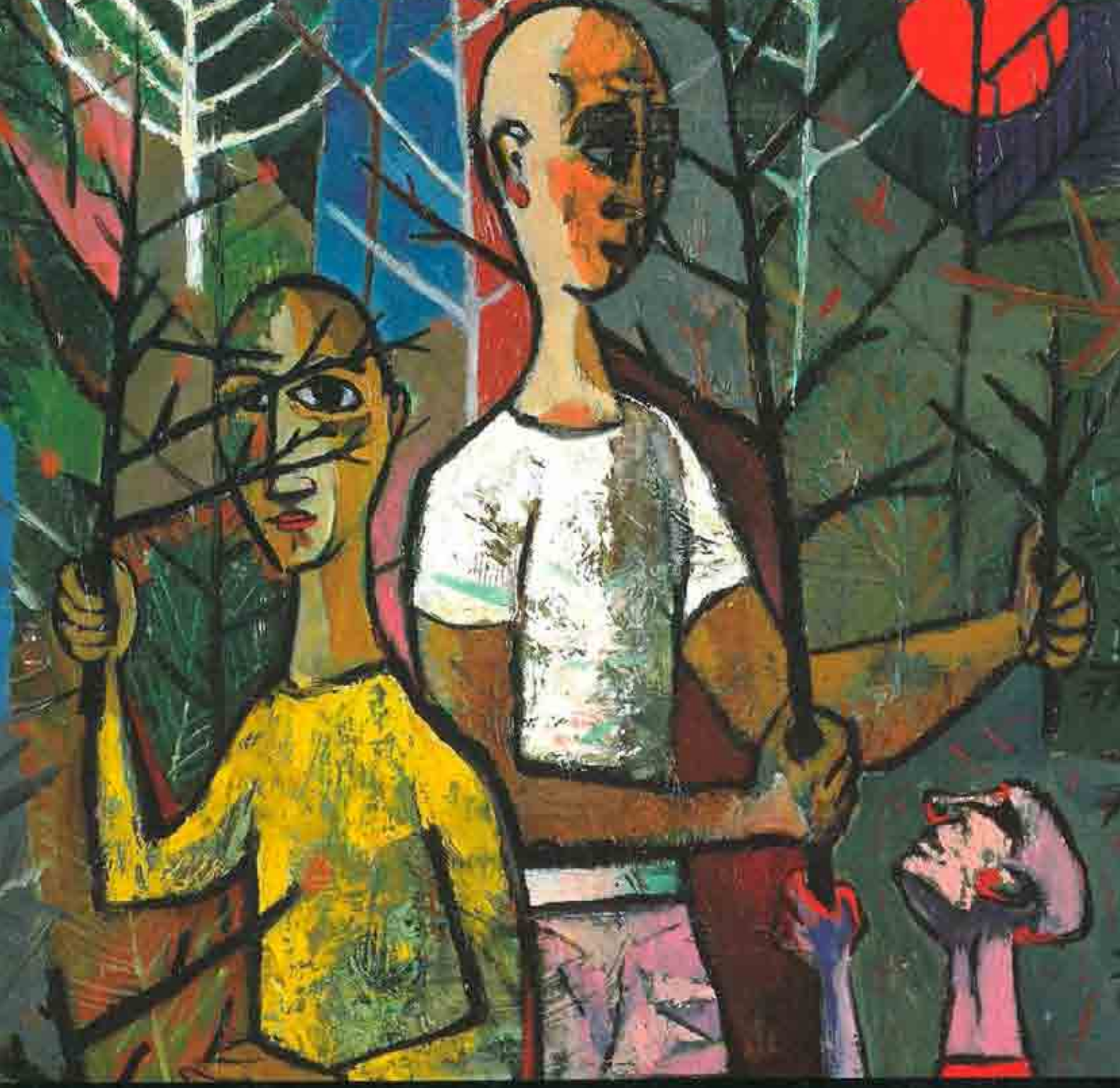

Environmental Law and Justice in Context

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Environmental justice and international trade law

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1 Introduction

The aim of this chapter is to answer the question whether environmental justice could influence the trade–environment debate. At the outset, one needs to define the concept of environmental justice. Environmental injustice in this context occurs whenever some individual or group bears disproportionate environmental risks, or has unequal access to environmental goods.[1] The issue of environmental (in)justice usually arises with respect to the localisation of hazardous plants close to poor urban communities or minorities. Given that they have fewer resources to defend their interests than richer communities, these poor neighbourhoods have less ability to challenge administrative decisions entailing environmental risks imposed on them. Understood in this sense, environmental (in)justice is largely an American concept, that has never really gained a strong foothold in Europe. Moreover, this topic is related more to polluting installations and access to natural resources than to free trade.

Thanks to the entry into force of the 1994 Marrakesh Agreement, free trade liberalisation in goods and services has been gaining momentum. The WTO provides not only the principal forum for negotiations on multilateral trading issues, its rules underpin to some extent the development of international as well as municipal environmental law. In this context, free trade has been sparking off heated debates also with respect to fairness as to the access to natural resources.

