Introduction

Despite important contextual and institutional differences, one problem shared by the European Community and the United States systems relates to the tension that may arise between free trade and environmental protection. In both systems, free trade is a value of central importance that has been promoted through constitutional principles designed to bring about the creation of a common market based on the free movement of goods and services and the absence of distortions of competition between their component entities (the European Community member states and the states of the United States federation, both hereafter referred to as 'the states').[1] Yet, the environmental policies developed by the states may conflict with the free-trade principles on which these systems are based. The objective of the present study is to evaluate in a comparative manner how the competing Community or federal interest in free trade and the state interest in preserving their domestic environmental policies can be reconciled in Community and United States law.

It is important to note at the outset that the tension between trade and environmental protection may take different forms depending on the

[1] The benefits from a common market and the perceived detriments of commercial warfare between states during the period of the Articles of Confederation were the primary catalyst for the Convention of 1787 which led to the adoption of the United States Constitution. Similar considerations induced the creation one-and-a-half centuries later of the European Community. See P. Kapteyn and P. Verloren van Themaat, *Introduction to the Law of the European Communities* (Deventer, Boston: Kluwer, 2nd edn, by Gormley, 1990) at 13. For a general discussion on the benefits brought about by the creation of the United States and European Community common markets, see T. Heller and J. Pelkmans, 'The Federal Economy: Law and Economic Integration and the Positive State – The USA and Europe Compared in an Economic Perspective' in Cappelletti, Seccombe and Weiler (eds.), *Integration through Law* (Walter de Gruyter, 1985) vol. I, at 245*ff*.

area of environmental regulation involved.[2] In this regard, it is useful to distinguish between three areas of environmental regulation: waste, product standards and process standards.[3] As will be seen throughout this study, these areas of regulation generally raise different trade issues and require separate treatment.

First, a tension between trade and environmental protection may arise in the area of waste. Although it is sometimes considered as having a negative commercial value,[4] waste constitutes a good whose free movement is protected under the free-trade provisions of the EC Treaty and the US Constitution.[5] There may be circumstances, however, where states attempt to restrict imports or exports of waste. For example, states may restrict imports of waste in order to protect their environment against the environmental damage created by the disposal of such waste and/or to retain their waste-disposal resources for local use.[6] States may also restrict exports of waste in order to protect their waste-treatment undertakings against out-of-state competitors.[7] There is therefore a tension between the free interstate movement of waste and the ability of states to control such movement.

Trade and environmental protection may also conflict in the area of product standards. Product standards regulate the (environmental) char-

[2] For a good discussion on the different forms of tension that may arise between trade and environmental policies, see R. Stewart, 'International Trade and Environment: Lessons from the Federal Experience', *Washington and Lee Law Review* 49 (1992), 1,329.

[3] A tension between trade and environmental protection may also arise in the context of wildlife protection. For example, states may restrict exports of wildlife in order to protect endangered species located within their territory. Conversely, they may restrict imports of wildlife in order to protect endangered species located within the territory of other states. Although the movement of wildlife raises important questions, it has not been the object of specific cases (the exception being Case C-169/89, *van den Burg* [1990] ECR I-2,143) or legislation (a regulation on the movement of wildlife is currently in preparation, but it is unclear whether it will be adopted) in Community law. No meaningful comparison is therefore possible between Community and United States law, which is far more developed on this aspect. The trade aspects of wildlife protection are accordingly outside the scope of this study.

[4] See Second Opinion of Advocate-General Jacobs in Case C-2/90, *Commission* v. *Belgium* [1992] ECR I-4,431.

[5] See Case C-2/90, *Commission* v. *Belgium* [1992] ECR I-4,431, at para. 28 and *City of Philadelphia* v. *State of New Jersey*, 437 US 617, 626 (1978) (holding that waste constitutes goods the free movement of which should be protected).

[6] See, e.g., Case C-2/90, *Commission* v. *Belgium* [1992] ECR I-4,431 and *Fort Gratiot Sanitary Landfill Inc.* v. *Michigan Department of Natural Resources*, 112 S. Ct 2,019 (1992) (cases involving restrictions on the imports of out-of-state waste).

