult, and also how subjective, the courts' task is to achieve both free trade and environmental protection in their relevant markets. Courts have a very important, although limited role to play. Their decisions have mainly a corrective effect: they can only strike down obstacles to trade in an integrated market. The duty falls on the federal or Community legislator to adopt coherent environmental policies based on harmonized standards

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284. Smith and Sarnoff, *Free Commerce and Sound Waste Management: Some International Comparative Perspectives*, INT'L ENVTL. REP., April 8, 1992, 207, 214.

285. *Id.* at 207.

286. Sheridan, *Environmental Provisions of the European Communities - New Conditions for Trade?* (Sept. 28, 1992) (unpublished manuscript of paper delivered at the IBC Conference in Brussels, Belgium, on the impact of EC law on EFTA-based companies).

287. For an analysis, see the dissenting opinion of Justice Stewart in Philadelphia v. New Jersey, 437 U.S. 617, 629 (1978).

that are protective of the environment. Only an interplay between the judiciary and the legislator will permit trade and the environment to be well balanced in the integrated markets of the U.S. and the European Community.