First, free trade has been criticised for widening the economic gaps between nations. Indeed, not every nation is taking advantage of the increase in trading in goods. Obviously, marked differences in terms of economic development can be observed across the world. The increase in production, and as a result in trade, has been concentrated in a number of countries. By way of illustration, if Asia represents 50 per cent of the world's economic exchange, Africa contributes only 1 per cent.[2] As a result, disparities in income between rich and poor countries have widened.

Furthermore, free trade has been criticised as a significant factor compounding the environmental crisis. For instance, the liberalisation of trade could unleash a

[1] Shrader-Frechette 2002 at 3. [2] Castri 1996 at 71.

flow of economic investments, which could generate an uncontrollable process of environmental degradation across the globe. The situation is aggravated by the resulting overexploitation of natural resources for trading purposes, which may accelerate environmental changes, and these changes may in turn impinge negatively upon regional or local economic development. By way of example, the economic impacts of over-harvesting natural resources, such as timber or fish, can compound the vulnerability of these resources, on which indigenous populations depend for their livelihoods.

This chapter does not focus on these deeply contested issues. Rather, it takes a fresh look at this debate from a legal perspective, by comparing the developments and considerations in international law with those of the European Union (EU) (formally speaking, the European Community, EC). In this respect, account must be taken of the fact that we have been experiencing in these last decades two parallel developments without precedent in the history of mankind. On the one hand, the emergence of ecological crises of global scope (climate change, loss of biodiversity, ozone depletion) leading to the enactment of a flurry of international agreements. On the other hand, a progressive liberalisation of world trade, embodied at the international level by the conclusion of the Uruguay Round in 1994, leading to the establishment in 1995 of the World Trade Organization (WTO), and at the European level by the functioning of the internal market. Underlying these parallel developments is a clash of legal rules on several fronts that go well beyond the disputes of the past. The doctrine of free trade, based on the premise that products should be able to circulate freely without hindrance from technical obstacles erected by states, is diametrically opposed to national or regional regulations in the areas of public health or environmental protection. Indeed, the need to open up markets directly conflicts with the need to promote legitimate environmental objectives; until now, efforts to reconcile these two goals have been rather unsuccessful.

Although the academic literature on the relationship between trade and environment is rife with controversies, issues of environmental justice have not gathered momentum so far. In most cases, the genuinely environmental considerations are usually taken into consideration in this debate (conservation of protected species, waste management, clean air) irrespective of the groups at risk. That said, products such as waste or pesticides could nonetheless have a significant effect on the environment of poor people or minorities. Depending on their composition, their production method and how they are used, they can become a source of pollution, or they can entail specific hazards. Given that they have less access to education, populations of poorer countries could more easily become vulnerable to these products. Moreover, cheap products can entail greater hazards for consumers unable to purchase better quality products.

In an attempt to manage these conflicts and facilitate commercial exchanges, international organisations have sought to harmonise national rules (positive harmonisation) by agreeing on common standards. Nevertheless, positive harmonisation is

difficult to achieve at the international level, and even at the EC level. When no common ground can be found between states that do not share the same goals, free trade is encouraged by a principle of mutual recognition that allows goods lawfully produced and marketed in one state to be commercialised in another state (negative harmonisation), and by placing the burden of proof on the states which impose stricter standards in order to achieve a higher level of protection than those applied in the producer country.

Ideally, free trade presupposes that states share a concept of product safety on the one hand and of human health and the environment on the other hand. In real life, however, goals for the protection of human health, the environment, consumers, as well as some specific social groups vary appreciably from one state to another.

2 International environmental trade measures driven by justice considerations

Although the United Nations Conference on Environment and Development[3] has expressed some scepticism towards the use of trade measures enacted with the aim of fostering the effectiveness of international environmental agreements, this did not preclude the enactment of further trade restriction regimes. In this connection, a few examples will suffice. The Montreal Protocol on Substances that Deplete the Ozone Layer adopts trade controls that are more restrictive as to non-parties than parties. CITES allows the enactment of punitive trade restrictions on non-complying parties. In so doing, parties to these agreements enact legal regimes that could hinder trading rights stemming from other international agreements, and in particular those laid down in the WTO agreements. Nonetheless, it should be stressed that, among the hundreds of environmental treaties, only a small number of MEAs allow their parties to restrict the trade in specific goods as a means for increasing their effectiveness. For instance, restrictions on trade with other parties as well as non-parties may be set out with a view to protecting the populations of poorer countries unable to protect themselves against particular risks. Conversely, the vast majority of international agreements concluded with a view to protecting the environment, such as the 1971 Ramsar Convention on Wetlands of International Importance,[4] or the 1991 Helsinki Convention on Environmental Impact Assessment in a Transboundary Context,[5] do not regulate trading activities. Since most international environmental agreements purport to protect the global commons and not to regulate trade, and since only few WTO litigations so far concerned the validity of international environmental agreements, one could take the view that the trade–environment debate is nothing but a purely academic exercise, at least as far as conformity of MEAs with WTO rules

[3] 1992 United Nations Declaration on Environment and Development, 31 *International Legal Materials* (ILM) (1992) 876.