[7] See, e.g., Case 172/82, *Interhuiles* [1983] ECR 555 and *C&A Carbone Inc.* v. *Town of Clarckstown*, 114 S. Ct 1,677 (1994) (cases involving restrictions on the exports of waste).

acteristics of products offered for sale on a given state market.[8] Although they do not directly regulate interstate trade, such standards may be used as an instrument of protectionism when their effect is to discriminate between domestic and out-of-state products. In addition, in the absence of a discriminatory effect, inconsistent product standards impede interstate trade since they deny manufacturers the ability to realize economies of scale in production and distribution and generally create market fragmentation.[9]

Finally, a tension between trade and environmental protection may arise in the area of process standards. Contrary to product standards, process standards do not regulate the characteristics of the products themselves, but the production methods used in the manufacture of products.[10] Although inconsistent process standards do not generally impede interstate trade, they may distort it.[11] Because the costs of production will differ from one state to another, inconsistent process standards may create unequal conditions of competition and, hence, give incentives for producers operating in states enforcing strict process standards to relocate in states where such standards are less stringent.

In this study, I will suggest that the various kinds of tension that may arise between trade and environmental protection can be adequately dealt with through two complementary institutional responses offered in the Community and United States systems. First, in the absence of harmonized legislation, the European Court of Justice (the 'Court of Justice') and the United States Supreme Court (the 'Supreme Court') can place limits on the ability of states to adopt environmental legislation impeding trade. The Court of Justice and the Supreme Court have

[8] Product standards 'prescribe the physical or chemical properties of a product (e.g., lead additives in gasoline), the maximum permissible polluting emissions from a product during its use (e.g., automobile emissions, detergent biodegradability) and the rules for making up, packaging or presenting a product (e.g., prescribed conditions for the elimination of packaging material, product labelling)': C. Thomas and G. Tereposky, 'The Evolving Relationship between Trade and Environmental Regulation', *Journal of World Trade* 27 (1993), 35, 37.

[9] See, e.g., Case 302/86, *Commission* v. *Denmark* [1988] ECR 4,607 and *American Can Co.* v. *Oregon Liquor Control Commission*, 517 P. 2d 691 (1973) (cases involving regulations on containers for drinks that have a restrictive effect on trade).

[10] Process standards 'include emission and effluent standards and other standards governing the production process': Thomas and Tereposky, 'The Evolving Relationship' at 37.

[11] See, e.g., Case C-300/89, *Commission* v. *Council* [1991] ECR I-2,867, 2,901 ('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 national provisions on the matter, competition may be appreciably distorted').

respectively used Articles 30*ff* of the EC Treaty and the dormant Commerce Clause doctrine to invalidate state environmental measures impeding trade in an unacceptable manner (a process of 'negative' harmonization of state environmental standards). Alternatively, the Community and US federal legislatures can set common environmental standards for all states in order to avoid the trade distortions that may be generated by inconsistent state regulations (a process of 'positive' harmonization of state environmental standards).[12] In this context, a central objective in this study will be to discuss the respective contributions of the judiciary and the legislature to the solution of the various kinds of tension that may arise between trade and environmental protection, as well as to show the interactions existing between such judicial and legislative contributions. Another important objective will be to observe the tension that may arise between the Community or federal interest in uniformity and the national or state interest in (environmental) diversity. In this regard, the techniques that have been developed by the Court of Justice and the Supreme Court, on the one hand, and the Community and US federal legislatures, on the other hand, to deal with these competing interests will be discussed.