[4] 1971 Convention on Wetlands of International Importance Especially as Waterfowl Habitat, 11 ILM (1972) 963, amended in 1982, 22 ILM (1983) 698.

[5] 1991 Convention on Environmental Impact Assessment in a Transboundary Context, 30 ILM (1991) 800.

are concerned. That said, an assessment as to whether the few international agreements allowing their parties to curtail trading rights were driven by environmental justice considerations or were underpinned by a more technocratic approach gives a rather nuanced answer.

Since waste disposal has featured prominently in the environmental justice movement (waste facilities are often located in minority and poor communities), the international regulation of trading in hazardous wastes appears to be a good case in point. Public awareness of potential threats from inadequate waste disposal as well as the rising costs of complying with waste regulations fostered the emergence of an international trade in hazardous wastes.[6] For a long while, the dumping of wastes on less developed or poorer countries in Africa or in Latin America was left unchecked. The discrepancy in costs has been clearly considered the result of lower environmental standards in the countries importing waste.[7]

However, in the course of the 1980s, this trade in waste began to be commonly associated with egregious cases of waste dumping by undertakings from OECD countries on poorer countries. Indeed, a spate of scandals sparked off a protracted debate as to the responsibility of industrialised countries. The concerns about the ecological and human damage attributable to this practice resulted in the negotiations, under the auspices of UNEP, of an international agreement of global application. The outcome of the negotiations, the 1989 Basel Convention on the Transboundary Movement of Hazardous Wastes (Basel Convention)[8] had the initial purpose of regulating trade in hazardous wastes from developed to less developed countries.[9] The Convention is the product of a particular set of circumstances that occurred in the 1980s, and its *ratio legis* must be understood in light of the contentious process between developing countries, advocating a ban on transboundary movements of wastes, and developed countries, arguing for regulation of these movements.

However, the call for a ban was not endorsed. Aiming at promoting the protection of human health and of the environment, the Convention was intended to minimise the generation of wastes and to control their transboundary movements instead of banning them. In other words, the Convention was based on notification rather than prohibition. To achieve these objectives, trade-related environmental measures (TREMs) were laid down. For instance, waste exports are prohibited to countries that have banned such imports.[10] Likewise, the Convention requires that states of export ban shipments of hazardous wastes if there are reasons to believe that these will not be managed in an environmentally sound manner in the country of import.[11] In addition, exports and imports of hazardous and other wastes by parties to the Convention to and from non-parties are banned.[12]

[6] Kummer 1999 at 6–7. [7] *Ibid.* at 7.
[8] 1989 Basel Convention on the Transboundary Movement of Hazardous Wastes, 28 ILM (1989) 657.
[9] O'Neill 2000 at 37. [10] Basel Convention, note 8 above, Art. 4(1)(e).
[11] *Ibid.*, Art. 4(2)(e). [12] *Ibid.* Art. 4(5).

Following the publicity given to cases of illegal waste dumping, many African countries, with the support of non-governmental organisations (NGOs) such as Greenpeace, have begun again to advocate a global ban on hazardous wastes with the objective of protecting the poorer countries from the toxic imperialism of industrialised countries. In response to the frustration of the African countries, work on an African convention on hazardous wastes began, under the auspices of the Organization of African Unity, shortly after the adoption of the Basel Convention. This resulted in the adoption in 1991 of the Bamako Convention on the Ban of the Import into Africa and the Control of Transboundary Movement of Hazardous Wastes within Africa (Bamako Convention).[13] Likewise, several decisions of the Conference of the Parties (COP) of the Basel Convention were enacted, in 1992 and 1994, in order to ban the export of hazardous wastes from OECD to non-OECD countries.[14] Finally, in 1995, it was proposed at the instigation of the Nordic countries that the ban enshrined in the 1994 COP decision should be formally incorporated by way of a new provision into the Basel Convention.[15] However, this amendment to the Convention has not yet entered into force.

Needless to say, a ban on waste movements from developed to developing countries mirrors a strong public perception that industrialised nations should keep their own wastes and not dispose of them in poorer countries. To some extent, both the Bamako Convention and the Basel Convention reflect the aim of fostering the disposal of hazardous wastes in an environmentally sound manner (principle of prevention) as close as possible to the place where they have been generated (proximity principle), and to minimise the production of wastes (principle of rectification of environmental harm at source).[16] Since the entry into force of the 1989 Basel Convention, the worst forms of waste dumping in developing countries have ceased. Despite its relative success, vigorous debate has ensued as to the extent to which the provisions of the Basel Convention are compatible with WTO regimes.[17] So far, this controversy rumbles on unresolved. Different solutions to solve this conundrum were set forth and discussed in Geneva. These solutions range from amending GATT Article XX to endorsing a collective interpretation of that provision with the aim of validating existing MEAs.[18]

The 1998 Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade (Rotterdam Convention) is also illustrative of the evolving regimes of trade in hazardous wastes.[19] This Convention contains several lists of chemicals, classified as especially hazardous, which are subject to a procedure known as the 'Prior Informed Consent procedure'

[13] Kummer 1999 at 99–102. [14] Krueger 1999 at 31–2. [15] Kummer 1999 at xxviii–xxxvi.

[16] 1991 Convention on the Ban of Import into Africa and the Control of Transboundary Movement and Management of Hazardous Wastes Within Africa, 30 ILM (1991) 775; Basel Convention, note 8 above, Art. 4A.

[17] Calster 2000. [18] Birnie and Boyle 2000 at 706; Calster 2000.

[19] 1998 Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade, 38 ILM (1999) 1.

('PIC procedure'). The chemicals subject to the PIC procedure can be exported only if the *prior consent of the country of destination* has been given. In this respect, the Rotterdam Convention enables importing countries to oppose the import of hazardous chemicals on the ground that they could harm vulnerable groups of people. Some pesticides producers have been contending with this procedure on the ground that it could be inconsistent with WTO obligations.

Whether or not they were driven by environmental justice considerations, both the Basel and the Rotterdam Conventions have been criticised for abridging trading rights stemming from the WTO legal regime. In this respect, one should bear in mind that, despite the aim of the WTO, set out in the preamble, i.e. 'an optimal use of the world's resources in accordance with the objective of sustainable development', the fundamental principles of the GATT remain unaltered; environmental concerns are still considered an irritating obstacle in the trading community. Indeed, Principle 12 of the Rio Declaration on Environment and Development, by stating that '[t]rade policy measures for environmental purposes should not constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on international trade', in its own way also recognises the primacy of free trade over environmental interests. Furthermore, Principle 12 clearly discourages unilateral action to deal with environmental challenges outside the jurisdictions of importing countries; transboundary or global issues should be based, as far as possible, on international consensus.

3 EU environmental trade measures and justice considerations

3.1 EU internal market: negative harmonisation

In the European context, considerable tension exists between protection of the environment and the operation of the internal market as regards conditions relating to placing products on the market. Since products are intended to circulate and to be the subject of physical movement for the purpose of trade, national environmental requirements may impede ease of access to the market of the member state, taking the measure in question. This tension between trade and environmental justice has different permutations depending on whether the measures in question are also the subject-matter of European harmonising legislation.

It is equally important to stress that the Treaty Establishing the European Community (EC Treaty) at Articles 28 and 29 prohibits quantitative restrictions on imports and exports as well as all measures having equivalent effect, which affects trade between member states. Any trade measures taken by member states, which is likely to restrict intra-Community trade – directly or indirectly, actually or potentially – is to be considered a measure with effects equivalent to a quantitative restriction. However, this is not an absolute prohibition. At present, two types of measures with potential barriers to trade are permitted, subject to very specific conditions.

The first is based on the exception set out in the EC Treaty, Article 30, which permits restrictions to intra-Community trade, provided that they could be based on the following reasons: public morality; public policy; public security; the protection of the health and life of humans, animals or plants; the protection of national treasures possessing artistic, historic or archaeological value; or the protection of industrial or commercial property. Moreover, they are subject to the condition that they do not constitute a means of arbitrary discrimination or a disguised restriction on trade between member states.

The second possibility arose from the extensive interpretation of the EC Treaty by the European Court of Justice (ECJ), in what is know as the *Cassis de Dijon* case.[20] In this case, the ECJ was led to rule on restrictions of a quantitative character which had been drawn up at national level in order to meet objectives other than those mentioned in the EC Treaty, among them protection of the environment. In doing so, and drawing from the *Cassis de Dijon* case, the ECJ has acknowledged the status of environmental protection as a 'legitimate objective of general interest', which could form the basis for a possible barrier to trade.

In reviewing the validity of national measures akin to technical restrictions, the ECJ has so far paid scant heed to the issue of environmental justice.[21] Its considerations have then generally focused on the extent to which the national measures are proportionate in meeting the critera for trade restrictions allowed by the EC Treaty or as interpreted by the ECJ in the *Cassis de Dijon* case. However, environmental considerations involve deeper environmental justice aspects only in a few ECJ cases, relating to the rights of local communities affected by pollution arising.