Two important remarks should be made regarding the scope and the orientation of this study. First, I will concentrate exclusively on the relationship between free trade and state *regulatory* environmental policies. Although state environmental taxes and subsidies may have some impact on interstate trade,[13] they are excluded from the scope of this

[12] The terms 'negative' and 'positive' harmonization or integration were developed in Pinder, 'Positive Integration and Negative Integration: Some Problems of Economic Union in the EEC', *World Today* 24 (1968), 88. They are now frequently used in the legal literature to describe the respective contributions of the judiciary and the legislature to free trade. The contribution of the judiciary takes a 'negative' form since free trade is achieved through the abolition of trade-restrictive state rules. On the other hand, the contribution of the legislature takes a 'positive' form since free trade is achieved through the adoption of a common regulatory regime. In the European Community context see, e.g., S. Weatherill and P. Beaumont, *EC Law* (London: Penguin, 1993) at 419; M. van Empel, 'The 1992 Programme: Interaction Between the Legislator and the Judiciary', *Legal Issues of European Integration* (1992/1), 1, 2. In the United States context see, e.g., R. Stewart, 'Interstate Commerce, Environmental Protection and US Federal Law' in Cameron, Demaret and Geradin (eds.), *Trade and the Environment – The Search for Balance* (London: Cameron & May, 1994) at 342.

[13] Taxes may restrict interstate trade when they discriminate on their face or in their effects between domestic and out-of-state products. Although they do not generally restrict interstate trade, subsidies may nevertheless distort such a trade by giving an advantage to domestic producers in relation to out-of-state ones.

study.[14] Second, I will proceed on the assumption that both trade and environmental policies are valuable means to promote human welfare, as understood in a broad sense.[15] This assumption has the consequence that I reject the position defended by some environmentalists according to whom environmental values are absolute, i.e., they may not be sacrificed at any price even if they impose disproportionately large costs on society.[16] Since both trade and environmental policies are useful tools to further human welfare, I will attempt to develop mechanisms to reconcile these policies in the best way possible rather than to establish any absolute priority between them.

A word should also be said about the method of comparative analysis that will be used throughout this work. By its very nature, comparative analysis contains a 'dialectical tension'.[17] On the one hand, the objects of comparison must have a point of identity or similarity in order to render analysis meaningful. On the other hand, comparative analysis is meaningless in conditions of total identity or similarity. In the light of this observation, it seems that, with regard to the matter at hand, the Community and United States systems offer excellent objects of comparison. On the one hand, these systems face the same problem (i.e., how to

[14] On the use of taxes and subsidies by Community member states and their impact on intra-Community trade see, however, E. Rehbinder, 'Environmental Regulation Through Fiscal and Economic Incentives in a Federalist System', *Ecology Law Quarterly* 20 (1993), 57; E. Grabitz and C. Zacker, 'Scope for Action by the EC member states under EEC Law: The Example of Environmental Taxes and Subsidies', *Common Market Law Review* 26 (1989), 423. Little has been written on the impact of state environmental taxes and subsidies on the US common market. For some analysis of the fiscal aspects, see Stewart, 'Interstate Commerce'. See also S. Levmore, 'Interstate Exploitation and Judicial Intervention', *Virginia Law Review* 69 (1983), 563.

[15] For a more elaborated treatment of this position, see Stewart, 'International Trade'. In his article, Professor Stewart makes reference to the conception of human welfare similar to that proposed by John Stuart Mill, 'which goes beyond the maximization of existing preferences to include qualities of diversity, education, aspiration, reflection and solidarity'. He also claims that this conception 'rejects the position that environmental protection is an autonomous moral duty – an independent absolute': *ibid.* at 1,332. Professor Stewart's position has been strongly criticized by environmentalists such as R. Housman for whom 'Mill's approach generally fails to take into account the widely held belief that certain values are so central to humanity that they must be protected even at a cost to the larger society'. According to the same author those values can be best understood by the concept of categorical imperative used by Emmanuel Kant in his philosophical works. See R. Housman, 'A Kantian Approach to Trade and the Environment', *Washington and Lee Law Review* 49 (1993), 1,373, 1,374.

[16] See, e.g., Housman, 'A Kantian Approach'.