The judgment of the ECJ in the *Wallonia Waste* case provides a fine example of integration of local environmental considerations in the field of trade law. The case arose from a challenge by the European Commission to the Walloon ban on waste import. This ban was justified by Belgium on the ground that huge quantities of foreign wastes were imported illegally into Wallonia. As a result, several communities living close to contaminated landfills were likely to be affected by leaks of hazardous wastes dumped illegally. The ECJ took the view that 'waste is matter of special kind. Accumulation of waste, even before it becomes a health hazard, constitutes a danger to the environment, regard being paid in particular to the limited capacity for each region or locality for waste reception.' In addition, the ECJ stressed 'the real danger to the environment having regard to *the limited capacity of that region*'.[22] As a result, the ECJ reached the conclusion that the ban on import of foreign wastes was justified by imperative requirements of environmental protection.[23] It is worth noting that the Court was aware that Belgium was subject to an 'abnormal large scale inflow of waste

[20] Case 120/78, *Rewe-Zentral AG* v. *Bundesmonopolverwaltung für Branntwein* [1979] ECR 649.
[21] French 2000 at 21–2; Temmink 2000 at 291.
[22] Case C-2/90, *Commission* v. *Belgium* [1992] ECR I-4431, para. 30. [23] *Ibid.*, para. 32.

from other regions', that 'there was a real danger to the environment',[24] and that several landfills were severely polluted because foreign hazardous industrial waste had been dumped illegally at the time when the case was being adjudicated. As a result, local NGOs ignited at that time a heated political debate on waste management practices in Wallonia.

Another issue with some bearing on environmental justice is aircraft-related noise and its impact on neighbouring populations. With a view to protecting the health of these populations, several member states have enacted acoustic thresholds. In so doing, national authorities can jeopardise the free movement of aircraft. In the *Aher-Waggon* case, the ECJ took the view that German legislation, which laid down acoustical technical standards for certain aircraft, was proportional to the environmental objective sought, for the measures adopted were necessary in order to reduce nuisance caused by noise. In particular, the ECJ stressed that 'such a barrier may ... be justified by considerations of public health and environmental protection'. In that respect, the Court highlighted that the German authorities 'attached special importance to ensuring that *its population is protected from excessive noise emissions*'.[25]

Greater use of public infrastructures by freight carriers can also hinder the quality of life of communities living near to motorways. In this respect, the Brenner motorway, linking Innsbruck in Austria to Verona in Italy, has been at the centre of a spate of lawsuits, some of which have been adjudicated by the ECJ in light of the principle of free movement of goods. The Brenner motorway is one of the very few which cross the Alps, and it is predominantly used by lorries over 12 tonnes. As Switzerland had for decades contemplated a policy restricting road traffic in favour of rail traffic, the traffic along the Brenner motorway has increased significantly. Given the residents' complaints about the pollution stemming from the increase of traffic, the Austrian authorities adopted different measures with a view to affording better protection to the local communities living along the motorway.[26]

In particular, Austria increased the tolls paid by the users of the motorway. Whereas the tolls for full journeys were considerably increased, the tolls for short journeys were hardly increased. In so doing, Austria was confronted with the provisions of a European directive on the application of taxes on certain vehicles used for the carriage of goods by road as well as of tolls and charges for the use of certain infrastructures.[27] This directive acknowledges the right to maintain or introduce tolls, provided that they do not discriminate between hauliers, but the European Commission was of the opinion that the Austrian tolls were discriminating against goods vehicles over 12 tonnes from other member states. The ECJ accepted this argument and held against

[24] *Ibid.*, para. 31.

[25] Case C-389/96, *Aher-Waggon* [1988] ECR I-4473, para. 19 (emphasis added).

[26] Krämer 2002 at 100.

[27] Directive 93/89/EEC on the Application by Member States of Taxes on Certain Vehicles Used for the Carriage of Goods by Road and Tolls and User Charges for the Use of Certain Infrastructures, [1993] OJ L279/32.

Austria for treating non-Austrian hauliers less favourably.[28] It held that the tariff differences cannot be justified on grounds relating to environmental protection or by considerations based on national transport policy.[29] The Austrian government argued that the environmental problems did not stem from Austrian vehicles which partially used the motorway, but from the influx of foreign hauliers. However, the Court rejected that argument, and stressed that the directive at issue did not provide for invoking environmental considerations in order to justify tariff arrangements, which give rise to indirect discrimination.[30] Austria could have avoided these adverse findings by applying similar fees for both short and full journeys, but that was impossible at the time for local economic reasons.

Likewise, the freedom of expression, in the form of a right to protest, is also relevant from an environmental justice point of view, as it may jeopardise free trade of goods. In this respect, *Schmidberger* is a good case in point.[31] The case arose out of a challenge to a permission implicitly granted by the Austrian authorities to an environmental group to organise a demonstration on the Brenner motorway, the effect of which was to completely close that motorway to traffic for almost 30 hours without interruption. As a result, heavy goods vehicles that should have used the Brenner motorway were immobilised. The demonstrators were intent upon persuading the competent authorities to reinforce measures to reduce that traffic and the pollution resulting therefrom, in the highly sensitive region of the Alps. Given that the motorway was the sole transit route for vehicles between Germany and Italy, the operator of several vehicles brought a claim for damages for the alleged breach of Community law, on the grounds that the Austrian authorities should have banned the demonstration. In particular, the claimant argued that the failure on the part of the Austrian authorities to ban the demonstration and to intervene to prevent that trunk route from being closed amounted to a restriction of the free movement of goods.