[17] See M. Cappelletti, M. Seccombe and J. Weiler, 'Integration through Law: Europe and the American Federal Experience: A General Introduction' in Cappelletti *et al.* (eds.), *Integration through Law* (Walter de Gruyter, 1985), vol. I, at 9.

reconcile trade and environmental policies) and, as will be seen, generally attempt to solve this problem through a comparable mix of negative (i.e., judicial) and positive (i.e., legislative) harmonization. On the other hand, because of important contextual and institutional differences,[18] the nature of the judicial and legislative solutions adopted in each system will often differ, thereby providing a fertile ground for comparison. In this context, the use of the comparative method in this study will have two main objectives. The first, and perhaps the more important of these, will be to understand better the various aspects of the tension between free trade and environmental protection, transcending the specific manifestation of this problem in the Community and United States systems. The second objective will be of a policy nature, i.e., to see to what extent the solutions found to this tension in one system are suitable for adoption by the other.

In Part 1, I analyse and compare the case law of the Court of Justice and the Supreme Court dealing with state environmental measures affecting trade. I also argue that, with regard to the tension that may arise between trade and environmental protection, these courts have an important although limited role to play. In a number of circumstances, some form of legislative action is needed. In the light of this observation, in Part 2, I first discuss the respective powers of the Community and United States federal legislatures to regulate environmental matters, as well as the potential limits that may be placed on such powers. Then, I evaluate how, through or in the context of their legislative action, the Community and the US federal legislatures have attempted to balance trade and environmental objectives in the areas of product standards, process standards and waste. I also deal with the question of pre-emption, i.e., to what extent states may apply stricter standards than Community or US federal environmental standards, as well as the impact of this question on the relationship between trade and environmental protection. Finally, I draw some general conclusions.

[18] The contextual and institutional differences between the Community and the United States systems have been described at length elsewhere and will not be the object of systematic attention here. For good discussions on these differences see, e.g., F. Jacobs and K. Karst, 'The "Federal" Legal Order: The USA and Europe Compared – A Juridical Perspective' in Cappelletti *et al.* (eds.), *Integration through Law* (Walter de Gruyter, 1985), vol. I, at 169–72; E. Stein and T. Sandalow, 'On the Two Systems: An Overview' in Stein and Sandalow (eds.), *Courts and Free Markets* (Oxford University Press, 1982) at 3. For a discussion on the impact of these differences on the development of Community and United States federal environmental policies, see L. Kramer, 'The European Economic Community' in Smith and Kromarek (eds.), *Understanding US and European Environmental Law* (London: Graham & Trotman, 1989) at 4*ff*.

PART 1

Negative harmonization

As we have seen, various kinds of tension may arise between trade and environmental protection in the Community and United States legal orders. The objective of Part 1 is to discuss and compare how, through their power to review state (environmental) measures interfering with trade, the Court of Justice and the Supreme Court have attempted to reconcile these tensions.

Part 1 is divided into four chapters. Chapter 1 first discusses the principle of free intra-Community trade as it is established and protected by the EC Treaty and interpreted by the Court of Justice in its case law. It then discusses the case law of the Court of Justice dealing with trade-restrictive member state environmental measures. Chapter 2, which is devoted to United States law, follows the same structure as chapter 1. First, it discusses the development by the Supreme Court of a principle of free trade between states. It then discusses the Supreme Court cases dealing specifically with trade-restrictive state environmental measures. Chapter 3 consists of a comparative analysis of the findings made in chapters 1 and 2. First, it draws a parallel between the case law of the Court of Justice and of the Supreme Court in so far as they establish and protect a principle of free interstate trade. It then compares the case law of these courts specifically dealing with trade-restrictive state environmental measures. Finally, chapter 4 discusses to what extent judicial intervention through selective judicial invalidation of trade-restrictive state environmental measures offers an adequate response to the various kinds of tension that may arise between trade and environmental protection in the European Community and United States systems. It concludes that, in a number of circumstances, such tensions can only be properly solved through the adoption of positive rules of harmonization.

1 The case law of the Court of Justice

The principle of free trade

Article 3 of the EC Treaty states that, in order to achieve the general objectives of the Community expressed in Article 2 of the Treaty, the activities of the Community include, *inter alia*:

> the elimination, as between Member States, of customs duties and quantitative restrictions on the import and export of goods, and all measures having equivalent effect.