Relying on provisions in the EC Treaty which allow national courts to seek a preliminary ruling from the ECJ (Article 234 EC), the Austrian court (Oberlandsgericht Inssbruck) adjudicating claims filed by an economic operator whose lorries were blocked, asked for clarification, whether, and if so to what extent, there was a breach of Community law giving rise to liability on the part of Austria. Since the Austrian authorities did not ban the demonstration, which resulted in the complete closure of a major transit route such as the Brenner motorway for almost 30 hours, the ECJ held that the omission to ban the demonstration 'must be regarded as constituting a measure of equivalent effect to a quantitative restriction which is, in principle, incompatible with the Community law'.[32] According to the ECJ, the protection of the environment and public health, especially in that region, may, under certain conditions, constitute a legitimate objective in the public interest capable of justifying a restriction of the fundamental freedoms guaranteed by the EC Treaty, including the

[28] Case C-205/98, *Commission* v. *Austria* [2000] ECR I-7367, para. 79. [29] *Ibid.*, para. 90.
[30] *Ibid.*, para. 95. [31] Case C-112/02, *Schmidberger* [2003] ECR I-5659. [32] *Ibid.*, para. 64.

free movement of goods. However, the liability was to be inferred from the fact that the national authorities did not prevent an obstacle to traffic from being placed on the Brenner motorway.

In this respect, the Austrian authorities were inspired by considerations linked to respect of the fundamental rights of the demonstrators to freedom of expression and freedom of assembly, which are enshrined in and guaranteed by the European Convention on Human Rights (ECHR) and the Austrian Constitution.[33] As a result, the ECJ took the view that 'since both the Community and its Member States are required to respect fundamental rights, the protection of those rights is a legitimate interest which, in principle, justifies a restriction of the obligations imposed by Community law, even under a fundamental freedom guaranteed by the Treaty such as the free movement of goods'.[34] Nonetheless, the ECJ did not take the view that a fundamental right should prevail over free trade. On the Contrary, the court was adamant to reconcile the freedom of expression and freedom of assembly, guaranteed by Articles 10 and 11 of the ECHR, and the free movement of goods, and this for two reasons.

First, whilst the free movement of goods constitutes one of the fundamental principles in the scheme of the Treaty, it may, in certain circumstances, be subject to restrictions for the reasons laid down in Article 30 of the EC Treaty or for overriding requirements relating to the public interest, in accordance with the *Cassis de Dijon* case law. Secondly, 'whilst the fundamental rights at issue in the main proceedings are expressly recognised by the ECHR and constitute the fundamental pillars of a democratic society, it nevertheless follows . . . that freedom of expression and freedom of assembly are also subject to certain limitations justified by objectives in the public interest, in so far as those derogations are in accordance with the law'.[35]

Unlike other fundamental rights enshrined in the ECHR, such as the right to life or the prohibition of torture and inhuman or degrading treatment or punishment, which admits of no restriction, neither the freedom of expression nor the freedom of assembly guaranteed by the ECHR appears to be absolute, but must be viewed in relation to its social purpose.[36] As a result, the ECJ concluded that 'the exercise of those rights may be restricted, provided that the restrictions in fact correspond to objectives of general interest and do not, taking account of the aim of the restrictions, constitute disproportionate and unacceptable interference, impairing the very substance of the rights guaranteed'.[37]

As regards the proportionality of the measure, the ECJ took into account that the decision not to ban the demonstration was taken following a detailed examination of the facts, that information as to the date of the closure of the Brenner motorway had been announced in advance in Austria, Germany and Italy, and that the demonstration did not result in substantial traffic jams or other incidents. Given the wide discretion which must be accorded to the national authorities in striking a balance between the opposing freedoms, they 'were reasonably entitled to consider that the legitimate aim

[33] *Ibid.*, para. 69. [34] *Ibid.*, para. 74. [35] *Ibid.*, para. 79. [36] *Ibid.*, para. 80. [37] *Ibid.*

of that demonstration could not be achieved . . . by measures less restrictive of intra-Community trade'.[38] As a consequence, the protesters' right to freedom of expression and freedom of assembly, the restriction was not in breach of Community law.

Needless to say, the cases commented in this section mirror justice considerations rather imperfectly. The ECJ would probably have reached the same conclusion if the national restrictions were justified by air or water protection considerations, irrespective of the potential impacts on the neighbourhood. Furthermore, one should point out that nothing is said in these judgments as to the vulnerability of the populations likely to be disturbed by the noise of aircraft or traffic.