As far as quantitative restrictions on the import and export of goods and measures having equivalent effect are concerned, their elimination is to be achieved through the application to member states' laws of the prohibitions contained in Articles 30 and 34 of the Treaty respectively.[1]

Article 30 of the Treaty provides that all quantitative restrictions on imports and measures having equivalent effect shall be prohibited between member states.[2] The concept of quantitative restrictions is relatively straightforward. Quantitative restrictions were defined by the Court of Justice as 'measures which amount to a total or partial restraint of, according to the circumstances, imports, exports or goods in transit'.[3] The definition of the concept of 'measure having equivalent effect' has created more difficulty.[4] After an initial attempt at definition by the

[1] Articles 95–8 of the Treaty also prohibit member states from restricting the free movement of goods by adopting discriminatory fiscal measures. As already noted, fiscal measures will not be examined here.

[2] On the Article 30 case law, see generally P. Oliver, *Free Movements of Goods in the EEC* (London: European Law Centre, 2nd edn, 1988); L. Gormley, *Prohibiting Restrictions on Trade within the EEC* (Amsterdam, New York, Oxford: North-Holland, 1985).

[3] See Case 2/73, *Geddo* v. *Ente Nazionale Risi* [1973] ECR 881; and Case 34/79, *Henn and Darby* [1979] ECR 3,795.

[4] From the very early life of the Treaty, the concept of measures having equivalent effect

Commission,[5] this concept has been interpreted by the Court of Justice in its leading judgment in *Procureur du Roi* v. *Dassonville et al.* as covering:

> all trading rules enacted by Member States which are capable of hindering, actually or potentially, directly or indirectly, intra-Community trade.[6]

It is clear from this formula that one must look to the effects of a measure and not to its nature or purpose in deciding whether it falls under Article 30. As defined in *Dassonville*, Article 30 appears to cover three kinds of measure depending on their effects.[7] First, it clearly covers national measures which discriminate on their face against imports (formal discrimination). Article 30 also covers national measures which, although applying to both domestic and imported products, have a discriminatory effect against the latter (material discrimination).[8] Finally, the scope of Article 30 is sufficiently broad to cover national measures which, although they do not discriminate on their face or in their effects against imported products, make such imports more difficult.[9]

has generated a considerable amount of academic writing. For a survey of different views see, Gormley, *Prohibiting Restrictions*, at 13.

[5] Directive 70/50 on the abolition of measures which have an effect equivalent to quantitative restrictions on imports and are not covered by other provisions adopted in pursuance of the EEC Treaty (1970) OJ (Special Edition) (I), at 17.

[6] Case 8/74, *Procureur du Roi* v. *Dassonville et al.* [1974] ECR 837, 852. The *Dassonville* formula has been criticized as being too broad and a number of authors have advised the court to reduce the scope of application of Article 30. See, e.g., W. Wils, 'The Search for the Rule in Article 30 EEC: Much Ado About Nothing?' *European Law Review* 19 (1993), 475; D. Chalmers, 'Free Movement of Goods within the European Community: An Unhealthy Addiction to Scotch Whisky?' *International and Comparative Law Quarterly* 42 (1993), 269; J. Steiner, 'Drawing Lines: Uses and Abuses of Article 30 EEC', *Common Market Law Review* 29 (1992), 749; E. White, 'In Search of the Limits to Article 30 of the EEC Treaty', *Common Market Law Review* 26 (1989), 235. It should be noted that in Joined Cases C-267 and C-268/91, *Keck and Mithouard* [1993] ECR I-6,097, the Court of Justice held that non-discriminatory measures relating to marketing arrangements for products (such as a prohibition on resale at a loss) would fall outside the scope of Article 30. Although this decision has generated some uncertainty as to the scope of Article 30, it is likely to have little impact on the way the Court of Justice deals with member state environmental measures. As will be seen, such measures typically apply to the product themselves (e.g., product standards) rather than to marketing arrangements. On *Keck and Mithouard*, see generally A. Mattera, 'De l'Arrêt "Dassonville" à l'Arrêt "Keck": L'Obscure Clarté d'une Jurisprudence Riche en Principes Novateurs et en Contradictions' ,*Revue du Marché Unique Européen* (1994/1), 117; D. Chalmers, 'Repackaging the Internal Market – The Ramifications of the Keck Judgment', *European Law Review* 19 (1994), 585.