3.2 EU internal market: positive harmonisation

Most European product standards set at national level are derived from EU law. The general objective behind these standards has been to create a common market through harmonised technical norms. On occasion, the content of these standards also stems from international environmental obligations. The advantage of such a harmonisation at the European or, more rarely, at international level, is undeniable for producers and distributors since it allows the setting, on the scale of a large territory, of environmental standards which then govern the marketing of products and their free circulation within that area. Purely national norms by the member states, on the other hand, may require that the product be conceived or adapted specifically in order to gain access to a particular national market. These measures are likely to restrict intra-Community trade, directly or indirectly, actually or potentially.

Article 95 of the EC Treaty provides the basis for hundreds of directives laying down health, consumer or worker safety and even environmental standards. In order not to favour trade to the detriment of other values recognised by the EC Treaty, Article 95, dealing with the proper functioning of the internal market, provides certain guarantees. It states that measures proposed at the European level concerning health, safety, environment and consumer protection are to take as a base a high level of protection, taking account in particular of any new development based on scientific facts. However, there is no mention that greater protection should be given to groups at risk in light of environmental justice commitments.[39]

The question, therefore, is whether there is a space left in the EU internal market for *national* measures driven by environmental justice considerations. We shall explore the means by which environmental justice considerations could come to the forefront in this debate.

Article 95 of the EC Treaty includes two derogation mechanisms allowing member states to attain a higher level of protection than the one achieved at EU level. The requirements laid down by Article 95 vary depending on whether the intention is to introduce new national provisions,[40] or to maintain provisions existing prior to the

[38] *Ibid.*, para. 93. [39] De Sadeleer 2003 at 889–915. [40] EC Treaty, Art. 95(5).

instrument of Community law.[41] In both cases, those requirements must be strictly construed, given that they lead to a level of protection which the EC directive or regulation does not in principle authorise.

A new measure must satisfy several conditions, among which is the requirement that the measure is necessary to deal with a problem specific to the member state in question. Indeed, the intention of the framers of the EC Treaty was clearly to avoid the enactment of measures of general character. In other words, the member state seeking the exemption from the European Commission has to demonstrate that the existence and the extent of the risk justifies the enactment of a national measure more stringent than the one laid down at the EC level. In so doing, the member state could give emphasis to specific demographic, geographic or epidemiological circumstances should render the problem particular. In this respect, issues of environmental justice could arise. Indeed, the population density, the degree of industrialisation, the vulnerability of some social categories could exacerbate the impacts of specific risks. By way of illustration, in the case concerning the Danish ban on pentachlorophenol, the European Commission held that it was demonstrated that the Danish population ran a *higher allergy risk* than other populations as the result of genetic predisposition, eating habits and natural environment.[42]

On the other hand, if the measure is already in existence in national law, the requirements for its maintenance are less strict. The state must then notify the Commission about the reasons for the maintenance of the national measures on grounds of major needs referred to in Article 30 of the EC Treaty (which include protection of health and public security) or relating to the protection of the environment or the working environment. However, in contrast to the preceding case, the risk must not be specific to the member state. Accordingly, whenever the European Commission has been adjudicating the member states' requests to maintain higher protection standards, it did not take into account the vulnerability of local populations.

3.3 Health regulation

As regards the protection of health and trade-restrictive measures, the European judiciary – i.e. the Court of Justice and the Court of First Instance – has stressed that the probability of the occurrence of the harm must be determined through a risk assessment procedure, in which experts examine both hazard and exposure – generally by mathematical modelling – in order to calculate an acceptable or tolerable level of contamination or exposure.[43] Once the risk assessment procedure has been completed, a *risk management* decision must be made by politicians, taking into account both legislative requirements and the economic, political and normative dimensions of

[41] *Ibid.*, Art. 95(4).
[42] European Commission Decision 97/783/EC on the prohibition of pentachlorophenol; [1996] OJ L68/32.
[43] De Sadeleer 2007.

the problem. Risk management, in contrast to risk assessment, is the public policy process of deciding how safe is safe enough. In this respect, environmental justice considerations could be taken into account. At least, nothing prevents the national legislator from placing greater emphasis upon the social groups at risk (elderly people, babies).

Indeed, it is settled case law that it is for the institution concerned to determine the level of protection, which it considers appropriate for society, depending upon the circumstances of the particular case.[44] Moreover, in the absence of harmonisation and insofar as uncertainties continue to exist in the current state of scientific research, it is for the member states to decide on the desirable level of protection of human health and life.[45] This means that the risk management decision rests with each member state, which has discretion in determining the level of risk it considers appropriate. Accordingly, the member state may invoke the precautionary principle with the objective of thwarting the occurrence of uncertain risks.[46] However, the precautionary measure must be based upon a scientific approach, although national experts are not required to prove extensively the existence or the extent of the risk. So far, the use of precautionary measures in EC food law has been embedded within a scientific context paying little heed to sociological issues that could encompass environmental justice considerations.