[7] For a survey of the type of measure capable of falling within Article 30, see A. Mattera, 'Protectionism inside the EC', *Journal of World Trade Law* 18 (1984), 283.

[8] On the distinction between formal and material discrimination, see F. Burrows, *Free Movement in European Community Law* (Oxford: Clarendon Press, 1987) at 50.

[9] In its interpretation of Article 30, the Court of Justice goes therefore beyond the

Article 34(1) of the Treaty provides that quantitative restrictions on exports and all measures having equivalent effect shall be prohibited by the member states. As in the case of quantitative restrictions on imports, the interdiction of quantitative restrictions on exports prohibits all partial and total restraints on the exports of goods to one or more member states.[10] On the other hand, contrary to what we have seen in the context of import restrictions, the notion of a 'measure having equivalent effect' on exports has been interpreted by the Court of Justice as only covering measures that on their face or in their effects discriminate against exports. Non-discriminatory measures would therefore fall automatically outside the scope of Article 34. This approach can be clearly perceived in *Groenveld* where the court stated that Article 34 of the Treaty concerns:

> national measures which have as their specific object or effect the restriction of pattern of exports and thereby the establishment of a difference in treatment between the domestic trade of a Member State and its export trade in such a way as to provide a particular advantage for national production or for the domestic market in question at the expense of the production or of the trade of other Member States. This is not so in the case of a prohibition of goods of a certain kind without drawing a distinction depending on whether such goods are intended for the national market or export.[11]

The court's different treatment of the concept of a 'measure having equivalent effect' under Articles 30 and 34 has been regretted by a number of authors. According to Gormley, the discrimination criterion adopted by the Court of Justice in *Groenveld* pays insufficient attention to the central position in the Treaty of the prohibition of measures capable of hindering trade between member states.[12] In his view, it would have been preferable

'national treatment' principle traditionally applied in international economic law. See E. U. Petersmann, 'Trade and Environmental Protection: The Practice of GATT and the European Community Compared' in Cameron, Demaret and Geradin (eds.), *Trade and the Environment – The Search for Balance* (London: Cameron & May, 1994) at 147. But see G. Marenco, 'Pour une Interprétation Traditionelle de la Notion de Mesure d'Effet Equivalent à une Restriction Quantitative', *Cahiers de Droit Européen* (1984), 291, who attempts to demonstrate that discrimination is the foundation of the Court of Justice's Article 30 case law. This view is, however, isolated and unconvincing.

[10] Case 2/73, *Geddo* v. *Este Nazionale Risi* [1973] ECR 881.

[11] Case 15/79 [1979] ECR 3,409, 3,415. See also Case C-80/92, *Commission* v. *Belgium* [1994] ECR I-1,019, 1,035; Case C-47/90, *Delhaize* [1993] ECR I-3,369; Case 15/83, *Denkavit* [1984] ECR 2,171, 2,184; Case 251/83, *Haug-Adrion* [1984] ECR 4,277, 4,289; Case 238/82, *Duphar* [1984] ECR 523, 543; Case 237/82, *Jongeneel Kaas BV* [1984] ECR 483, 504; Case 172/82, *Interhuiles* [1983] ECR 555, 566; Case 286/81, *Oosthoek's* [1982] ECR 4,575, 4,587; Joined Cases 141 to 143/81, *Holdijck* [1982] ECR 1,299, 1,313; Case 155/80, *Oebel* [1981] ECR 1,993, 2,009.

[12] See Gormley, *Prohibiting Restrictions*, at 108.