That said, the margin of appreciation reserved to the member states specifically allows them to set a very high level of protection where there is scientific (including technical) uncertainty. This approach is encapsulated in the *Melkunie* case, where the ECJ found that zero tolerance towards the admissibility of pathogenic microorganisms in food waste was admissible, falling under the protection of human health under Article 30 of the EC Treaty.[47] More recently, in the *Walter Hahn* case, the ECJ accepted that a member state could opt for a tolerance level equivalent to zero regarding the presence of listeriosis in fish, finding that, 'as long as the provisional results of those scientific discussions have not been translated into Community law, Member States have the right, by way of precaution, to set more stringent microbiological standards in order to protect human health and *in particular the health of susceptible groups*'.[48]

With respect to genetically modified organisms (GMOs), the EU legislator has given greater emphasis to societal factors in regulating the risks stemming from this technology. Indeed, 'societal, economic, traditional, ethical and environmental factors as well as the feasibility of controls' might appear as factors legitimising the regulation

[44] Case T-13/99, *Pfizer Animal Health SA* v. *Council* [2002] ECR II-3305, paras. 151 and 153.

[45] Case C-174/82, *Sandoz* [1983] ECR 2445, para. 16; Case C-42/90, *Bellon* [1990] ECRI-4863, para. 11; Case C-400/96, *Harpegnies* [1998] ECR I-5121, para. 33; and Case C-192/01, *Commission* v. *Denmark* [2003] ECR I-9693, para. 42. See also Case E-4/4, *Pedicel*, EFTA Court, judgment of 25 January 2005.

[46] Case C-286/02, *Bellio F.lli Srl* v. *Prefetura di Treviso* [2004] ECR I-3465, para. 58.

[47] Case 97/83, *Melkunie* [1984] ECR 2367, para. 15.

[48] Case C-121/00, *Walter Hahn* [2002] ECR I-9193, para. 31.

of a specific risk.[49] By the same token, the EC regulation on genetically modified food and feed provides that, as risk assessments cannot provide all the information on which a risk management decision should be based, 'other legitimate factors relevant to the matter under consideration' may be taken into account.[50] Nevertheless, the various regulatory measures enacted in the field of GMOs are based upon general health concerns and not justice considerations.

4 Conclusions

When considering the nature of trade-related environmental measures, one is drawn to the conclusion that so far broader health and environmental factors, rather than justice considerations as a discrete concept, have had a key role in shaping these instruments. That said, only a few international agreements, in particular in the field of waste shipments, came in direct response to a set of concerns about the impacts of dumping wastes on poor countries. By the same token, the growing awareness at the EU level of the need to offer better environmental protection has led the ECJ to pay attention in several cases to concerns of local communities. However, these cases are so far the exception rather than the rule. Therefore, the central finding of this chapter is that the concept of environmental justice does not occupy centre stage in discussions about trade and environment.[51]

Bibliography

Birnie, P., and Boyle, A., 2000. *International Law and the Environment.* 2nd edn, Oxford: Oxford University Press.

Calster, G. V., 2000. *International and EU Trade: The Environmental Challenge.* London: Cameron & May.

Castri, F., 1996. The Interactive Chain of Globalizations: From the Economic to the Ecologic One', in J. Theys (ed.), *L'Environnement au XXIe Siècle.* Paris: Germes.

De Sadeleer, N., 2003. 'Safeguard Clauses under Article 95 of the EC Treaty'. 40 *Common Market Law Review* 889.

2007. 'The Precautionary Principle in EC Health and Environmental Law: Sword or Shield for the Nordic Countries?', in N. de Sadeleer (ed.), *Implementing Precaution. Approaches from Nordic Countries, the EU and the USA.* London: Earthscan.

French, D., 2000. 'The Changing Nature of Environmental Protection: Recent Developments Regarding Trade and the Environment in the EU and the WTO'. 47 *Netherlands International Law Review* 1.

Krämer, L., 2002. *EU Casebook on Environmental Law.* Oxford: Hart.

[49] Regulation EC (No.) 178/2002 Laying Down the General Principles and Requirements of Food Law, Establishing the European Food Safety Authority and Laying Down Procedures in Matters of Food Safety, [2002] OJ L31/1, recital 19, and Art. 3(12).

[50] Regulation EC (No.) 1829/2003 on Genetically Modified Food and Feed, [2003] OJ L268/1, Art. 6(6).

[51] See also Krämer in Chapter 10 of this volume.

Krueger, J., 1999. *International Trade and the Basel Convention.* London: Earthscan.

Kummer, K., 1995. *International Management of Hazardous Wastes.* Oxford: Oxford University Press.

1999. *International Management of Hazardous Wastes: The Basel Convention and Related Legal Rules.* Oxford: Oxford University Press.

O'Neill, K., 2000. *Waste Trading Among Rich Nations.* Cambridge, MA: MIT Press.

Shrader-Frechette, K., 2002. *Environmental Justice.* Oxford: Oxford University Press.

Temmink, H., 2000. 'From Danish Bottles to Danish Bees: The Dynamics of Free Movement of Goods and Environmental Protection – A Case Law Analysis'. 1 *Yearbook of European Environmental Law* 291.